

Nomination of Steven Menashi to the U.S. Court of Appeals for the Second Circuit
Questions for the Record
Submitted September 18, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. According to your Senate Questionnaire, while serving as acting General Counsel of the Department of Education, you were involved in “all aspects” of the Department’s operations.

a. Did you work or advise on the Department’s decision to rescind guidance regarding how schools should address campus sexual assault under Title IX?

The General Counsel of the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. Consequently, during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department provided by the Office of the General Counsel during my tenure, including with respect to Title IX.

To the extent, however, that this question concerns *non-legal* advice such as whether a particular decision or action is sound as a matter of educational policy or otherwise, it is not the role of the General Counsel or the Office of the General to provide non-legal advice.

b. Did you work or advise the Department on whether schools could use federal funds to purchase guns for teachers?

To the best of my recollection, the Department of Education did not address this issue during my tenure at the Department.

c. Did you work or advise on the Department’s decision to reduce Department-led civil rights investigations at public institutions of higher education?

No. This question asks about the issuance of field guidance by the Office of Civil Rights in June 2017. That was a policy decision by the Office of Civil Rights and did not involve legal advice from the Office of the General Counsel.

d. Did you work or advise on the Department’s decision to rescind guidelines stating that Title IX prohibits discrimination against transgender students?

No. The rescission to which you refer occurred in February 2017. I did not begin work at the Department until May 2017.

e. Did you work or advise on the Department’s decision to delay the implementation of the 2016 Individuals with Disabilities Education Act rules—specifically, the “Equity in IDEA” or “significant disproportionality” regulations?

Yes. At that time I was Principal Deputy General Counsel. Please see my response to question 1.a.

f. Did you work or advise on any aspect of the Department's actions on the gainful employment regulations?

Yes. Please see my response to question 1.a.

g. Did you work or advise on any aspect of the Department's actions on the borrower defense to repayment rule?

Yes. Please see my response to question 1.a.

h. Did you work or advise on the Department's ethics arrangements for personnel who had previously worked for—or were on leaves of absence from—for-profit colleges or similar institutions?

As a general matter, ethics questions and arrangements such as those referenced here are handled by career ethics officials within the Office of the General Counsel. I did participate, however, in discussions with those attorneys on this topic.

i. Did you ensure that appointees with connections to for-profit colleges or similar institutions did not advise on issues that would impact such institutions?

Yes.

j. News reports indicate that the Department of Education has reduced its staff by more than 500 employees. Did you play any role in the Department's staff reductions? If so, what was your role?

As Acting General Counsel of the Department, I was involved in individual employment decisions, such as hiring personnel in the Office of the General Counsel. I was not, however, involved in Department-wide personnel decisions. As far as I can recall, during the time that I served as Acting General Counsel the Office of the General Counsel maintained approximately the same number of employees.

k. Did you work or advise on the Department's decision to rescind guidance on the consideration of race in college admissions?

Yes. At that time I was Principal Deputy General Counsel. Please see my response to question 1.a.

l. Do you believe that having a diverse student body is a goal that schools and universities should be allowed to pursue?

Yes. The Supreme Court has held that a university may pursue “the educational benefits that flow from student body diversity.” *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016).

2. During your hearing, you acknowledged that in your current position in the White House Counsel’s Office, you have worked with White House aide Stephen Miller on immigration issues.

As noted in my questionnaire to the Committee, I currently serve as Special Assistant to the President and Associate Counsel to the President in the White House Counsel’s Office. As a general matter, the legal advice I provide in the executive branch is subject to executive branch confidentiality interests. A number of legal doctrines protect the confidentiality of these communications. These include the presidential communications privilege, the deliberative process privilege, executive privilege, and the attorney-client privilege. An attorney may not waive these privileges unilaterally. The privileges belong to the client and, in the case of executive privilege, to the President. Whether particular advice is subject to one or more of these privileges requires a case-by-case analysis of the particular circumstances. For these reasons, executive branch attorneys must consult with the appropriate officials before disclosing information subject to executive branch confidentiality interests.

Moreover, the Rules of Professional Conduct impose a duty of confidentiality. *See* Rule 1.6(a), New York Rules of Professional Conduct. The duty of confidentiality “applies not only to matters communicated in confidence with the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source.” Comment 3 to Rule 1.6(a). Absent certain narrow exceptions to the duty, an attorney may disclose such information only with the informed consent of the client. *See* Rule 1.6(a).

Prior to my hearing, I consulted with the appropriate White House officials as to whether, and to what extent, I could disclose the matters on which I have worked during my time at the White House. I was authorized to disclose the broad topics on which I provided legal advice, but I was not authorized to disclose the content of my advice or the specific legal matters on which I advised. My testimony at my hearing reflected this guidance. I testified to the maximum extent permissible, consistent with my duties of confidentiality.

Upon receiving written questions from the Committee, I have again consulted with the appropriate White House officials as to whether, and to what extent, I may disclose the matters on which I have worked during my time in the executive branch. I am authorized to represent that, as a further accommodation to this Committee, the appropriate officials have authorized me to answer questions identifying specific legal matters on which I have advised, but not the contents of my legal advice. Nor am I able to disclose deliberative matters that have not been made public. My responses below reflect this accommodation.

a. Have you worked or advised on the Administration’s policy of separating families at the border?

I understand this question to refer to the zero-tolerance enforcement policy for illegal entry. The Department of Justice announced that policy in April 2018. I was working at the Department of Education at that time and did not provide legal advice in the development of that policy.

b. Have you worked or advised on efforts to limit the number of asylum seekers or refugees permitted to enter the country?

I have provided legal advice on regulations that affect asylum eligibility.

c. Have you worked or advised on funding options for building a wall along the border between the United States and Mexico?

Yes, insofar as this question asks whether I provided legal advice.

d. Have you worked or advised on the Administration's rules or policies restricting asylum for people entering through the Southern border, including but not limited to the rules issued on November 9, 2018, and July 16, 2019?

Yes, insofar as this question asks whether I provided legal advice.

e. Have you worked or advised on the Administration's public charge rule?

Yes, insofar as this question asks whether I provided legal advice.

f. Have you worked or advised on the creation or implementation of the Administration's Migrant Protection Protocols policy?

Yes, insofar as this question asks whether I provided legal advice.

g. Have you worked or advised on any potential safe-third party country agreements?

Yes, insofar as this question asks whether I provided legal advice.

h. Have you worked or advised on the creation or implementation of the Administration's rule to expand the scope of expedited removal?

Yes, I have provided legal advice related to the notice issued by the Department of Homeland Security in July 2019.

3. During your tenure in the White House Counsel's Office, have you worked—or provided any input at all—on any of the following:

a. Judicial nominations?

Yes. However, I did not participate in any respect in the decision of the President to nominate me.

b. Responses to Congressional oversight requests and/or subpoenas, including, but not limited to, the assertion of executive privilege claims?

No.

c. Gun control measures and/or the Administration's response to recent mass shootings?

No.

d. Pardons, commutations, or any use whatsoever of the President's pardon power?

No.

e. The Emoluments Clause, or any matters regarding the spending of taxpayer money to businesses owned by the President and/or his family?

No.

f. Compliance with the Presidential Records Act?

No, except to the extent that I am compliant with it.

g. Compliance with the Hatch Act?

Yes.

h. Efforts to alter the enforcement powers of the Consumer Financial Protection Bureau?

No.

i. Implementation of the First Step Act?

No.

j. The Justice Department's recent announcement to schedule executions?

No.

4. In an article you wrote while in college, you claimed that “the fact is that guns save lives.” You also argued that gun control legislation is “pointless [and] self-defeating, because guns reduce crime.” (*Arm Thyself*, DARTMOUTH REVIEW (Feb. 26, 2001))

a. What evidence do you have that “guns reduce crime”?

As the citation indicates, this article was written in 2001 as a college student, and I considered studies and anecdotal evidence available at the time. I have not reviewed contemporary evidence to offer an informed opinion with respect to this issue.

b. What evidence do you have that “guns save lives”?

Please see my response to question 4.a.

c. The International Association of Chiefs of Police and Major Cities Chiefs Association both support an assault weapons ban and have taken that position for some time. What makes you better positioned to assess the effectiveness of gun control legislation than those who lead this nation’s police departments?

Please see my response to question 4.a. Moreover, as a judicial nominee, it would be inappropriate for me to comment on proposed legislation. *See* Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

5. In an article you wrote in college, you claimed that “charges of racism or typically overblown.” (*Tolerance at Dartmouth*, DARTMOUTH REVIEW (Feb. 12, 2001))

What evidence do you have that “charges of racism are typically overblown”?

I do not believe that. The statement in that article referred to specific conduct by students at Dartmouth. I described that conduct as puerile and offensive.

6. Over the course of your academic and professional career, you have made numerous statements that call into question whether you have the temperament expected of a federal judge. You have argued that those who opposed the Iraq War were “totally unprincipled and thoroughly contemptible.” And you have claimed it is “obvious” that Western Civilization is superior to Islam.

How are those expressing opposition to military engagement abroad “totally unprincipled”? How are they “thoroughly contemptible”?

I do not believe that. Your question refers to a blog post from before I attended law school. It referred to a specific protest. The argument I advanced was that specific speakers were advocating isolationist principles in opposition to the Iraq War that they would not endorse in other contexts. At the time, I felt strongly about the humanitarian situation in Iraq, which was

informed by my own family background. I expressed that concern in a provocative style, and I would not express myself in the same manner today.

7. While in college, you wrote, “[s]ixty years after the promulgation of the Nuremburg laws, universities persist in cataloguing students according to race on college applications and official documents.” (*Matters of Life and Death*, DARTMOUTH REVIEW (Mar. 12, 2001)) At your hearing, you stated, “[t]here is no comparison to be made between the Nuremburg laws and any activity that goes on on a college campus. I did not believe that 20 years ago, when I wrote something in college, and I don’t believe that today.” You added, “I did not believe then, and I do not believe now that there is any comparison to be drawn between the Nuremburg laws and anything that happens on a contemporary college campus.”

If you never believed—even when you wrote this in college—that there was any comparison between the Nuremburg laws and any activity on a college campus, then why did you make such a comparison?

As I stated at my hearing, some of the writing I did in college advanced the view that people should be treated as individuals rather than as members of groups. That was important to me because my family had suffered discrimination based on group status. The statement in the article was intended to say that people should be treated as individuals. To the extent that it suggests more than this, such as an actual substantive comparison, it did not reflect my views even then, and I regret that implication.

8. You also wrote—after you had graduated from college: “[A]s sundry elites fret over the possible U.S. intervention in Iraq, it is instructive to remember that similar elites recoiled with moral revulsion at the idea of deposing Adolf Hitler.” (*Teaching Evil*, POLICY REVIEW (April-May 2002))

Which critics of the Iraq war did you believe were similar to those who “recoiled with moral revulsion at the idea of deposing Adolf Hitler”?

The essay to which you refer did not draw a direct comparison. It reviewed a book that drew lessons about foreign policy from history, and in doing so the book described Winston Churchill’s foresight in recognizing the threat posed by Hitler when others did not.

9. During the Iraq War, you wrote, “The State Department’s focus on conciliation, appeasement, and status-quo stability threatens to raise the white flag in this larger battle even as the Defense Department so decisively won victory in the Iraq war.” (*Losing the Battle*, AMERICAN SCENE (Apr. 22, 2003))

a. In what way was the State Department focused on “appeasement”?

The blog post to which you refer summarized a speech that Newt Gingrich, the former Speaker of the House, gave at the American Enterprise Institute on April 22, 2003. In that speech, he criticized “the Bureau of Near Eastern Affairs’ propensity for appeasing dictators.” Among other things, he said that the State Department should

apply pressure on Syria to stop it from developing chemical weapons and sponsoring terrorism. The speech was published as *Transforming the State Department: The Next Challenge for the Bush Administration*, Am. Enter. Inst. (Apr. 22, 2003), <http://www.aei.org/publication/transforming-the-state-department/>.

b. Why did you believe it was appropriate to accuse our diplomats of “appeasement”?

As noted above, the blog post recounted the argument of Gingrich’s speech. The post was written before I attended law school. At the time, I was working as an editor at a political magazine and I would write commentary on current events. I have not expressed arguments in the same way in my roles as a lawyer and a legal scholar.

10. In an article you wrote while in college, you accused the Human Rights Campaign of “incessantly exploit[ing] the slaying of Matthew Shepard for both financial and political benefit.” (*Matters of Life and Death*, DARTMOUTH REVIEW (Mar. 12, 2001))

a. Please provide specific evidence to back up your claim that the Human Rights Campaign exploited the murder of Matthew Shepard “for financial benefit.”

This article from college relied on, and quoted, a piece that Andrew Sullivan had written in *The New Republic* (*Us and Them*, The New Republic, Apr. 2, 2001). In that piece, Sullivan criticized the Human Rights Campaign for allegedly focusing on the Shepard murder while allegedly ignoring a comparable case. (Sullivan wrote: “The leading gay rights organization, the Human Rights Campaign—which has raised oodles of cash exploiting the horror of Shepard’s murder—has said nothing whatsoever about the Dirkhising case.”) The college article recounted this argument to make a point about the importance of valuing lives equally.

In retrospect, the criticism of the Human Rights Campaign was unfair. The murder of Matthew Shepard was a horrifying crime, and it is appropriate for the Human Rights Campaign to call special attention to a crime motivated by hatred. I regret the suggestion that it was improper.

b. Please provide specific evidence to back up your claim that the Human Rights Campaign “exploited” the murder of Matthew Shepard for “political benefit.”

Please see my response to question 10.a.

c. Do you believe that LGBT people experience discrimination, harassment and even violence because of who they are?

Yes.

11. As an editorial writer at the *New York Sun*, you helped write an editorial in which you argued against “imposing same-sex marriage through the courts rather than the democratic legislative process.” The editorial derided the “political factions” that want “nine unelected lawyers in Washington to make social policy for the whole nation.” (*State by State*, NEW YORK SUN (Nov. 8, 2004))

Given your strongly expressed views on this matter, will you recuse yourself from any cases relating to the right of LGBT Americans to marry?

In any case in which my impartiality might be questioned, I would evaluate my recusal obligations under the legal standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is a binding precedent of the U.S. Supreme Court. If confirmed, I would faithfully apply *Obergefell* and all precedents of the Supreme Court and Second Circuit.

12. In a 2000 article, you argued that many colleges were guilty of hypocrisy for favoring LGBT Americans serving in the military while also making various accommodations to help LGBT students feel safe on campus. (*Double Dorm Standards*, AMERICAN ENTERPRISE (Oct.-Nov. 2000))

In what way is it hypocritical to support LGBT Americans serving in the military while also helping LGBT students feel safe on campus?

There is no hypocrisy in those positions as you have described them. The article you mention from my time in college suggested there was a tension between the specific arguments that colleges had made in litigation with respect to the military and the specific arguments those colleges were making to establish separate housing for LGBT students. The last paragraph quotes the president of Tufts University as recognizing that tension and suggesting it could be avoided by housing students together.

13. In 2001, you wrote an article where you described *Roe v. Wade* as “codifying” “the radical abortion rights advocated by campus feminists.” You went on to write that “while abortion remains a vexing question for most Americans, the principle conceded with legal abortion has led to clearly undesired moral consequences.” (*The Yuck Factor*, DARTMOUTH REVIEW (Jan. 15, 2001))

a. How does *Roe v. Wade* represent the codification of “the radical abortion rights advocated by campus feminists”?

This article was written before I graduated from college or attended law school and it did not reflect a legal opinion about *Roe v. Wade*. *Roe v. Wade*, 410 U.S. 113 (1973), as reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is a binding precedent of the Supreme Court, and I would faithfully apply it should I be confirmed.

b. What are the “undesired moral consequences” that legal abortion has led to?

Please see my response to question 13.a.

14. In 2000, you wrote an editorial that criticized Dartmouth's "Take Back the Night" events. You claimed that the marches "charge the majority of male students with complicity in rape and sexual violence (every man's a potential rapist, they say; it's part of the patriarchal culture.)" You also stated that "while campus gynocentrists can throw around these accusations, there's no similar leeway for men." (*Heteropatriarchal Gynophobes!*, DARTMOUTH REVIEW (Oct. 2, 2000))

a. On what basis did you conclude that Take Back the Night events charged male students "with complicity in rape and sexual violence"?

Rape and sexual violence are serious crimes, and Take Back the Night events are legitimate and important ways to call attention to such crimes. As I noted in response to question 7, some of the writing I did in college advanced the view that people should be treated as individuals rather than as members of groups. The purpose of the editorial was to say that it is improper to make assumptions about people on the basis of sex and that people should be held accountable only for their individual conduct. But the piece itself was overstated and overwrought.

b. Who are the "campus gynocentrists" that you referenced?

This college editorial used provocative terminology, and specifically relied on the distinction between phallocentrism and gynocentrism in academic literature. In retrospect, the terminology contributed to the overwrought nature of the writing.

15. In the same article cited above, you also disparaged the notion of widespread discrimination against women, asserting among other things that women are "the beneficiaries of special academic programs and institutional support."

What "special academic programs" and "institutional support" were you referencing?

Sex discrimination exists and is a serious problem. The Supreme Court has said that women are entitled to the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). I do and will continue to treat all persons with equal respect and dignity. The article you reference does not further specify these terms, and I cannot now speculate about what might have been intended.

16. In 2001, you wrote a college editorial criticizing Dartmouth's Health Services for its policy on providing Plan B. You described Plan B as an abortifacient—a description that is heavily criticized by mainstream science—and wrote that by not sharing that fact with students, "Health Services is misleading those students who believe that life begins at conception—pushing them toward a choice they might abhor if they had complete information." (*The College and the Pill*, DARTMOUTH REVIEW (Jan. 15, 2001))

On what basis did you conclude that Plan B is an “abortifacient”? What evidence do you have to back up that claim? Please cite specific sources that you relied on in making that claim.

The article you reference did not reach that conclusion but explained that there was a “conflict over definition,” depending on a student’s individual beliefs. The Supreme Court has also recognized this difference of opinion in noting that “according to [some] religious beliefs,” certain “contraceptive methods . . . are abortifacients,” *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 691 (2014), even though “federal regulations . . . do not so classify them,” *id.* at 698 n.7.

17. In 2016, as pro-bono counsel, you co-authored an amicus brief submitted on behalf of several former Justice Department officials in *Zubik v. Burwell*, weighing in on the side of the employers who were arguing that they should be able to deny their employees the Affordable Care Act’s birth control benefits. You argued that simply by submitting an opt-out notice, “[p]etitioners seek to avoid moral complicity where, under analogous criminal circumstances, the law could judge them culpable.” You went on to argue that the situation was analogous to the aiding and abetting of terrorism. Your brief stated, “In the context of material support for terrorism, this Court has observed that a defendant need only have ‘knowledge about the organization’s connection to terrorism, not specific intent to further its terrorist activities,’ to be criminally culpable.” (Brief of Amici Curiae Former Justice Department Officials in Support of Petitioners, *Zubik v. Burwell*, 2016 WL 155631 (2016)).

Please explain how submitting an opt-out notice from the Affordable Care Act’s contraception coverage provision is analogous to providing material support for terrorism.

The petitioners in that case argued that “submitting this notice substantially burdens the exercise of their religion” because the submission initiated the conduct that petitioners found religiously objectionable and made them complicit in that conduct. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016). The amicus brief explained that the petitioners’ “religious concept of moral complicity resembles the legal concept of criminal complicity” because “[t]o be criminally complicit in wrongdoing, a person need only facilitate the scheme to some (even slight) degree with knowledge of the scheme’s intended result.” 2016 WL 155631, at *4. The material support statute was one example of how, in the criminal law, one might be criminally complicit even if one did not specifically intend to further the acts of others. That aspect was a point of comparison between the petitioners’ notion of moral complicity and the criminal law’s notion of criminal complicity. The brief did not suggest that there was a substantive comparison between material support and contraceptive coverage.

18. As an editorial writer at the *New York Sun*, you helped write an editorial in which you accused the President of the United Federation of Teachers—Randi Weingarten—of trying to “spin” rising test scores in her favor. (*High Marks*, NEW YORK SUN, (June 7, 2005)) You wrote that the union and the contract it was working to negotiate with the mayor, “[i]f anything, [] held students back.” In another *New York Sun* editorial, you criticized teachers’ unions further, stating that the “dishonest, self-preserving protestations” of teachers’ unions over voucher programs “must be ignored.” (*Teachers’ Choices and Ours*, NEW YORK SUN (Sept. 13, 2004))

- a. **How were teachers' efforts to negotiate a contract "dishonest"?**
- b. **How do teachers' unions "hold students back"?**
- c. **Why "must" teachers' voices "be ignored" in forging education policy?**

Response to Questions 18.a.-18.c.: The editorial I identified on the Senate Judiciary Questionnaire, *Teachers' Choices—and Ours*, is dated September 10, 2004. The writing that appeared under the headline *Teachers' Choices and Ours* on September 13, 2004 is not the editorial but a letter to the editor responding to the editorial. Accordingly, it is not a writing in which I was involved. The editorial of September 10, 2004 is available online at <https://www.nysun.com/editorials/teachers-choices-and-ours/1547/>. It does not contain the language you mention. I apologize for the confusion.

To respond to your question about *High Marks*, I worked as an editorial writer before attending law school and participated in writing about political issues in New York. As the editors of the *New York Sun* explained in a letter to the Committee, editorials reflected "an institutional view" and included "the views of others folded in." The newspaper took Mayor Bloomberg's side in a dispute over a teachers' contract, it supported school choice and charter schools, and it expressed these views in an editorial style. The editorial addressed a specific dispute, and it is not accurate to attribute to it the general proposition in question 10.b. The editorial said that a "contract held students back," based on a comparison of test scores between charter and public schools. As noted, no editorial said that "teachers' voices" should be ignored in education policy or that teachers' efforts to negotiate a contract were "dishonest."

More importantly, the role of an editorial writer is different than that of a judge. My employment prior to law school as an editorial writer writing on behalf of a newspaper would not prevent me from acting impartially as a judge and faithfully following precedent in each case.

- d. **If a teachers' union came before you as a judge, would you recuse yourself? If not, how could a teachers' union expect a fair trial before you after reading your past writings?**

In any case in which my impartiality might be questioned, I would evaluate my recusal obligations under the legal standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges. My employment prior to law school as an editorial writer writing on behalf of a newspaper would not prevent me from acting impartially as a judge and faithfully following precedent in each case.

19. In 2016, you participated in a conference titled "Rethinking Judicial Deference: History, Structure, and Accountability." In your introduction, you expressed skepticism of *Chevron* and *Auer* deference, suggesting that they are akin to "the foxes guarding the henhouse." (Discussion, "Pushing the Limits of Deference: *Seminole Rock* and *City of Arlington*," Conference at George

Mason University's Center for the Study of the Administrative State: "Rethinking Judicial Deference: History, Structure, and Accountability," (June 2, 2016))

a. How are *Chevron* and *Auer* deference akin to "the foxes guarding the henhouse"?

With that comment, I was introducing a discussion of *City of Arlington v. FCC*, 569 U.S. 290 (2013), in which the Supreme Court held that a court must defer to an agency's interpretation of a statute that limits the agency's jurisdiction. I said that "there's a concern about the foxes guarding the henhouse" in that case. The Court in *City of Arlington* recognized that this was a concern animating the legal dispute. *See id.* at 307 (addressing "[t]hose who assert that applying *Chevron* to 'jurisdictional' interpretations 'leaves the fox in charge of the henhouse'"). The concern, as the Chief Justice put it in his dissent, is whether a court should "leave it to the agency to decide when it is in charge." *Id.* at 327 (Roberts, C.J., dissenting).

I raised the concern in order to introduce an academic discussion of the *City of Arlington* case. But regardless of that discussion, *City of Arlington* is a precedent of the Supreme Court and I would faithfully apply it were I to be confirmed.

b. Do you consider *Chevron* and *Auer* to be settled law?

Yes. Both are precedents of the Supreme Court that I would be bound to apply, and would faithfully apply, if I were to be confirmed.

c. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in an opinion?

A circuit court must always "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions," even in those instances in which the case "appears to rest on reasons rejected in some other line of decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In those instances, it may be appropriate for a circuit judge to indicate to the Supreme Court that there is a question about the continuing vitality of an applicable precedent that the Supreme Court ought to clarify. But the circuit judge may never decline to apply the precedent that directly controls.

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

It is never appropriate for a lower court to depart from Supreme Court precedent. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

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

It is never appropriate for a circuit panel to overturn prior circuit precedent. See *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002). A circuit court may depart from its prior precedent only based on intervening authority from the Supreme Court or a decision of the circuit court sitting *en banc*.

20. In 2010, you and Judge Douglas Ginsburg wrote a law review article in support of the nondelegation doctrine and the unitary executive. In the article, you found issue with Chief Justice John Marshall's interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland* and asked that the reader "consider the violence [that interpretation] does to the text." You also contended that congressional delegation in general and independent agencies in particular weighed down the executive branch with the "morass of congressional oversight and agency rulemaking." You concluded that "the imperial instinct of the legislature" was more concerning than that of the executive. (Douglas Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 J. of Const. L. 251, 252 (2010))

a. What evidence do you have to support the contention that Chief Justice John Marshall's interpretation of the Necessary and Proper Clause does "violence" to the text of the Constitution?

That academic argument was based on textual analysis and also cited Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993). Other scholars have identified additional evidence. See, e.g., Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 Geo. Wash. L. Rev. 1, 28 (2010) ("The history analyzed above suggests that, regardless of the meaning of the clause today, Judge Ginsburg and Menashi offer a better account of its historical meaning.").

The article contains an academic discussion. If confirmed as a judge, I would faithfully apply all precedents of the Supreme Court and Second Circuit, including *McCulloch*.

b. What evidence do you have for the existence of "the imperial instinct of the legislature"?

That phrase refers to James Madison, who wrote in The Federalist No. 48, "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." Again, the article contains an academic discussion that would not affect my decisions as a judge, should I be confirmed.

c. Do federal circuit courts have a role in countering the legislature's "imperial instinct"? If so, what is that role?

The Supreme Court has said that Congress may delegate authority to the executive branch as long as it "lay[s] down by legislative act an intelligible principle to which the [agency] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*,

276 U.S. 394, 409 (1928). Congress generally will meet that standard. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001).

d. Do federal circuit courts have a role in cutting through the “morass of congressional oversight and agency rulemaking”? If so, what is that role?

In the article, that phrase was used to explain the executive’s reliance on “czars,” not a role for the courts.

21. In a 2003 article, you criticized the World Health Organization’s “long-running war against the tobacco industry.” You argued that there was “zero” increased risk of cancer from second-hand smoke, even for “adults living or working with smokers.” (*The Politics of the WHO*, NEW ATLANTIS (Fall 2003))

a. On what basis did you conclude that there is “zero” increased risk of cancer from second-hand smoke, even for those who live or work with smokers? Please cite all evidence for this conclusion.

I did not reach that conclusion. My article described the conclusion of one 1998 study on second-hand smoke, as reported by the *Sunday Telegraph*, in the course of describing activities of the World Health Organization. I have not reviewed the evidence related to second-hand smoke. My understanding is that secondhand smoke is harmful to those exposed to it.

b. How is the WHO’s concern with the consequences of smoking a “long-running war against the tobacco industry”?

The 2003 article you mention argued that the World Health Organization had developed other priorities that detracted from its traditional mission of combating disease, including, as the article describes, an unexpected and serious outbreak of Severe Acute Respiratory Syndrome in Asia. This phrase described a particular concern with tobacco companies rather than smoking in general. As explained above, before law school I worked as an editor at a political magazine and sometimes would write commentary on current events. But the role of a commentator is different than the role of a judge.

22. 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”?

All Supreme Court precedents are binding on the lower courts. I agree that *Roe v. Wade*, 410 U.S. 113 (1973), as affirmed by *Planned Parenthood v. Casey*, 506 U.S. 833 (1992), binds all lower courts.

b. Is it settled law?

Please see my response to question 22.a.

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

Yes, and *Obergefell* is binding on the lower courts.

24. 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 not be proper for me to comment on whether I personally agree with particular Supreme Court majority opinions or dissents. I would adhere to *Heller* and all Supreme Court precedent if I were confirmed.

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

The Supreme Court in *Heller* said that "the right secured by the Second Amendment is not unlimited," that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," and that there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

The Supreme Court had not, by the time of *Heller*, developed extensive precedent on the question of whether the Second Amendment protects an individual right. The justices in the majority and in dissent disagreed on the implications of prior precedent.

Compare District of Columbia v. Heller, 554 U.S. 570, 619-26 (2008), with *id.* at 672-79 (Stevens, J., dissenting).

25. 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 held that "First Amendment protection extends to corporations." *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). As a lower-court judge, I would faithfully apply that precedent if I were confirmed.

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

Please see my response to question 25.a. It would not be proper to opine further because litigation is currently pending or impending on this issue. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

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

The Supreme Court has said that nonprofit corporations and for-profit closely held corporations have protection under the Religious Freedom Restoration Act. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 719 (2014). I would faithfully apply that precedent if I were to be confirmed.

26. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2008. 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 was not involved in the drafting of that statement and I do not know what the Federalist Society means by it.

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

Please see my response to question 26.a.

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

Please see my response to question 26.a.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

No.

27. 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?

As a lawyer in the executive branch, I have been asked to provide advice on issues related to administrative law. No one involved in the decision to nominate me, however, asked for my views on administrative law in connection with my nomination.

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?

Between 2016 and 2017, I taught administrative law as a professor and I worked as a lawyer dealing with issues related to administrative law. As part of those activities I

likely had conversations with people who are “affiliated” with the Federalist Society in the sense of being a member. No representative of the Federalist Society, the Heritage Foundation, or any other group has contacted me in order to obtain my views on administrative law or administrative law issues.

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

Administrative law is a broad area. I have expressed personal views regarding administrative law issues in academic articles that I disclosed as part of Question 12.a. of the Senate Judiciary Questionnaire. Those views, however, would not affect my commitment to following applicable Supreme Court and Second Circuit precedent in each case, if I were to be confirmed.

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

I am aware of research indicating that human activity is contributing to or causing climate change. It would be improper for me as a nominee to express further views related to an issue that is subject to litigation and political debate. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 5 (“A judge should refrain from political activity”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

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

The Supreme Court has said that it is appropriate to consider legislative history when the statutory text is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017).

30. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

As I explained in my response to question 2, upon receiving the questions I consulted with the appropriate officials in the White House and received authorization to answer the questions related to my work there. I drafted answers to these questions, solicited comments from members of the White House Counsel’s Office and the Office of Legal Policy at the Department of Justice, and revised my draft answers as I decided was appropriate. These answers are my own.

Written Questions for Steven Menashi
Submitted by Senator Patrick Leahy
September 18, 2019

1. In your testimony you claimed that the point of your 2010 law review article, "Ethnonationalism and Liberal Democracy," "was to point out that many states that are well-known as liberal democracies have a linguistic or an ethnic basis." Regardless of your article's intended purpose, you made several normative judgments. For example, you embraced the views of supporters of ethnonationalism when you said that "ethnically heterogeneous societies exhibit less political and civic engagement, less effective governing institutions, and fewer public goods" than ethnically homogenous societies. You stated that "ethnic diversity weakens social solidarity." In fact you cautioned generally – not just in the context of one particular country – that "it does not serve the cause of liberal democracy to ignore this reality."

(a) Is it still your view that as a general matter, "ethnically heterogeneous societies exhibit less political and civic engagement, less effective governing institutions, and fewer public goods"?

The purpose of the article was to explain that Israel can be both a Jewish state and a liberal democracy. The article rejects the criticism that Israel is illegitimate because it is associated with the Jewish people. In doing so, it discusses the origin of the Jewish state and the argument of Hannah Arendt in *The Origin of Totalitarianism* about the relationship between human rights and the nation state. It also, as you note, points out that "many states that are well-known as liberal democracies have a linguistic or an ethnic basis."

The sentence you quote does not reflect a normative judgment but describes the findings of social scientists in the cited academic papers. The descriptive statement was intended to provide some explanation as to why "many states that are well-known as liberal democracies have a linguistic or an ethnic basis." Immediately after describing these findings, the article discusses the importance of accounting for differences in order to establish a political system based on equality. It says not to ignore the reality of ethnic allegiances because, as Arendt argued, the failure to account for such allegiances contributed to the Holocaust.

The article reflects my view that an essential feature of liberal democracy is the guarantee of equal rights. As I noted at the hearing, my own family suffered persecution because of ethnic prejudice. The notion that I somehow advocate such prejudice is inconsistent with my writing and with who I am.

2. The United States is an ethnically diverse country with more than one third of the U.S. population belonging to minority ethnic groups.

(a) Is it your view that America's ethnic diversity "weakens social solidarity" in our country?

No. As I stated at my hearing, in the United States our national identity is based on shared political views that are articulated in the Declaration of Independence and in the Constitution.

3. Saudi Arabia and North Korea are among the most ethnically homogeneous societies on earth.

(a) How would you compare their governing institutions with the United States?

Unfavorably. The governing institutions of the United States are an example to the world. My family and countless others came to this country because of the opportunities it presents. As I said at my hearing, I have special reverence for our constitutional traditions of equality before the law, religious freedom, tolerance, and an impartial judiciary. Such traditions do not exist in many places in the world, such as the ones you mention.

4. The U.S. Constitution vests the Senate with the role of providing “advice” and “consent” when a President nominates a candidate to be a federal judge. To carry out this role, the Senate holds hearings so senators can question a nominee. Nominees have an obligation to answer questions, unless it violates a canon of judicial conduct, and answer them truthfully. At your confirmation hearing you refused to answer Senator Feinstein’s and Senator Durbin’s questions on your role in the White House Legal Counsel’s Office advising the Trump administration on the policy of separating families at the border. You refused to answer their questions “consistent with [your] duties of confidentiality to the client.” Your role shaping the current administration’s agenda is of great concern to members of this Committee and your unwillingness to answer questions as simple as acknowledging what specific matters you worked on is a gross deviation.

(a) Please provide a list of specific policies and matters you worked on in the White House.

Ordinarily, I would not be able to disclose the specific matters on which I have worked while at the White House Counsel’s Office. As noted in my questionnaire to the Committee, I currently serve as Special Assistant to the President and Associate Counsel to the President in the White House Counsel’s Office. As a general matter, the legal advice I provide in the executive branch is subject to executive branch confidentiality interests. A number of legal doctrines protect the confidentiality of these communications. These include the presidential communications privilege, the deliberative process privilege, executive privilege, and the attorney-client privilege. An attorney may not waive these privileges unilaterally. The privileges belong to the client and, in the case of executive privilege, to the President. Whether particular advice is subject to one or more of these privileges requires a case-by-case analysis of the particular circumstances. For these reasons, executive branch attorneys must consult with the appropriate officials before disclosing information subject to executive branch confidentiality interests.

Moreover, the Rules of Professional Conduct impose a duty of confidentiality.

See Rule 1.6(a), New York Rules of Professional Conduct. The duty of confidentiality “applies not only to matters communicated in confidence with the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source.” Comment 3 to Rule 1.6(a). Absent certain narrow exceptions to the duty, an attorney may disclose such information only with the informed consent of the client. See Rule 1.6(a).

Prior to my hearing, I consulted with the appropriate White House officials as to whether, and to what extent, I could disclose the matters on which I have worked during my time at the White House. I was authorized to disclose the broad topics on which I provided legal advice, but I was not authorized to disclose the content of my advice or the specific legal matters on which I advised. My testimony at my hearing reflected this guidance. I testified to the maximum extent permissible, consistent with my duties of confidentiality.

Upon receiving written questions from the Committee, I have again consulted with the appropriate White House officials as to whether, and to what extent, I may disclose the matters on which I have worked during my time at the White House. I am authorized to represent that, as a further accommodation to this Committee, the appropriate officials have authorized me to answer questions identifying specific legal matters on which I have advised, but not the contents of my legal advice. Nor am I able to disclose deliberative matters that have not been made public. My responses to the Committee reflect this accommodation, and I have answered questions from Senators who have asked about specific matters.

With respect to your question, I do not have an exhaustive list of all matters on which I may have provided legal advice. I may be asked to provide legal advice concerning a dozen matters in a given day. The majority of my time has been spent advising on a few broad subject areas, and I can identify illustrative specific matters in those areas.

I provided legal advice on matters related to healthcare and to food and drugs, including *Proposed Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Price Transparency of Hospital Standard Charges*, 84 Fed. Reg. 39,398 (Aug. 9, 2019); the *Safe Importation Action Plan* (July 31, 2019); *Advancing American Kidney Health*, Exec. Order No. 13,879, 84 Fed. Reg. 33,817 (July 15, 2019); *Improving Price and Quality Transparency in American Healthcare To Put Patients First*, Exec. Order No. 13,877, 84 Fed. Reg. 30,849 (June 27, 2019); *Health Reimbursement Arrangements and Other Account-Based Group Health Plans*, 84 Fed. Reg. 28,888 (June 20, 2019); *Modernizing Part D and Medicare Advantage To Lower Drug Prices and Reduce Out-of-Pocket Expenses*, 84 Fed. Reg. 23,832 (May 23, 2019); and the *Agreement Between FDA and USDA Regarding Oversight of Human Food Produced Using Animal Cell Technology Derived from Cell Lines of USDA-amenable Species* (Mar. 7, 2019).

I provided legal advice on tax regulatory matters, including *Regulations*

Regarding the Transition Tax under Section 965 and Related Provisions, 84 Fed. Reg. 1838 (Feb. 5, 2019); *Guidance under Section 958 (Rules for Determining Stock Ownership) and Section 951A (Global Intangible Low-Taxed Income)*, 84 Fed. Reg. 29,114 (June 21, 2019); *Contributions in Exchange for State or Local Tax Credits*, 84 Fed. Reg. 27,513 (June 13, 2019); *Investing in Qualified Opportunity Funds*, 84 Fed. Reg. 18,652 (May 1, 2019); and *Investing in Qualified Opportunity Funds*, 83 Fed. Reg. 54,279 (Oct. 29, 2018).

I provided legal advice on immigration matters, including *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019); *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409 (July 23, 2019); *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019); *Memorandum on Extension of Deferred Enforced Departure for Liberians*, 2019 Daily Comp. Pres. Doc. 185 (Mar. 28, 2019); issues related to border wall funding; and issues related to the agreements of the United States with Guatemala and Mexico.

I provided legal advice related to constitutional issues when reviewing signing statements, including *Statement on Signing the Nuclear Energy Innovation and Modernization Act*, 2019 Daily Comp. Pres. Doc. 29 (Jan. 14, 2019); *Statement on Signing the Modernizing Recreational Fisheries Management Act of 2018*, 2018 Daily Comp. Pres. Doc. 877 (Dec. 31, 2018); *Statement on Signing the Johnson-O'Malley Supplemental Indian Education Program Modernization Act*, 2018 Daily Comp. Pres. Doc. 876 (Dec. 31, 2018); *Statement on Signing the Innovations in Mentoring, Training, and Apprenticeships Act*, 2018 Daily Comp. Pres. Doc. 875 (Dec. 31, 2018); *Statement on Signing the Frank LoBiondo Coast Guard Authorization Act of 2018*, 2018 Daily Comp. Pres. Doc. 832 (Dec. 4, 2018); *Statement on Signing the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act*, 2018 Daily Comp. Pres. Doc. 726 (Oct. 24, 2018); and *Statement on Signing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, 2018 Daily Comp. Pres. Doc. 692 (Oct. 11, 2018).

(b) Attorney-client privilege extends to the substance of a communication, not the fact that there has been a communication. As a result, a description of the work, acts, or services performed by the attorney is not protected by the privilege. The subject matter of meetings with an attorney, the persons present, the location of the meetings, or the persons arranging the meetings are also not protected by the privilege. If you refuse to detail what specific policies and matters you were involved in, please provide a citation for what authority you are invoking.

Please see my response to question 4.a.

5. Department of Education records obtained through the Freedom of Information Act show that since the start of the Trump administration, Title IX complaints related to sexual orientation or gender identity were more than nine times less likely to result in corrective action than they were during the Obama administration.

(a) During your tenure at the Department of Education under Secretary DeVos, you stated that you provided legal advice “related to all aspects” of the Department’s operations including litigation and enforcement. Please explain what role you played, if any, related to Title IX complaints.

Title IX complaints are addressed by the Office of Civil Rights at the Department of Education. The General Counsel of the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. Consequently during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department provided by the Office of the General Counsel during my tenure, including with respect to Title IX. As the Acting General Counsel, I would not have been involved in addressing each complaint but I would have overseen the attorneys who were consulted by the Office of Civil Rights as particular legal questions arose.

(b) Why has there been such a steep drop in the number of corrective actions taken by the Department?

That question would need to be addressed by a policymaker rather than by a legal adviser.

6. Shortly after you began your tenure as Acting General Counsel, the Department of Education dramatically scaled back its investigations into civil rights violations at public schools and university. The Department specifically removed the requirement for its civil rights investigators to “identify systematic issues” impacting “classes of victims” – which is the entire point of having civil rights investigators.

(a) Were you involved in any way in the Department’s decision to remove the requirement that civil rights investigators attempt to identify any systematic civil rights issues?

Please see my response to Ranking Member Feinstein’s question 1.c.

7. In July 2018, while you were serving as Acting General Counsel, the Departments of Education and Justice jointly announced the elimination of federal guidance that removed the suggestion that schools and colleges consider race as a factor when promoting diversity on their campuses. The Department of Education also added guidance to its website noting that the department “strongly encourages the use of race-neutral methods” in admissions.

(a) As a matter of law or policy, do you believe there are any circumstances under which schools and colleges can appropriately consider race or ethnicity in their admissions process?

The Supreme Court has held that a university may consider race in its admissions process to pursue “the educational benefits that flow from student body diversity”

provided that “its use of the classification is necessary . . . to the accomplishment of its purpose.” *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208-10 (2016). If I were to be confirmed, I would faithfully apply *Fisher* and all other binding precedent. (Please note that I was not serving as Acting General Counsel in July 2018.)

8. In a series of articles you wrote for The Dartmouth Review discussing campus-wide protests following the hosting of a “ghetto” party and “Miami” party where participants were encouraged to dress “like Cubans” you criticized fraternities for apologizing and described the college community’s reaction as “hysterical,” claiming that “charges of racism are typically overblown.”

(a) Do you stand by those views?

On that particular statement, please see my answer to Ranking Member Feinstein’s question 5. In college, I often defended free speech in campus debates, even speech that was offensive. In retrospect, I see that in many cases my writing expressed only one side of the debate, defending speech without fully acknowledging the valid concerns of those who might be hurt by offensive speech. I am sensitive to those concerns and I wish my college writing had more clearly expressed them. In particular, I understand it is hurtful to play on stereotypes and that doing so leads to real problems of exclusion. I continue generally to believe that free speech should be protected and that charges of racism are serious and should not be leveled lightly. But I do regret the lack of balance and provocative tone of some of my college writings.

9. You also defended a fraternity wide newsletter that promised “patented date rape techniques” in a future edition as protected speech and Dartmouth’s student handbook..

(a) Do you still believe that describing methods of date rape should be protected speech?

I understand this question to refer to a 2001 article I wrote while in college, *Speaking for the Greeks*. The article does not reference or discuss “describing methods of date rape” as protected speech. Nor did I defend the content of the newsletters.

Date rape is a serious crime and publishing such content is offensive and demeaning. To the extent, however, that this question asks me to offer an opinion as to whether such speech would enjoy constitutional protection, it would be inappropriate for me to offer an opinion because the question of protection for offensive speech is regularly the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

10. The GAO recently completed a yearlong review of the Public Student Loan Forgiveness Program. The report found that 99 percent of the requests under the new expansion program were rejected.

(a) Did you play any role in the creation and implementation of the Temporary Expanded Public Service Loan Forgiveness Program?

Congress created the Temporary Expanded Public Service Loan Forgiveness Program through the Consolidated Appropriations Act of 2018, which was adopted on March 23, 2018. The program is administered by the Office of Federal Student Aid. For a brief period of time when I was Acting General Counsel, I oversaw attorneys who advised on legal issues that may have arisen after its creation.

(b) Can you explain why a program purporting to expand access to public service loan forgiveness ended up rejecting 99 percent of applicants to the program?

The GAO review (GAO-19-595) of the Temporary Expanded Public Service Loan Forgiveness Program to which you refer covered a one year period from May 2018 to May 2019. I was not at the Department as of July 2018.

11. The 1984 *Chevron* decision held that courts should defer to agency interpretations of unclear laws, and this deference has created one of the fundamental underpinnings of the modern administrative state. At a panel in 2016 you expressed skepticism about *Chevron* deference, suggesting it is akin to “the foxes guarding the henhouse.”

(a) Should *Chevron* be interpreted to limit the ability of agencies to legislate in areas of economic or political significance? As a federal appellate judge would you protect the Supreme Court’s deferment to regulatory expertise under *Chevron*?

For the context of that particular statement, please see the answer to Ranking Member Feinstein’s question 19.a. The Supreme Court has held that Congress must “speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014). *Chevron v. Nat. Res. Def. Council* is a binding precedent of the Supreme Court and I would faithfully apply it if I were to be confirmed.

12. In a 2010 law review article you argued in favor of strengthening the nondelegation doctrine to support the unitary executive, emphasizing that “that the President alone is responsible for the actions of the executive branch.” Rather than worrying about an imperial President, you worried about “the imperial instinct of the legislature.”

(a) Do you still hold these views?

If I were to be confirmed, I would faithfully apply the Supreme Court’s precedents related to the nondelegation doctrine, including *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) and *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

13. 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 notion that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” is a “fundamental canon of statutory construction,” and I would adhere to it if I were to be confirmed. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

14. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

(a) Does labelling a judge who does not rule in one’s favor a “so-called judge” erode respect for the rule of law?

The Constitution provides for an independent federal judiciary through life tenure and salary protection precisely so that a judge will not be affected by public criticism. Nor should a judge engage in public debate. *See* Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity”).

(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 14.a.

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

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

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

16. 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, any future President, or any other executive branch official refuses to comply with a court order, how should the courts respond?

It would be improper to comment on an issue that could arise in litigation. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

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

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

In his *Youngstown* concurrence, Justice Jackson said the President “has no monopoly of ‘war powers.’” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring). The Constitution divides war powers between the President and Congress. The proper exercise of those powers in particular circumstances may arise in litigation, and as such it would be inappropriate for me to comment further. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”). I would follow the precedents of the Supreme Court if I were to be confirmed.

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.” 542 U.S. 507, 536 (2004).

(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?

The Supreme Court has said that the “Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952), and the Supreme Court has limited the actions of the President in wartime on that basis. I would apply that precedent if I were to be confirmed. As a judicial nominee, it would not be proper to comment further on abstract questions that could arise in litigation. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

18. **How should courts balance the President’s expertise in national security matters**

with the judicial branch's constitutional duty to prevent abuse of power?

In general, “[t]he proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006). That scheme asks whether the President is acting pursuant to congressional authorization, in the absence of congressional action, or against the expressed or implied will of Congress. If confirmed, I would faithfully apply *Youngstown*.

19. 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 prohibits a government from denying “to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996). A gender-based government action is unconstitutional absent “an ‘exceedingly persuasive justification’ for that action.” *Id.* at 531. That is a binding precedent of the Supreme Court, and I would faithfully apply it if I were to be confirmed.

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

Justice Scalia’s comment is not a holding of the Supreme Court with respect to the Voting Rights Act. I would faithfully apply Supreme Court precedent concerning the Voting Rights Act if I were to be confirmed.

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

The Constitution provides that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. Const. art. I, § 9, cl. 8. The application of the Emoluments Clause to the President is the subject of pending litigation and therefore inappropriate for comment. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

22. 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?

In general, the Supreme Court relies on a factual record developed before the filing of an appeal. The scope of *Shelby County v. Holder*, 570 U.S. 529 (2013), is subject to ongoing litigation and political debate and therefore it is not proper to comment. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 5 ("A judge should refrain from political activity"); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

23. 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 authority to enforce the protections of each of the amendments by "appropriate legislation." U.S. Const. amdt. XIII, § 2; U.S. Const. amdt. XIV, § 5; U.S. Const. amdt. XV, § 2. The power "to enforce" the Fourteenth Amendment's provisions means that "there must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

24. 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, 539 U.S. 558 (2003), is a precedent of the Supreme Court, which I would faithfully apply if I were to be confirmed.

25. 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?

The Supreme Court has said that “the doctrine of stare decisis is of fundamental importance to the rule of law.” *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). It is not appropriate for a lower court to depart from Supreme Court precedent. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997). And it is not appropriate for a circuit panel to depart from circuit precedent. See *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002). I would adhere to the precedents relating to stare decisis if I were to be confirmed.

26. 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.

A federal judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). I would also recuse myself from a case in which a colleague from private practice served as lawyer while we were associated, and from a case in which I participated as a government attorney. *Id.* § 455(b). In general, I would follow the legal standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges.

27. 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?

In the passage you quote, the Supreme Court indicated that courts have a role in ensuring that democratic processes work as intended and do not exclude citizens entitled to representation. The footnote also introduced the idea, which the Supreme Court later developed, of tiered levels of judicial scrutiny to assess constitutionality. If confirmed, I will faithfully follow those binding precedents of the Supreme Court.

28. 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.

29. 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?

I have not had the occasion to study this question.

30. 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?

Congress has the power to regulate an activity under the Commerce Clause if "the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Under Section 5 of the Fourteenth Amendment, Congress has the power "to enforce" the Amendment's provisions, meaning that "there must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

31. 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, 138 S. Ct. 2392 (2018), is a precedent of the Supreme Court that I would faithfully apply if I were to be confirmed. It would not be proper for a judicial nominee to question that precedent or to resolve a hypothetical future case. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make

public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

32. 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.

An undue burden exists when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). *Planned Parenthood v. Casey* is a binding precedent of the Supreme Court. If I were confirmed as a lower court judge, I would faithfully follow that precedent.

33. 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 reaffirmed the doctrine of qualified immunity. *See, e.g., San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). If I were confirmed, I would faithfully apply Supreme Court precedent and leave it to the Supreme Court to revise its precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Because this is an issue that is subject to litigation in the courts, it would be improper as a judicial nominee to advocate a view. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

34. 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?

In *Carpenter*, the Supreme Court held that because “[m]apping a cell phone’s location over the course of 127 days provides an all-encompassing record of the holder’s whereabouts,” providing “an intimate window into a person’s life,” the government “must generally obtain a warrant supported by probable cause before acquiring such records.” 138 S. Ct. 2206, 2217, 2221 (2018). *Carpenter* is a binding precedent I would follow if I were to be confirmed.

35. 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?

Because this question concerns pending or impending litigation, it would be inappropriate for me to comment on the abstract question. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

36. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with one political party and disparage another. 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 Constitution provides for an independent judiciary. Article III insulates judges from political influence through life tenure and salary protection. These protections enable judges to make decisions based on what the law requires rather than as a result of political pressure or public criticism. Should I be confirmed, I would be committed to deciding cases based on the law alone.

Senator Dick Durbin
Written Questions for Steven Menashi
September 18, 2019

For questions with subparts, please answer each subpart separately.

1. You say in your questionnaire that you have appeared in court “occasionally.” Your questionnaire does not say how many times you have argued an appeal in court. **How many times have you argued an appeal in court?**

2. **How many times have you made an oral argument before a judge in court?**

Response to questions 1-2: Like other nominees, my career has involved government service and academic work in addition to private litigation practice before state and federal courts. My private practice experience focused on writing and analysis of legal issues, work that closely resembles the responsibilities of a circuit judge. During my time in private practice, I appeared in court as second chair for appeals and motions but I did not conduct the arguments. My role was to author appellate briefs and dispositive trial motions, including approximately 90 substantive court filings in some 45 different cases addressing a wide range of legal issues. I have prepared briefs or similar filings in federal and state appellate courts including the U.S. Supreme Court; the First, Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits; and the Florida, Indiana, and Colorado Supreme Courts. I have also prepared dispositive motions and briefing in trial courts within the Second Circuit including the Southern District of New York, the Eastern District of New York, and the District of Connecticut, as well as other federal and state trial courts including the New York Supreme Court, the District of Maryland, the Eastern District of Louisiana, the Southern District of Florida, and the Delaware Court of Chancery.

I have also served as the principal legal officer of a cabinet agency and overseen an office of 110 attorneys conducting litigation before administrative judges and in coordination with the Department of Justice in trial and appellate courts across the country—in addition to other legal work involving rulemaking, adjudication, and program legal advice. As a lawyer in the Office of the White House Counsel, I have provided legal advice on complex issues. Finally, as an academic, I have published articles on constitutional law, administrative law, statutory interpretation, and other topics. My scholarship has been cited in prominent law journals including the *Harvard Law Review*, *Columbia Law Review*, and *Yale Law Journal*. I have also taught foundational courses in civil procedure and administrative law.

Taken together, I have a broad range of experience in private practice, as the chief legal officer of a federal agency, as a White House lawyer, and as a legal scholar. I am honored that when evaluating my qualifications, the American Bar Association took into consideration the breadth of my experience and rated me well-qualified to serve as a circuit judge.

3. Your questionnaire indicates that you have only been practicing law for eight years after your clerkships ended in 2011. You also say in your questionnaire that you “have not served as counsel in a case tried to verdict.” **How many depositions have you conducted?**

In private practice, I worked with trial teams who were developing or had developed the evidentiary record in a case, and I analyzed that record in addressing dispositive legal questions in motions for summary judgment and appellate briefs. I did not myself conduct the depositions. As Acting General Counsel, I oversaw fact-finding and discovery related to proceedings before administrative law judges, administrative boards and commissions, agency adjudications, and, in cooperation with the Department of Justice, the U.S. district courts.

4. When asked in your questionnaire what percentage of your practice was in criminal proceedings, you answered "0%." **Have you ever observed an entire criminal trial? If so, when?**

My practice has not involved criminal trials. As Acting General Counsel, my office coordinated with the Department of Justice on criminal matters and provided advice on civil enforcement matters, such as enforcement of audit and monitoring findings, debarments and suspensions, program reviews, and audits or investigations by the Inspector General or the Government Accountability Office. I also advised on the resolution of criminal appeals as a law clerk at the Supreme Court of the United States and the U.S. Court of Appeals for the District of Columbia Circuit.

5. You were a top lawyer for Education Secretary Betsy DeVos for two years, and since 2018 you have worked in the White House Counsel's office.

When current D.C. Circuit Judge Greg Katsas appeared before this Committee in 2017, he said in writing: "I can commit to recusing myself from any case that I worked on while in the Executive Branch [and] any challenge to presidential or agency action on which I provided advice." **Will you make the same recusal commitment as Judge Katsas?**

I will recuse myself from any case that I worked on while in the Executive Branch and any challenge to presidential or agency action on which I provided advice. I will also consult with the ethics specialists at the Administrative Office of U.S. Courts on any matter that may raise an issue of my impartiality.

6. Under 28 U.S.C. § 455(a), a judge's recusal is required "in any proceeding in which his impartiality might reasonably be questioned."

a. **What is your understanding of this statutory provision?**

I understand that this statutory provision, like the Code of Judicial Conduct, guarantees that litigants have an opportunity to be heard by a fair and impartial judge.

b. **In your view, might the impartiality of a judge reasonably be questioned if the judge has worked or advised, while a government attorney, on a law, policy, regulation, or initiative that is being challenged in a proceeding before the judge?**

c. **In your view, might the impartiality of a judge reasonably be questioned if the judge has written, or contributed to the writing of, an editorial or opinion piece about a law, policy, regulation, or initiative that is being challenged in a proceeding before the judge?**

Response to questions 6.b. and 6.c.: Whether certain circumstances create the appearance of impartiality requires an examination of particular facts. I agree that the impartiality of a judge could reasonably be questioned if he or she has worked or advised, while a government attorney, on a law, policy, regulation, or initiative that is being challenged in a proceeding before him. But without more information, I cannot say that the mere fact that a sitting judge once expressed a personal view on a certain issue forecloses the possibility that litigants will reasonably expect a fair hearing on the legal merits—particularly if the judge was not an attorney at the time. I do believe, however, that consistent with the Code of Judicial Conduct, sitting judges and judicial nominees should refrain from political activity. *See* Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity.”).

7. **In 2017 and 2018 you were a top lawyer for Education Secretary Betsy DeVos, serving as Acting General Counsel and Principal Deputy General Counsel for the Department of Education. You say in your questionnaire that you were involved in providing legal advice on “all aspects” of the Department of Education’s operations while you were there, including litigation, rulemaking, regulation, and enforcement. Will you commit that, if you are confirmed, you will recuse yourself from any proceedings involving matters you worked on while at the Department of Education?**

Yes.

8. **Do you believe that the DeVos Department of Education served students well during your tenure there?**

I am proud of my work at the Department of Education and of the legal advice that I provided. As a judicial nominee, it would be inappropriate for me to comment on political issues. *See* Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

9. **Please explain what your specific role and involvement was in each of the following Department of Education matters that took place during the time period when you were involved in “all aspects” of the Department of Education’s operations:**

a. **The rescinding of the Obama Administration’s gainful employment regulation which protected students and taxpayers from subsidizing underperforming for-profit colleges.**

The General Counsel of the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to

provide legal advice on all legal matters to policymakers within the Department. Consequently, during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department provided by the Office of the General Counsel during my tenure.

To the extent, however, that this question concerns *non-legal* advice such as whether a particular decision or action is sound as a matter of educational policy or otherwise, it is not the role of the General Counsel or the Office of the General to provide non-legal advice.

With respect to the particular issue you note in question 9.a., the rescission to which you refer occurred after I left the Department. While I was at the Department, as the Acting General Counsel I provided legal advice related to the gainful employment regulations.

b. The suspension of the Obama Administration's borrower defense regulations that sought to provide loan relief for students who were defrauded by for-profit colleges—a suspension that was held by a federal court to be unlawful.

As the Acting General Counsel I provided legal advice related to this issue. Please see my response to question 9.a.

c. The delay in the Department of Education's processing of 87,000 borrower defense claims against for-profit colleges.

As the Acting General Counsel I provided legal advice related to this issue. Please see my response to question 9.a.

d. The rescinding of the Obama Administration's Title IX Guidance on handling campus sexual harassment and assault.

As the Acting General Counsel I provided legal advice related to this issue. Please see my response to question 9.a.

e. The delay of the compliance date for the Obama Administration's rules aimed at addressing disparities in the identification of minority students with disabilities.

As the Principal Deputy General Counsel I provided legal advice related to this issue. Please see my response to question 9.a.

f. The change in the Department of Education's handling of investigations of systemic civil rights violations at colleges.

Please see my response to Ranking Member Feinstein's question 1.c.

10. In 2003, you wrote an article about the World Health Organization in which you criticized the WHO's "war against the tobacco industry." In this article, you cast doubt on scientific studies demonstrating the harms of secondhand smoke. You wrote: "a person can't catch smoking as one catches smallpox or malaria. Indeed the prevalence of smoking isn't an epidemic at all, but the accumulated choices of individual smokers who, despite the risks, find some value in the activity." **Is it your view today that science shows that secondhand smoke is harmful to those exposed to it?**

Secondhand smoke is harmful to those exposed to it. For further information, please see my response to Ranking Member Feinstein's question 21.

11. In an article you wrote in 2001 in your college newspaper, you said that the LGBTQ advocacy organization Human Rights Campaign "incessantly exploited the slaying of Matthew Shepard for both financial and political benefit."

a. **Why did you make this statement?**

Please see my response to Ranking Member Feinstein's question 10.a.

b. **Does this statement still represent your views?**

Please see my response to Ranking Member Feinstein's question 10.a.

12. In 2004, you wrote or contributed to an editorial in the *New York Sun* in which you discussed the "consensus" against same sex marriage. You wrote that "some political factions want nine unelected lawyers in Washington to make social policy for the whole nation." **Did the *Obergefell* case represent nine lawyers making social policy for the whole nation?**

That quotation is taken from an editorial that I authored before I entered law school. It does not reflect a legal opinion on the Supreme Court's precedents on same sex marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is a precedent of the U.S. Supreme Court. If confirmed, I would faithfully apply *Obergefell* and all precedents of the Supreme Court and Second Circuit.

13. In an article you wrote in your college newspaper in 1998, you said that affirmative action in faculty hiring "is inimical to the educational enterprise." **Is this still your view?**

That quotation is taken from an article that I authored during my freshman year of college. It does not reflect a legal opinion on the Supreme Court's precedents on affirmative action. If confirmed, I would faithfully apply the precedents of the U.S. Supreme Court on affirmative action, which recognize "the educational benefits of diversity." *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016). In context, the quotation was referring to treating people as members of groups rather than as individuals. As I stated at my hearing, this perspective motivated some of the writing I did in college, and it was informed by the fact that my family had suffered discrimination based on group status.

14. In an article you wrote in *Forbes Magazine* in 2009, you wrote that “Despite its good intentions, the welfare system produced a permanent underclass and bred destructive social pathologies.”

a. **What did you mean by this?**

That quotation is taken from an article I wrote following the death of the political writer Irving Kristol, and it was intended to describe his views. Kristol wrote, in the context of welfare reform, that “[t]he problem with our current welfare programs is . . . that they have such perverse consequences for people they are supposed to benefit.” See Irving Kristol, *A Conservative Welfare State*, Wall St. J., Jun. 14, 1993.

b. **Is this still your view?**

Please see my response to question 14.a.

15. In 2003, you wrote “the animal rights crowd is, by and large, a contemptible bunch.” **Do you still hold this view?**

Your question refers to a book review I wrote, before attending law school, of Matthew Scully’s *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy*. The review begins with provocative statements of animal rights activists who had compared the eating of chicken to 9/11 and the Holocaust. The review is critical of those statements but goes on to contrast them with Scully’s argument for animal welfare, which it considers respectfully and at length. The introduction is purposefully exaggerated; as evidenced by the whole review, I have respect for advocates of animal rights.

16. You say in your questionnaire that you wrote or contributed significantly to over 120 editorials at the *New York Sun* newspaper. You also have written over 40 articles and editorials while in college, and you’ve written numerous other articles and blog posts. **Have you ever written anything that you regret? If so, what?**

Yes. As your question recognizes, over the course of my life I have written frequently. I have expressed arguments in good faith and relying upon the best evidence available to me at the time. I understand that some assertions may, in the light of better evidence, have been inaccurate. In addition, my views may have changed since I began writing decades ago. That is the natural consequence of engaging in public debate and attempting to think through contested issues. Over time, moreover, my tone has matured; I would not express myself the same way today as I did in college. Yet I have always tried to participate in the robust exchange of ideas in good faith. For further information, please see my responses to Ranking Member Feinstein’s questions 6, 7, 10.a., and 14.a. and to Senator Leahy’s question 8.a.

I also understand that the role of an editorial writer, which was my job prior to law school, is different than that of a lawyer or of a judge. An editorial writer engages in political debate. A judge refrains from politics and puts his or her personal views aside to decide cases based on what the law requires.

**Nomination of Steven James Menashi
to the United States Court of Appeals for the Second Circuit
Questions for the Record
Submitted September 18, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During your nominations hearing, Senator Feinstein (D-CA) asked whether you provided advice on immigration policy while at the White House Counsel's Office, including policies relating to family separation and limiting the number of refugees entering the United States. You indicated that you were not authorized to say whether you had worked on these issues. Similarly, Senator Durbin (D-IL) asked whether you worked on deferred action for immigrants with life threatening illnesses, to which you responded you "may have provided advice."

a. Did you provide legal advice on family separation, limiting the number of refugees entering the United States, and/or deferred action for immigrants with life threatening illnesses while at the White House Counsel's Office?

Please see my responses to Ranking Member Feinstein's question 2 and Senator Leahy's question 4.a. I understand this question to refer to the zero-tolerance enforcement policy for illegal entry. The Department of Justice announced that policy in April 2018. I was working at the Department of Education at that time and did not provide legal advice in the development of that policy. I have provided legal advice on regulations that affect asylum eligibility. I have not provided legal advice with respect to deferred action for immigrants with life threatening illnesses.

b. If yes, to what extent did you provide legal advice on these issues?

I analyzed statutes and other legal authorities subject to the direction of the leadership of the White House Counsel's Office.

c. Do you believe that the right to seek asylum is a human right?

The Supreme Court has said that "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion" as governed by statutes passed by Congress. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). If confirmed, I would faithfully apply the applicable precedents and statutes. Beyond my commitment to apply precedent, it would be inappropriate as a judicial nominee to comment further on a political issue and an issue that is the subject of litigation. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 5 ("A judge should refrain from political activity"); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

2. If you decline to answer Question #1, are you claiming any sort of legal privilege? Please specify.

N/A.

3. Does attorney-client privilege protect the fact of the existence of attorney-client communications, as well as their contents? If yes, please cite cases supporting that proposition.

Please see my responses to Ranking Member Feinstein's question 2 and to Senator Leahy's question 4.a. With respect to the executive branch confidentiality interests noted there, I refer you to *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481 (1982) and the authorities cited therein. The opinion discusses the scope of the privileges that protect the legal advice provided to the President. It notes that "courts have made clear that the presumption of confidentiality accorded presidential communications is intended to protect not only the substance of sensitive communications between the President and his advisers but the integrity of the decisionmaking process within the Executive Branch as well." *Id.* at 485-86.

With respect to the duty of confidentiality, that duty "applies not only to matters communicated in confidence with the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source." Comment 3 to Rule 1.6(a), New York Rules of Professional Conduct.

4. During your hearing, Senator Blumenthal (D-CT) questioned an article you wrote in which you argued that gun control legislation is "pointless [and] self-defeating, because guns reduce crime." In light of the mass-shooting epidemic in this country, do you still believe gun control to be pointless and self-defeating? On what basis do you believe that guns reduce crime?

Please see my answer to Ranking Member Feinstein's question 4.

5. During your hearing, Senator Blumenthal (D-CT) asked whether you believe that *Roe v. Wade* was decided correctly. You responded that, because *Roe* is the subject of active litigation in a number of states, it would be inappropriate for you to comment.

a. Do you believe that a woman's right to choose is a fundamental right?

The Supreme Court has recognized such a right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed I would faithfully apply all binding Supreme Court precedent, including *Roe v. Wade* and *Planned Parenthood v. Casey*.

b. Do you believe that *Roe v. Wade* is settled law?

The Supreme Court has reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973) in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and other cases. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedents on this issue.

c. Do you believe that *Planned Parenthood v. Casey* is settled law?

The Supreme Court has reaffirmed *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and other cases. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedents on this issue.

d. Do you believe that *Whole Women's Health v. Hellerstedt* is settled law?

Whole Women's Health v. Hellerstedt is a precedent of the U.S. Supreme Court. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedents.

6. In explaining why you felt comfortable affirming the correctness of *Brown v. Board of Education* while refusing to affirm the correctness of *Roe*, you distinguished the cases by saying that *Roe* is the subject of active litigation, while *Brown* is not.

a. Please elaborate on this distinction. Is it your contention that issues related to *Brown v. Board* and school desegregation do not remain subject to active litigation? See, e.g., *Robinson v. Wentzell*, No. 3:18-cv-00274 (D. Ct. 2018).

As I stated at my hearing, *Brown v. Board of Education*, 347 U.S. 483 (1954), has a special role in our constitutional history. I am not aware of any pending litigation challenging the Court's core holding in *Brown v. Board of Education*.

7. Your questionnaire indicates that you have been a member of the Federalist Society since 2008.

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

I have not had the occasion to make plans for future activities in the event I were to be confirmed. In activities I undertake after confirmation, I would be guided by the Code of Conduct for United States Judges and would consult with ethics specialists at the Administrative Office of U.S. Courts for their advice.

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

Please see my response to question 7.a.

c. Have you had contacts with representatives of the Federalist Society, in either their official or unofficial capacity, in preparation for your confirmation hearing? Please specify.

No.

8. 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?

I have reviewed the article in response to the above request.

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

As a nominee for judicial office, it would be inappropriate for me to comment on the political aspects of the confirmation process. *See* Canon 5, Code of Conduct for United States Judges; *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

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 8.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 aware from published reports that the Judicial Crisis Network has expressed public support for my nomination, but I did not solicit that support. I appreciate the support my nomination has received from across the political spectrum.

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 8.b.

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

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

I agree that the job of a judge is to apply legal principles fairly to the facts in a particular case, without regard to result.

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

In general, it is not the role of the judge to consider practical consequences. The Supreme Court has said that judges should consider practical consequences in some circumstances, however, such as when considering whether to grant a preliminary injunction. *See, e.g., Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008).

10. 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?

The role of a judge is to apply the law “faithfully and impartially” to the case before him or her. 28 U.S.C. § 453. Therefore, it would be improper to decide a case based on external factors. Judges sitting together on a panel may discuss the legal issues to reach agreement on a decision.

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?

I would not do that.

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?

As an inferior court judge, I would be bound to follow precedent of the Supreme Court and the Second Circuit. That duty is non-negotiable, and I would put all personal views aside.

11. 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?

A dispute about a material fact is “genuine” if a reasonable jury could return a verdict for the nonmoving party. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). This test requires a judge to undertake an objective determination. The “judge’s function is not himself to weigh the evidence and determine the truth of the matter” but to decide whether an issue must be resolved by a finder of fact because it could reasonably be resolved in favor of either party. *Id.* at 249.

12. 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?

Congress has specifically required all federal judges to swear that they “will administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. Nevertheless, understanding a litigant’s particular background may be relevant to adjudicating specific issues. For example, at sentencing, a judge must consider “the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1).

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

The outcome of a particular case should not turn on the identity of a particular judge.

13. 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.

14. 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 Constitution discusses rights related juries in the Fifth, Sixth, and Seventh Amendments thereto. These rights include the right of criminal defendants to trial by an impartial jury, the right not to be tried for a capital crime except on indictment from a grand jury, and the right to a jury trial in civil cases. As the Supreme Court has noted, jury service “preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.” *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

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

Questions concerning the enforceability of mandatory pre-dispute arbitration clauses are the subject of ongoing litigation. *See* Canon 5, Code of Conduct for United States Judges. If confirmed, I would faithfully apply all provisions of the U.S. Constitution, including the Seventh Amendment, as well as all relevant Supreme Court and Second Circuit precedent on the Seventh Amendment and arbitration clauses.

- 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 answer to Question 14.b.

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

In general, an appellate court decides a case on the record presented to it from a trial court and does not disturb findings of fact unless the trial court's findings are "clearly erroneous." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993).

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

It is generally inappropriate for an appellate court to engage in fact-finding, except in limited circumstances, such as ensuring it has jurisdiction. The responsibility for fact-finding generally belongs to the trier of fact rather than the appellate court.

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

The Supreme Court has said that courts "must review legislative 'factfinding under a deferential standard'" but "must not 'place dispositive weight' on those 'findings.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). If I were to be confirmed, I would faithfully apply Supreme Court and Second Circuit precedent regarding deference to congressional fact-finding.

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

- a. Have you read Advisory Opinion #116?

Yes.

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

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

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 would faithfully discharge my duties under the Code of Judicial Conduct and all applicable federal laws. These requirements include the obligation to avoid impropriety and the appearance of impropriety. I would accordingly evaluate my participation in any activity for compliance with these requirements, and I would consult with the ethics specialists at the Administrative Office of U.S. Courts.

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 18.b.

Senate Judiciary Committee Hearing on Nominations
Questions for the Record
Senator Amy Klobuchar

For Steven J. Menashi, nominee to be United States Circuit Judge for the Second Circuit

The nonpartisan Brookings Institute has reported that the Trump Administration had a 5 percent success rate when defending its regulatory actions in court, which is far lower than previous administrations that averaged a 69 percent success rate. You provided legal advice on a number of agency actions that have been overturned by the courts, including the Department of Education's unsuccessful attempt to delay the implementation a regulation intended to benefit students who were defrauded by schools.

- How do you explain the increase in agency actions overturned by courts under this Administration?

Because these cases continue to be litigated, it would be inappropriate for me as a judicial nominee either to comment on pending litigation or to evaluate the merits of these judicial decisions. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

While you were working at the Department of Education in July 2018, the Department attempted to postpone the implementation of the Equity in IDEA regulation, which addressed disparities in how students of color with disabilities are treated in public schools under the Individuals with Disabilities Education Act (IDEA).

- What was your role in the Department's attempt to postpone the implementation of this rule?

It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. At that time, I served as Principal Deputy General Counsel and was responsible, subject to the direction of the General Counsel, for the provision of legal advice to policymakers by the Office of the General Counsel.

- A federal court in Washington, D.C. found that the Department's postponement of the rule violated the Administrative Procedure Act. Do you agree with the district court's ruling?

The Department of Justice defended the Department of Education's action for the reasons stated in its briefs in the case. The court did not agree. Consistent with the longstanding tradition that judicial nominees decline to evaluate the merits of judicial decisions it would be inappropriate to comment on the merits of the decision.

At your hearing, you acknowledged that you “provided advice to policymakers within the White House on many policy issues including immigration,” although you refused to answer whether you provided advice on specific immigration policies.

- Did you work on, or provide advice related to, any of the following policies: the “zero tolerance” policy, including the practice of family separation; terminating Temporary Protected Status for El Salvador, Haiti, Nicaragua, or Sudan; “winding down” the Deferred Enforced Departure program for Liberians; limiting the grounds on which asylum can be sought, including by people fleeing domestic violence or persecution based on their family ties; or terminating the Medical Deferred Action program? If so, which ones?

I provided legal advice related to the Deferred Enforced Departure program for Liberians and to regulations that affect asylum eligibility. For further information, please see my responses to Ranking Member Feinstein’s question 2 and to Senator Leahy’s question 4.a.

**Nomination of Steven J. Menashi,
to be United States Circuit Judge for the Second Circuit
Questions for the Record**

Submitted September 18, 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 U.S. Supreme Court has evaluated fundamental rights in a series of cases. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In determining whether a right is fundamental and protected under the Fourteenth Amendment, I would follow the principles identified in these cases.

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

If a right is expressly enumerated in the Constitution, that right is protected from interference by the federal government by the clause enumerating that right. The Supreme Court has said that whether the right is expressly enumerated is relevant for purposes of applying the incorporation doctrine under the Fourteenth Amendment, *see McDonald v. City of Chicago*, 561 U.S. 742 (2010), and I would apply that 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?

Yes. The Supreme Court has explained that a right is fundamental and protected under the Fourteenth Amendment if it is deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed, I would faithfully apply Supreme Court precedent and rely on sources used by the Supreme Court.

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

If confirmed, I would be bound to apply all applicable Supreme Court and Second Circuit precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002). Consistent with Second Circuit precedent, I would evaluate decisions by other U.S. Courts of Appeals for their persuasive value. *See, e.g.,*

Desiano v. Warner-Lambert & Co., 467 F.3d 85, 90-91 (2d Cir. 2006).

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

Yes, consistent with the obligation to consider the rationale outlined in prior precedent.

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*).

Yes. The Supreme Court considered that factor in *Casey* and *Lawrence*. If confirmed, I would follow *Casey*, *Lawrence*, and all precedents of the U.S. Supreme Court and Second Circuit.

f. What other factors would you consider?

If confirmed, I would consider all other relevant factors under Supreme Court and Second Circuit precedent.

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

The Supreme Court has held that the Fourteenth Amendment’s Equal Protection Clause applies to gender as well as race. The Clause prohibits a government from denying “to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*, 518 U.S. 515, 532 (1996). A gender-based government action is unconstitutional absent “an ‘exceedingly persuasive justification’ for that action.” *Id.* at 531.

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?

The response is that longstanding and binding precedent establishes the scope of the Equal Protection Clause. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

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?

Decisions of the Supreme Court establish what the Fourteenth Amendment has

always required, given that judicial decisions are “regarded as an expression of pre-existing law.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 847 (1990). I am unaware of why *United States v. Virginia* was filed and resolved when it was.

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

The Fourteenth Amendment requires that same-sex couples be afforded the right to marry “on the same terms as accorded to couples of the opposite sex.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). If confirmed, I would faithfully apply *Obergefell* and all other relevant Supreme Court and Second Circuit precedent.

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

Equality under the law is of great importance in our legal system. This issue is the subject of pending or impending litigation and therefore I cannot express an opinion as a judicial nominee. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

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

The Supreme Court held that there is such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully apply these and all precedents of the Supreme Court and Second Circuit.

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 held there is such a right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully apply these and all precedents of the Supreme Court and Second Circuit.

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 held there is such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully apply *Lawrence* and all precedents of the Supreme Court and Second Circuit.

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 to questions 3, 3.a., and 3.b.

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?

The U.S. Supreme Court has explained how changes in society can be relevant to judicial considerations in a variety of contexts. If confirmed, I would follow those precedents that consider evidence of changed social understandings, including *Virginia* and *Obergefell* and other relevant Supreme Court and Second Circuit precedent.

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

Please see my answer to question 4.a. I would consider applicable Supreme Court and Second Circuit precedent to determine what role these sources should play in a particular context. In general, a trier of fact may consider such evidence when it has a reliable foundation and is relevant to a disputed issue. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

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?

If confirmed, I would faithfully apply *Obergefell* and all other relevant Supreme Court and Second Circuit precedent. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”).

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

Please see my answer to Question 5.a.

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

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

As I stated at my hearing, *Brown v. Board of Education* was correctly decided and has a special role in our constitutional history. While the debate is purely academic in light of the Supreme Court’s holding, I have found compelling the work of scholars who argue that *Brown* is consistent with originalism. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Sept. 18, 2019).

As the criticism indicates, it may be difficult to determine the original public meaning of a constitutional provision. It is also difficult to apply that meaning to changed circumstances. Whether such an analysis is required depends on the precedent applicable in a particular case. If confirmed, I would faithfully apply all precedent of the Supreme Court and the Second Circuit related to constitutional interpretation.

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

In some cases, the Supreme Court has relied heavily on the meaning of a provision at the time of its adoption. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008). As a lower-court judge, I would be bound to follow the applicable precedent of the Supreme Court and the Second Circuit.

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?

If confirmed, I would consult those sources that have been considered in the applicable Supreme Court and Second Circuit precedent. In addition, I would review the arguments and evidence that litigants before me present in their briefs.

7. During your Judiciary Committee hearing, you acknowledged that you advised senior administration officials on immigration matters during your time at the White House, including as part of Stephen Miller's Immigration Working Group, but you refused to answer whether you gave guidance on particular matters. Having had the opportunity to discuss these matters with the White House Counsel's Office:

a. Please provide a complete list of immigration matters you have worked on during your service in the Trump administration.

Please see my response to Senator Leahy's Question 4.a.

b. Were you involved in the administration's "zero tolerance" family separation policy? If yes, please provide a description of your role.

The Department of Justice announced the zero-tolerance enforcement policy for illegal entry in April 2018. I was working at the Department of Education at that time and did not provide legal advice in the development of that policy.

c. Were you involved in the administration's policies regarding Deferred Action for Childhood Arrivals? If yes, please provide a description of your role.

The Department of Homeland Security announced the rescission of Deferred Action for Childhood Arrivals in September 2017. I was working at the Department of Education at that time and did not provide legal advice in the development of that policy.

d. Were you involved in the administration's policies regarding refugees? If yes, please provide a description of your role.

I have provided legal advice on regulations that affect asylum eligibility. I analyzed statutes and other legal authorities subject to the direction of the leadership of the White House Counsel's Office.

e. Were you involved in Executive Order 13769, Executive Order 13780, Presidential Proclamation 9645, and/or any litigation associated with the travel ban?

Executive Order 13769 (Jan. 12, 2017), Executive Order 13780 (Mar. 6, 2017), Presidential Proclamation 9645 (Sept. 24, 2017), and *Trump v. Hawaii*, 138 S. Ct. 2392

(June 26, 2018) were completed prior to my joining the White House Counsel's Office. I was not involved in providing legal advice on these matters.

8. In your Senate Judiciary Committee Questionnaire, you stated that you were involved in "all aspects" of the Department of Education's operations during your tenure at the agency.

a. Please provide a complete list of education matters you have worked on during your service in the Trump administration.

The General Counsel of the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. Consequently, during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department provided by the Office of the General Counsel. I do not have an exhaustive list of all matters on which the Office worked but I was responsible for all legal advice provided by the Office of the General Counsel during my tenure.

To the extent that this question concerns *non-legal* advice such as whether a particular decision or action is sound as a matter of educational policy or otherwise, it is not the role of the General Counsel or the Office of the General to provide non-legal advice.

b. Were you involved in the administration's rescission of and/or development of rewritten rules governing sexual harassment and assault investigations under Title IX?

Yes. Please see my response to question 8.a.

c. Were you involved in the administration's elimination of seven federal guidance documents in July 2018; including the removal of the suggestion that schools consider race as a factor when promoting diversity and/or the addition of departmental guidance that "strongly encourages the use of race-neutral methods" in admissions?

Yes. At that time I served as Principal Deputy General Counsel. Please see my response to question 8.a.

d. Were you involved in the department's postponement of the compliance date for the Equity in IDEA regulation?

Yes. At that time I served as Principal Deputy General Counsel. Please see my response to question 8.a.

e. Were you involved in the department's reduction in staff in the Office of Federal Student Aid and the Office for Civil Rights?

Please see my response to Ranking Member Feinstein's question 1.j.

9. In a 2000 article for the *Dartmouth Review*, you expressed criticism of Take Back the Night marches and stated, “while campus gynocentrists can throw around these accusations, there’s no similar leeway for men.”

a. Please explain what you meant by these statements.

Please see my response to Ranking Member Feinstein’s question 14.a.

b. Do you still agree with the views that you expressed in your article?

Please see my response to Ranking Member Feinstein’s question 14.a.

10. In a 2001 article for the *Dartmouth Review*, you stated, “[s]ixty years after the promulgation of the Nuremberg laws, universities persist in cataloging students according to race on college applications and official documents.”

a. Please explain what you meant by these statements.

Please see my response to Ranking Member Feinstein’s question 7.

b. Do you still agree with the views that you expressed in your article?

Please see my response to Ranking Member Feinstein’s question 7.

c. Do you believe any race-based consideration in college admissions or other fields are permissible under the Fourteenth Amendment?

Yes. The Supreme Court has held that a university may consider race in its admissions process to pursue “the educational benefits that flow from student body diversity” provided that “its use of the classification is necessary . . . to the accomplishment of its purpose.” *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208-10 (2016). If I were to be confirmed, I would faithfully apply *Fisher* and all other binding precedent.

11. You wrote that the Human Rights Campaign “incessantly exploited” the slaughter of Matthew Shepard for “financial and political benefit,” saying the group was “guilty of valuing lives instrumentally.” Do you still agree with the views you expressed in this 2001 article for the *Dartmouth Review*?

Please see my response to Ranking Member Feinstein’s question 10.a.

12. In a 2010 article for the *University of Pennsylvania Journal of International Law*, you wrote, “social scientists have found that greater ethnic heterogeneity is associated with lower social trust, “and [e]thnically heterogeneous societies exhibit . . . fewer public goods.”

- a. Please explain what you meant by these statements.

Please see my response to Senator Leahy's question 1.a.

- b. Do you still agree with the views that you expressed in your article?

I continue to believe that Israel can be both a Jewish state and a liberal democracy. For further information, please see my response to Senator Leahy's question 1.a.

13. In a 2002 *Washington Times* article called, "Defining 'Culture,' But Not as Anthropologists Would," you characterized a statement about the "superiority of Western civilization over Islam" as "obvious."

- a. Please explain what you meant by these statements.

- b. Do you still agree with the views that you expressed in your article?

Response to Questions 13.a. and 13.b.: Your questions ask about a book review I wrote in 2002 before I entered law school. It reviewed *The Survival of Culture*, edited by Hilton Kramer and Roger Kimball. The review and the book quote a statement by Silvio Berlusconi, the former Italian prime minister. Both the review and the book state clearly that the feature of western countries to which the statement referred was "respect for religious and political rights." The statement therefore endorsed the ability of western democracies to provide strong protections for religious and political rights. The book elaborates that the statement "has nothing whatever to do with racism, or the elevation of one segment of humanity over another." I continue to believe that the freedoms guaranteed by the First Amendment are important and sacred. I do not believe that any group of people is superior to any other. The review did not intend to suggest otherwise.

14. In a 2009 article entitled "The Moral Critic: Irving Kristol," you asserted that "the welfare system produced a permanent underclass and bred destructive social pathologies." Do you still believe that people receiving welfare funding are part of an "underclass" subject to a "destructive social pathology"?

Please see my response to Senator Durbin's question 14.

15. Do you agree that the rationale and holding of *Humphrey's Executor*, 295 U.S. 602 (1935), remain good law?

Humphrey's Executor is a binding precedent of the Supreme Court. If confirmed, I would faithfully adhere to *Humphrey's Executor* and all other binding precedent of the Supreme Court and the Second Circuit.

16. Do you agree that the rationale and holding of *Morrison v. Olson*, 487 U.S. 654 (1988), remain good law?

Morrison v. Olson is a binding precedent of the Supreme Court. If confirmed, I would faithfully adhere to *Morrison* and all other precedent of the Supreme Court and the Second Circuit.

17. You filed an amicus brief in *Zubik v. Burwell*, in which you asserted, “Petitioners’ religious concept of moral complicity resembles the legal concept of criminal complicity,” and “[t]he courts and the government should not dismiss a religious concern that so closely parallels traditional legal concepts of complicity.” If any attenuated role in supporting a third party’s conduct can be claimed as a violation of the Religious Freedom Restoration Act, many neutral laws and personal freedoms are at risk. What limiting principle applies?

Because the extent to which a religious objection qualifies for protection under the Religious Freedom Restoration Act is a matter of pending or impending litigation, I cannot express an opinion on that question as a judicial nominee. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

18. The bases for recusal provided in 28 U.S.C. § 455 include instances involving a relationship to a party, prior involvement in the particular case in controversy, or a personal financial interest in the outcome of the case. You have worked on a wide range of matters that may end up in litigation before the Second Circuit.

a. If confirmed, will you recuse from any cases that come before your court involving Department of Education action on which you worked during your time in the Trump Administration?

Yes. If confirmed, I would address recusal in cases by faithfully applying the standards set forth in 28 U.S.C. § 455 and Canon 3(C) of the Code of Conduct for United States Judges.

b. If confirmed, will you recuse from any cases that come before your court involving policies on which you worked during your time in the Trump Administration?

Please see my response to question 18.a.

Questions for Steven Menashi from Senator Mazie Hirono

Where I ask questions related to topics on which you have already worked, written, and made your views known, please do not respond to these questions by telling me that as a judge you will "follow the law."

1. While you worked at the U.S. Department of Education, did you work on the decision to roll back protections for students through the borrower defense to repayment rule?

Why was it necessary for the Department to roll back protections for students, specifically for students defrauded by fraudulent schools?

As Acting General Counsel of the Department of Education, my role was to provide legal advice to policymakers on relevant legal authorities. It was not my role to make policy decisions or to evaluate policymakers' decisions as a policy matter.

2. The New York Times reported that while you were at the Department of Education, the agency's division responsible for investigating fraud and abuse in federal student aid programs was reduced from 12 staffers to three, who were then responsible for overseeing these programs for 12 million students at 6,800 schools. Back in May 2018, I joined a letter with 28 of my colleagues questioning the Department's decision to reduce the staff in this division, but I never received an adequate response.

a. Given that you were involved in "all aspects" of the Department's operations while you were there, what was your role in this decision?

Please see my response to question 1.

b. Why was it necessary to make it more difficult for the Department to investigate fraud and abuse in federal student aid programs?

Please see my response to question 1.

3. You were reported as having participated in an Immigration Strategic Working Group led by Stephen Miller. The Washington Post describes Stephen Miller as "the singular force behind the Trump administration's immigration agenda." That agenda includes: separating families at the border; the Migrant Protection Protocols, which sends children and vulnerable migrants to dangerous parts of Mexico to await their asylum claims; and more recently, a public charge rule that shifts our family-based immigration system to one based on wealth, privilege, and English language ability.

a. As a member of the Trump administration, have you ever been involved in a working group on immigration or separately discussed any immigration policies with Stephen Miller?

Yes, insofar as this question concerns whether I have provided legal advice. For further information, please see my responses to Ranking Member Feinstein's question 2 and Senator Leahy's question 4.a.

b. Which immigration policies have you worked on while in the Trump administration? Have you worked on any of the policies I just mentioned – the public charge rule, family separations, or the Migrant Protection Protocols?

Please see my responses to Ranking Member Feinstein's questions 2.e., 2.a., and 2.f.

c. If so, what was your role?

I provided legal advice.

4. You've previously supported the view that "greater ethnic diversity weakens social solidarity, fosters social isolation, and inhibits social capital."

a. Do you believe promoting greater ethnic diversity in immigration weakens a country's social solidarity?

No. For further information, please see my response to Senator Leahy's question 1.a.

b. In your view, do you believe that immigration should promote greater ethnic homogeneity?

No. For further information, please see my response to Senator Leahy's question 1.a.

5. In your article on "ethnonationalism" you write that "the aspirations of liberal democracy can be achieved only through particularistic nation-states."

Only? Are you saying that the best kind of liberal democracy is one made up of only one kind of ethnic group orr that the only kind of real liberal democracy is one made up of only one kind of ethnic group?

No. The term "particularistic" refers only to the fact that a nation-state entails a national rather than a global community. It does not mean that a nation-state is composed of a single ethnic group.

The purpose of the article was to explain that Israel can be both a Jewish state and a liberal democracy. The article rejects the criticism that Israel is illegitimate because it is associated with the Jewish people. In doing so, it discusses the origin of the Jewish state and the argument of Hannah Arendt in *The Origin of Totalitarianism* about the relationship between human rights and the nation state. Arendt argued, based on the experience of World War II and the Holocaust, that the protection of universal human rights depended on a framework of particular nation-states.

The article reflects my view that, regardless of nationality, an essential feature of liberal democracy is the guarantee of equal rights. I have special reverence for our constitutional traditions of equality before the law, religious freedom, tolerance, and an impartial judiciary. My own family found a home in the United States after suffering from persecution because of ethnic prejudice. The notion that I somehow advocate such prejudice is inconsistent with who I am.

6. You have so far provided very little information about the issues that you have worked on while in the White House Counsel's office and the Department of Education. But you have been prolific in sharing your views in your writing.

a. Are the views you expressed in your writing reflected in your work in the Trump administration? If so, how?

No. As the Acting General Counsel of the Department of Education and a lawyer in the White House Counsel's Office, my role has been to provide policymakers with analysis of the relevant legal authorities.

b. Do you agree that if confirmed to the Second Circuit you would have to recuse yourself from matters you handled while in the Trump administration?

Yes. If confirmed, I would address recusal in cases by faithfully applying the standards set forth in 28 U.S.C. § 455 and Canon 3(C) of the Code of Conduct for United States Judges.

c. Please provide a list to this Committee of the policies you worked on in the Trump administration to make clear which matters you would be recused from if you are confirmed to the Second Circuit.

Please see my response to Senator Leahy's question 4.a.

7. In 2000, you wrote a college editorial entitled "Heteropatriarchal Gynophobes" that criticized Dartmouth University's "Take Back the Night" events. You made the claim that these marches "charge the majority of male students with complicity in rape and sexual violence (every man's a potential rapist, they say; it's part of the patriarchal culture.)" You also stated that men live "in a state of permanent culpability."

a. Can you explain what you mean by those statements?

Please see my response to Ranking Member Feinstein's question 14.a.

b. Do you still stand by those statements today?

Please see my response to Ranking Member Feinstein's question 14.a.

c. Which do you think is more prevalent: being falsely accused of sexual or being sexually assaulted?

I believe that actual incidents of sexual assault outnumber false accusations.

8. In that same 2000 article, you also mocked the notion of widespread discrimination against women and claimed that “women may be the majority, they may be the beneficiaries of special academic programs and institutional support, but they remain, by definition, an oppressed minority.”

a. Can you explain what you mean by those statements?

Please see my response to Ranking Member Feinstein’s question 15.

b. Do you still stand by those statements today?

The writing to which you refer was written while I was in college. It was overstated and overwrought. I would not write it today.

9. In September 2017, the Department of Education, under the leadership of Betsy DeVos, withdrew Obama era Title IX guidance from 2011 and 2014 regarding schools’ Title IX responsibilities. In their place, the Department released a Question and Answers guidance document. The new 2017 guidance directly conflicted with the rescinded guidance and had dangerous implications for students.

Were you involved in any way with this recession of the guidance?

Yes. The General Counsel of the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. Consequently, during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department provided by the Office of the General Counsel during my tenure, including with respect to Title IX.

10. One of the results of the withdrawal of the earlier guidance was in addressing transgender students’ issues. During your tenure, a spokesperson from the Department of Education said that the Office of Civil Rights at the Department of Education would no longer be investigating complaints regarding bathroom usage from transgender students.

a. Do you believe that transgender students experience discrimination and harassment?

Yes.

b. Have you ever talked to a transgender student or a parent of a transgender student?

Policymakers at the Department of Education met with transgender students and their parents to discuss issues related to Department policy.

11. Another area that was affected was how schools addressed sexual harassment, including sexual assault.

a. Do you believe that a student or teacher accused of sexual assault should be allowed to personally cross examine the student survivor?

The Department of Education's proposed rule does not permit personal cross-examination and restricts questioning about a student's sexual history. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

However, because disputes involving procedural due process in the context of campus adjudications are subject to pending or impending litigation, it would be inappropriate for me to further express an opinion on this question as a judicial nominee. *See Canon 3(A)(6), Code of Conduct for United States Judges* ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

b. Why do you believe it is appropriate for student survivors to endure cross-examination?

Please see my response to question 11.a.

c. Do you believe that schools should be able to question a survivor about her sexual history in investigating her assault allegations?

Please see my response to question 11.a.

d. Why do you believe it is appropriate to question a survivor's sexual history?

Please see my response to question 11.a.

e. Do you believe that schools should be able schools to give appeal rights only to named harassers/assailants and not to survivors?

Such a policy would not be consistent with the Department of Education's proposed rule. Please see my response to question 11.a.

f. Why do you believe only harassers/assailants should be given appeal rights?

Please see my response to question 11.a.

g. What was your basis for allowing those changes that so clearly expose student survivors to harm?

Please see my response to question 11.a.

h. Do you believe that schools should only be responsible for addressing sexual harassment when one of a small subset of school employees actually knew about the harassment? Why?

The Supreme Court identified standards for a school's liability under Title IX for failing to address sexual harassment in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). If confirmed, I would faithfully apply *Gebser*, *Davis*, and all other binding precedent. However, because disputes involving this issue are subject to pending or impending litigation, it would be inappropriate for me to further express an opinion on this question as a judicial nominee. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

i. Do you believe that schools should be required to ignore harassment that occurs outside of a school activity, including most off-campus and online harassment? Why?

Please see my response to question 11.h.

j. Do you believe that schools should be required to ignore harassment until it becomes quite severe and harmful and denies a student educational opportunities? Why?

Please see my response to question 11.h.

k. What was your basis for allowing those changes that so clearly expose student survivors to harm?

Please see my response to question 11.h.

12. In a law review article entitled "Toward a 'More Enlightened and Tolerant View': Educational Choice and the Regulation of Religious Institutions," you argued that requiring a religious school not to discriminate on the basis of race or sex in hiring and firing as a condition of the school's participation in a publicly funded program would be "standardiz[ing] education in accordance with majoritarian norms." You said imposing this requirement as a condition of participation in the program would be an unconstitutional condition if the religious schools' asserted beliefs or practices allowed discrimination.

a. Do you think religious beliefs should override non-discrimination protections?

The Supreme Court has held that the First Amendment requires a "ministerial exception" that precludes application of employment discrimination laws "to claims

concerning the employment relationship between a religious institution and its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). If I were confirmed, I would faithfully apply *Hosanna-Tabor* and other binding precedents of the Supreme Court and the Second Circuit. Because the scope of the ministerial exception is subject to pending or impending litigation, it would be inappropriate for me to express an opinion on that question as a judicial nominee. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

b. Do you believe institutions should be able to refuse to hire someone from a certain racial or ethnic background because it would be against their religious beliefs?

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race or ethnicity. To the extent this question asks for an opinion on the scope of the ministerial exception, please see my response to question 12.a.

To the extent this question asks for clarification of my article, I note that the article’s language about “standardiz[ing] education in accordance with majoritarian norms” is a description of another author’s argument, quoted in the article, that “state regulators” should apply “state education standards” to religious schools so as “to restrict the freedom of parents and religious groups to educate children in accordance with their deeply held beliefs.” It is not a reference to non-discrimination requirements. The article does not say that any institution would have a religious objection to hiring someone from a certain racial or ethnic background.

c. Do you believe that institutions should be able to fire a woman based on religious beliefs if she is unmarried and pregnant?

Title VII prohibits employment discrimination on the basis of religion or pregnancy, and it prohibits an employer from discriminating between men and women of the same marital status. *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1446 (2d Cir. 1995), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000). To the extent this question asks for an opinion on the scope of the ministerial exception, please see my response to question 12.a.

d. Do you believe that institutions should be able to fire a woman if she used birth control or had an abortion?

At least two circuits have addressed this issue and held that Title VII, as amended by the Pregnancy Discrimination Act, protects women from being fired for having an abortion or contemplating having an abortion. See *Doe v. C.A.R.S. Prot. Plus*, 527 F.3d 358, 364 (3d Cir. 2008); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996). It is my understanding, however, that litigation with respect to this issue is pending or impending in other federal courts. It would, therefore, be inappropriate for me to express an opinion on that question as a judicial nominee. See Canon 3(A)(6),

Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

To the extent this question asks for an opinion on the scope of the ministerial exception, please see my response to question 12.a.

13. In 2016, as pro-bono counsel, you co-authored an amicus brief submitted on behalf of several former Justice Department officials in *Zubik v. Burwell*, weighing in on the side of employers who were arguing they should be able to deny their employees the Affordable Care Act birth control benefit. The brief argues that employers, by simply submitting an opt-out notice, are morally complicit in a way that is akin to the legal principle of criminal complicity.

The Religious Freedom Restoration Act (RFRA) bars the government from imposing a “substantial burden” on a person’s religious exercise. This is an objective legal issue for the court to decide. However, in your brief, you argued that once someone asserts that an action is a substantial burden on their religious belief, then the court’s inquiry ends.

a. Do you still believe that once employers assert a religious objection to legally required conduct, the court should not separately assess whether the alleged objection imposes a substantial burden?

Under RFRA, a court must decide whether a legal requirement “substantially burden[s]” the exercise of religion. 42 U.S.C. § 2000bb-1(a). The Supreme Court has held that such a burden exists where the requirement forces parties to “engage in conduct that seriously violates their religious beliefs,” provided the beliefs are sincere. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 720 (2014). If I were confirmed, I would apply that and other binding precedent of the Supreme Court and the Second Circuit.

b. Does your view apply to other health services beyond contraception? Does it apply to anti-discrimination protections?

The extent to which employers may assert religious objections under the Religious Freedom Restoration Act is a question that is subject to pending or impending litigation. Accordingly, it would be inappropriate to express an opinion on that question as a judicial nominee. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

c. In the wake of the Hobby Lobby decision, attempts have been made to use RFRA to avoid child labor laws, laws criminalizing kidnapping, nondiscrimination laws, and more. If an individual brought a RFRA defense to a crime because it imposes a substantial burden on their religious belief, your brief suggests that a court cannot assess that claim of substantial burden. Is this correct?

I do not believe that this is correct. At no point in that brief did I assert that RFRA could serve as a defense in criminal proceedings.

14. In your article "Double Dorm Standards" published in *The American Enterprise* in 2000 and in a second article on the same topic, called "College Housing Hypocrisy," you write in support of the "Don't Ask, Don't Tell" policy.

a. When you wrote those articles, did you believe that integrating gay, lesbian and bisexual troops with straight troops would disrupt unit cohesion or encourage "sexual tension and sex-based favoritism" as you suggest in your article?

The quotation to which you refer is itself a quotation of a representative of the military explaining the military's argument in favor of the Don't Ask, Don't Tell policy. These articles from my time in college suggested there was a tension between the specific arguments that colleges had made in litigation with respect to the military and the specific arguments those colleges were making to establish separate housing for LGBT students. The last paragraph of "Double Dorm Standards" quotes the president of Tufts University as recognizing that tension and suggesting it could be avoided by housing students together.

b. Do you continue to believe that to be the case?

Please see my response to question 14.a.

c. Do you believe that DADT should have been repealed?

It would be improper for me to express a personal opinion on a political issue. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity"); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

15. In an article titled "Matters of Life and Death" published in the *Dartmouth Review*, you say that the Human Rights Campaign "incessantly exploited" the brutal murder of Matthew Shepard. You said that while they are not themselves "guilty of murder" they are "guilty of valuing lives instrumentally, according to political calculations."

a. Do you believe that the outcry that occurred after the brutal slaying of Matthew Shepard based on his sexual orientation was done for political purposes and not because of the hate that motivated the crime?

No. The murder of Matthew Shepard was a horrifying crime, and the outcry was warranted. Please see my response to Ranking Member Feinstein's question 10.a.

b. Do you believe that violence against the LGBT community should be treated as a hate crime?

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act requires that violence motivated by the actual or perceived sexual orientation or gender identity of the victim be treated as a hate crime.

c. Do you believe that LGBT people experience discrimination, harassment and even violence because of who they are?

Yes.

16. In an article titled "Humans, Animals, and the Human-Animal" published by the Hoover Institution, you say that the "modern left that believes people stand outside and above nature, peering down on the rest of creation with a godlike power to manipulate it for our own purposes." You then say that "feminists and gender theorists argue that institutions like marriage and the family — and, indeed, gender itself — are 'social constructs' that can be uprooted and rearranged through education and social engineering."

Do you believe that LGBT people and their families are "outside and above nature"?

No. That passage in the book review contrasted different approaches to social policy based on competing views about whether human nature is fixed or malleable. It does not suggest that one group of people is different from another, and indeed it adopts the view that no one is "outside and above nature."

Nomination of Steven James Menashi
United States Court of Appeals for the Second Circuit
Questions for the Record
Submitted September 18, 2019

QUESTIONS FROM SENATOR BOOKER

1. According to your Senate Judiciary Questionnaire (SJQ), in your legal career you “focused on issues and appeals, and then as a general counsel, [you] have not served as counsel in a case tried to verdict.”¹ Additionally, you said that none of your practice focused on criminal proceedings.²

a. Given your lack of trial experience, please elaborate on why you are qualified to be an appellate judge.

Like other nominees, my career has involved government service and academic work in addition to private litigation practice before state and federal courts. My private practice experience focused on writing and analysis of legal issues, work that closely resembles the responsibilities of a circuit judge. I authored appellate briefs and dispositive trial motions, including approximately 90 substantive court filings in some 45 different cases addressing a wide range of legal issues. I have prepared briefs or similar filings in federal and state appellate courts including the U.S. Supreme Court; the First, Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits; and the Florida, Indiana, and Colorado Supreme Courts. I have also prepared dispositive motions and briefing in trial courts within the Second Circuit including the Southern District of New York, the Eastern District of New York, and the District of Connecticut, as well as other federal and state trial courts including the New York Supreme Court, the District of Maryland, the Eastern District of Louisiana, the Southern District of Florida, and the Delaware Court of Chancery.

I have also served as the principal legal officer of a cabinet agency and overseen an office of 110 attorneys conducting litigation before administrative judges and in coordination with the Department of Justice in trial and appellate courts across the country—in addition to other legal work involving rulemaking, adjudication, and program legal advice. As a lawyer in the Office of the White House Counsel, I have provided legal advice on complex issues. Finally, as an academic, I have published articles on constitutional law, administrative law, statutory interpretation, and other topics. My scholarship has been cited in prominent law journals including the *Harvard Law Review*, *Columbia Law Review*, and *Yale Law Journal*. I have also taught foundational courses in civil procedure and administrative law.

Taken together, I have a broad range of experience in private practice, as the chief legal officer of a federal agency, as a White House lawyer, and as a legal scholar. I am honored that when evaluating my qualifications, the American Bar Association took into consideration the breadth of my experience and rated me well-qualified to serve as a circuit judge.

¹ SJQ at pp. 30-31.

² Id.

b. An appellate court judge handles a vast array of criminal matters. Given your lack of experience in this area of law, please elaborate on why are you qualified to serve as an appellate judge in criminal matters?

Every judge comes to the bench with significant experience or specialized expertise in certain areas of law. Some appellate judges have backgrounds as trial judges and bring those experiences to bear. Other judges assume the bench from academia or government service and bring their unique expertise to bear on issues before them. I have been fortunate to have had broad and diverse experiences—from being a litigator in private practice, to a professor and legal scholar, to the acting general counsel of a cabinet agency, to a White House lawyer. As Acting General Counsel, my office coordinated with the Department of Justice on criminal matters and provided advice on civil enforcement matters, such as enforcement of audit and monitoring findings, debarments and suspensions, program reviews, and audits or investigations by the Inspector General or the Government Accountability Office. I also advised on the resolution of criminal appeals as a law clerk at the Supreme Court of the United States and the U.S. Court of Appeals for the District of Columbia Circuit.

2. In your SJQ, you claimed that during your time at the Department of Education (DoED) you were “responsible for providing legal advice related to *all* aspects of the Department's operations, including litigation, rulemaking, regulation, and enforcement.”³

a. Within weeks of your appointment as Acting General Counsel of the DoED, the agency announced it would reduce broad investigations into civil rights violations at public universities by removing the requirement that DoED investigators work to “identify systemic issues and whole classes of victims” and the requirement that regional offices are to “alert department officials in Washington of all highly sensitive complaints on issues such as the disproportionate disciplining of minority students and the mishandling of sexual assaults on college campuses.”⁴

i. At your hearing, Chairman Graham directed you to answer questions regarding what matters you provided legal advice on. Without disclosing the substance of your counsel, did you provide the DoED legal advice on this policy?

Please see my response to Ranking Member Feinstein’s question 1.c

ii. Do you stand by your work on this matter?

Please see my response to Ranking Member Feinstein’s question 1.c

b. In November 2018 Secretary DeVos released revised rules that instructed colleges

³ SJQ at p. 30 (emphasis added).

⁴ Erica L. Green, Education Dept. Says it Will Scale Back Civil Rights Investigations, THE NEW YORK TIMES (Jun. 16, 2017).

to consider “fewer allegations . . . [to] be considered sexual harassment.”⁵ Her actions were consistent with an announcement she made in September 2017, while you were serving as Acting General Counsel at DoED.⁶

i. At your hearing, Chairman Graham directed you to answer questions regarding what matters you provided legal advice on. Without disclosing the substance of your counsel, did you provide the DoED legal advice on this policy?

Yes. The General Counsel of the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. Consequently, during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department provided by the Office of the General Counsel during my tenure, including with respect to Title IX.

ii. Do you stand by your work on this matter?

I always provide candid advice to clients to the best of my abilities.

c. On June 6, 2017, Secretary DeVos told senators that she was amenable to providing funding to educational institutions that discriminate against LGBT students. She said, “For schools that receive federal funds, federal law must be followed, period. . . . On areas where the law is unsettled, this department is not going to be issuing decrees. That is a matter for Congress and the courts to settle.”⁷ Additionally, while you were at the DoED the agency announced that it would no longer interpret Title IX to allow transgender students to use the appropriate restroom or locker room.⁸

i. At your hearing, Chairman Graham directed you to answer questions regarding what matters you provided legal advice on. Without disclosing the substance of your counsel, did you provide the DoED legal advice on its decision to provide federal funding to schools that discriminate against LGBT

⁵ Laura Meckler, *Betsy DeVos releases sexual assault rules she hails as balancing rights of victims, accused*, THE WASHINGTON POST, (Nov. 16, 2018), https://www.washingtonpost.com/local/education/betsy-devos-releases-sexual-assault-rules-she-hails-as-balancing-rights-of-victims-accused/2018/11/16/4aa136d4-e962-11e8-a939-9469f1166f9d_story.html.

⁶ Laura Meckler, *Betsy DeVos releases sexual assault rules she hails as balancing rights of victims, accused*, THE WASHINGTON POST, (Nov. 16, 2018), https://www.washingtonpost.com/local/education/betsy-devos-releases-sexual-assault-rules-she-hails-as-balancing-rights-of-victims-accused/2018/11/16/4aa136d4-e962-11e8-a939-9469f1166f9d_story.html.

⁷ Liam Stack, *Transgender Students Turn to Courts as Government Support Erodes*, THE NEW YORK TIMES (JUL. 14, 2017).

⁸ *Id.*

students?

At the June 2017 hearing, I believe Secretary DeVos was discussing a proposed program in the fiscal year 2018 budget request that was never adopted. *See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations for Fiscal Year 2018: Hearing Before the Subcomm. on Labor, Health and Human Services, Education, and Related Agencies of the S. Comm. on Appropriations*, 115th Cong. 1 (2017). Nevertheless, during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department, including with respect to grant programs.

ii. At your hearing, Chairman Graham directed you to answer questions regarding what matters you provided legal advice on. Without disclosing the substance of your counsel, did you provide the DoED legal advice on its decision to announce that Title IX did not allow transgender students to use the appropriate restroom or locker room?

The article you cite refers to the announcement of guidance on this issue in February 2017. I did not begin work at the Department until May 2017 and therefore did not advise on that matter.

iii. Do you stand by your work on these matters?

Please see my response to question 2.c.iii.

d. According to a memorandum released by the House of Representatives on July 2018, your office advised Secretary DeVos that federal dollars could be used to arm teachers.⁹

i. At your hearing, Chairman Graham directed you to answer questions regarding what matters you provided legal advice on. Without disclosing the substance of your counsel, did you provide the DoED legal advice on this policy?

Please see my response to Ranking Member Feinstein's question 1.b.

ii. Do you stand by your work on this matter?

Please see my response to Ranking Member Feinstein's question 1.b.

⁹ Laura Meckler, *Internal memo contradicts DeVos on using federal money to buy guns for teachers*, THE WASHINGTON POST (Apr. 10, 2019), https://www.washingtonpost.com/local/education/internal-memo-contradicts-devos-on-using-federal-money-to-buy-guns-for-teachers/2019/04/10/49d1e81c-5bc6-11e9-9625-01d48d50ef75_story.html?noredirect=on. *See also* Internal Memorandum: Jason Botel to Kent Talbert, *Determine Options for the Allowable Use of Funds for School Safety Measures Under Title IV, Part A*, DEPARTMENT OF EDUCATION (Jul. 16, 2018), <https://edlabor.house.gov/imo/media/doc/Title%20IV-A%20Guns%20Memo.pdf>.

e. In 2016, DoED found that “children of color—particularly African-American and American Indian youth—are identified as students with disabilities at substantially higher rates than their peers.” Consequently, the department issued rules intended to address the disparities in the treatment of students of color with disabilities.¹⁰ Yet in July of 2018, while you were serving as Principal Deputy General Counsel, DoED issued its final rule postponing the compliance date for those rules.¹¹ In March 2019, the U.S. District Court in Washington, D.C. vacated the agency’s postponement of the rules and found that DoED had engaged in an “illegal delay” and had acted arbitrarily and capriciously.¹²

i. At your hearing, Chairman Graham directed you to answer questions regarding what matters you provided legal advice on. Without disclosing the substance of your counsel, did you provide the DoED legal advice on this policy?

Yes. Please see my response to question 2.b.i.

ii. When DoED issued a rule postponing compliance with the Obama Administration rule, it acknowledged that “[m]any commenters opposed postponing the compliance date.”¹³ Why did DoED proceed with postponing the rule?

The rule sets forth the views of all commenters and the Department’s agreement or disagreement with those views, consistent with the Administrative Procedure Act and the cases interpreting the Act. The basis for the Department’s decision is set forth in the rule.

iii. Do you agree with the U.S. District Court’s findings that DoED engaged in an “illegal delay” and had acted arbitrarily and capriciously?

The Department of Justice defended the Department of Education’s action for the reasons stated in its briefs in the case. The court did not agree. Consistent with the longstanding tradition that judicial nominees decline to evaluate the merits of judicial decisions it would be inappropriate to comment on the merits of the decision

iv. Do you stand by your work on this matter?

¹⁰ “Fact Sheet: Equity in IDEA,” U.S. Department of Education Press Office (Dec. 12, 2016), <https://www.ed.gov/news/press-releases/fact-sheet-equity-idea>.

¹¹ Department of Education, 34 CFR Part 300, “Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities,” FEDERAL REGISTER (July 3, 2018), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-14374.pdf>.

¹² *COPAA v. DeVos*, No. 18-cv-1636 (D.D.C. 2019), available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv1636-31.

¹³ Department of Education, 34 CFR Part 300, “Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities,” FEDERAL REGISTER (July 3, 2018), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-14374.pdf>.

Please see my response to question 2.b.ii.

3. In your writings, you have taken the opportunity to criticize Islam and Muslim society. For instance, when Silvio Berlusconi spoke about the superiority of Western civilization over Islam, you stated that “Mr. Berlusconi did nothing other than state the obvious.”¹⁴ In a 2002 article you mocked the contributions of Muslims to science by paraphrasing a joke that claimed that a 14th century sword design was the most recent contribution of “Muslim science.”¹⁵

a. Given your past public statements criticizing Muslims, would it be unreasonable for Muslim litigants in your courtroom to believe you wouldn’t be a neutral and fair jurist?

I believe that all individuals are entitled to equal dignity before the law, and I would treat all litigants fairly and impartially. In particular, the Constitution guarantees that we are all equal before the law. Judges may not discriminate on the basis of race or religion. As I testified at my hearing, these principles are especially important to me because of my family’s history. My family faced discriminated based on their ethnicity and ultimately found a home in this country. I believe all litigants in my courtroom would understand how important this principle is to me and trust me to be a neutral and fair jurist.

b. Why did you write that “Mr. Berlusconi did nothing other than state the obvious” when he spoke about the superiority of Western civilization over Islam? Do you believe it is appropriate to proclaim the superiority of one civilization over another? Are you willing to apologize to people who are offended by those comments?

Please see my response to Senator Coons’s question 13.

c. Do you regret making a joke that claimed that a 14th century sword design was the most recent contribution of “Muslim science”? Why did you make that joke? Do you believe it is appropriate to mock or belittle a religion?

As noted in response to Senator Coons’s question 13, I believe that the freedoms guaranteed by the First Amendment, including the freedom of religion, are important and sacred. The review did not criticize a religion but the effort of postcolonial theorists to “ground science in different, non-Western assumptions about the world.” I do not believe it is appropriate to belittle the religious beliefs of others.

4. In your 2010 article, “Nondelegation and the Unitary Executive,” you questioned the creation and status of independent agencies.¹⁶ With respect to President Franklin Roosevelt’s

¹⁴ Menashi, *Defining ‘Culture,’ But Not as Anthropologists Would*, WASHINGTON TIMES (Dec. 15, 2002) (reviewing Hilton Kramer and Roger Kimball, eds., *The Survival of Culture* (2002)) (SJQ Attachment 12(a) at pp. 509-511).

¹⁵ *Id.*

¹⁶ See Douglas Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 J. OF CONST. L. 251, 252 (2010), (SJQ Attachment 12(a) at p. 356).

efforts to rollback Congress's responsibility over independent agencies, you wrote that "Congress, of course, did not agree to decolonize the executive."¹⁷ You also expressed concern about "the imperial instinct of the legislature."¹⁸

- a. Do you still believe that Congress has colonized the executive branch? Please explain.

Your question addresses an article that I co-authored with Judge Douglas Ginsburg in 2010. In the article, we addressed the relative roles that Congress and the Executive have played in the administration of federal agencies. The specific language you quote referred to the historical struggle between President Franklin D. Roosevelt and Congress over the relative roles of each branch in the new agencies created by the New Deal. In transmitting the recommendations of his Committee on Administrative Management, President Roosevelt requested more direct control over the agencies from Congress, and Congress declined to provide it.

- b. Please elaborate on what you meant by the "imperial instinct of the legislature"?

Your question addresses a reference in the same article to the writings of James Madison. In that article, Judge Ginsburg and I referred to Madison's views on "the imperial instinct of the legislature." In *The Federalist No. 48*, Madison wrote that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

5. In a 2003 article, you wrote that "[t]he animal rights crowd is, by and large, a contemptible bunch."¹⁹

- a. What did you mean by that comment?

Please see my response to Senator Durbin's question 15.

6. You previously wrote that anti-Iraq War activists were "totally unprincipled – and thoroughly contemptible."²⁰ Additionally, in writing about opponents of the Iraq War you instructed readers in a 2002 article "to remember that similar elites recoiled with moral revulsion at

¹⁷ *Id.* at 269 (SJQ Attachment 12(a) at p. 373).

¹⁸ *Id.* at 269 (SJQ Attachment 12(a) at p. 373) (citing Madison in *Federalist No. 48*).

¹⁹ Menashi; *Humans, Animals, and the Human Animal*; POLICY REVIEW (Feb. - March 2003) (reviewing Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (2002)) (SJQ Attachment 12(a) at p. 500).

²⁰ Menashi, *True Believers*, AMERICAN SCENE (Mar. 19, 2003), SJQ Attachment 12(a) at pp. 809-810.

the idea of deposing Adolf Hiler, who was the democratically elected leader of Germany.”²¹

- a. Do you believe it was appropriate to compare critics of the Iraq War to those who “recoiled with moral revulsion at the idea of deposing Adolf Hitler”? Please explain why thought it was appropriate/inappropriate.

Please see my response to Ranking Member Feinstein’s Question 8.

- b. What point were you trying to make in drawing that comparison?

The only purpose of the sentence was to express opposition to dictatorship. For further information, please see my response to Ranking Member Feinstein’s Question 8.

7. In your SJQ you listed 124 *New York Sun* editorials. You claimed to have “prepared the initial draft or participated substantially in editing” of each of those editorials.²²

- a. You contributed to an editorial titled, “Dodge City?” The piece argued that Washington, D.C.’s 1976 handgun ban caused the city’s murder rate to increase.²³

- i. At the time, did you believe there was a positive correlation between the banning of firearms, such as handguns, and increases in murder rates?

1. Please list the evidence you relied upon in making that claim.

In response to your question, the editorial itself recounts data cited by Rep. Mark Souder and Rep. Michael Ross, who were the sponsors of the legislation that is the main focus of the editorial. I have no recollection of writing this particular editorial in 2004 and cannot recall if there were particular pieces of contemporaneous evidence not mentioned in the text that I may have consulted in drafting such an editorial. As the *New York Sun*’s editors explained in a letter to the Committee, the editorials reflected “an institutional view” of the newspaper and included “the views of others folded in.”

- ii. Do you still hold that belief today?

As a nominee for judicial office, it would be inappropriate for me to express a personal opinion on a political issue such as this. See Canon 5, Code of Conduct for United States Judges.

²¹ Menashi, *Teaching Evil*, The Hoover Institution’s POLICY REVIEW (April-May 2002) (reviewing Robert D. Kaplan, *Warrior Politics: Why Leadership Demands a Pagan Ethos* (2002)) (SJQ Attachment 12(a) at pp. 529-530), <https://www.hoover.org/research/teaching-evil>.

²² SJQ at p. 9.

²³ *Dodge City?*, N.Y. SUN (Sept. 23, 2004) (SJQ Attachment 12(a) at p. 703).

b. You contributed to a piece titled, "Freedom for the Faithful." In it, the *New York Sun* editorial board praised the "victory for civil liberties won by Christian students at Ohio State University" after it compelled the university to change its non-discrimination policy to allow a religious student group to continue its policy of "not allow[ing] non-Christians or gays to become officers."²⁴

i. Do you believe it is right for a student group to exclude members because of their sexual orientation or religious affiliation?

As a nominee for judicial office, it would be inappropriate for me to express a personal opinion on an issue that is the subject of pending or impending litigation. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

ii. Did you agree with the university's policy which allowed the student group to discriminate against people based on their sexual orientation or religion?

The *New York Sun* took that position in 2004. For further information, please see my response to question 7.a.i.1.

8. You once likened affirmative action to Germany under Adolf Hitler writing that "[s]ixty years after the promulgation of the Nuremburg laws, universities persist in cataloguing students according to race on college applications and official documents."²⁵

a. Do you believe it was appropriate to somehow equate affirmative action laws to the promulgation of the Nuremburg laws?

As I said at my hearing, there is no comparison between the Nuremburg laws and what takes place on university campuses.

b. Do you regret making this comparison? If so, why?

Please see my response to Ranking Member Feinstein's question 7.

9. According to news reports, you are a member of Stephen Miller's Immigration Strategic Working Group.²⁶

²⁴ *Freedom for the Faithful*, N.Y. SUN, Oct. 7, 2004, (SJQ Attachment 12(a) at p. 702).

²⁵ Steven Menashi, *Matters of Life and Death*, DARTMOUTH REV. (Mar. 12, 2001) (SJQ Attachment 12(a) at p. 837).

²⁶ Betsy Woodruff and Asawin Suebsaeng, Trump Aide Who Floated Sending Migrants to Sanctuary Cities Gets Powerful New Job, THE DAILY BEAST (Aug. 23, 2019), <https://www.thedailybeast.com/trump-aide-may-davis-a-stephen-miller-ally-who-floated-sending-migrants-to-sanctuary-cities-gets-promotion>.

- a. Is it accurate that you are a member of the Immigration Strategic Working Group?

Please see my response to Senator Hirono's question 3.a.

- b. If it is accurate that you are a member of the Immigration Strategic Working Group, please disclose the matters on which you have provided legal advice. Please do so without disclosing the contents of that advice per Chairman Graham's instruction at your hearing.

Please see my response to Senator Leahy's question 4.a.

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.

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

The Supreme Court has relied upon legislative history in certain contexts. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). If confirmed, I would faithfully apply the precedents of the Supreme Court, including both the outcomes the Supreme Court reached and the methods of interpretation that the Supreme Court used to reach those outcomes in those contexts.

- 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 an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

It is important for a judge to set aside his or her own policy views in deciding a case, to consider only the applicable law, and otherwise to leave policy decisions to the elected political branches.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.²⁷ Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Heller* is binding precedent on the lower courts. Consistent with the canons of judicial conduct, it would not be appropriate for me to grade prior Supreme Court decisions. If confirmed, I would faithfully apply the precedents of the

²⁷ 554 U.S. 570 (2008).

Supreme Court. *See* Canons 1 and 3, Code of Conduct for United States Judges.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.²⁸ 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.²⁹ 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 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.³⁰ 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.³¹

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

It would be inappropriate for me to opine on matters that are the subject of pending or impending litigation and political debate. Canon 3(A)(6), Code of Conduct for United States Judges; *id.* Canon 5, Code of Conduct for United States Judges.

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

Please see my response to question 12.a.

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

Please see my response to question 12.a.

13. According to a Brookings Institution study, African Americans and whites use drugs at

²⁸ 558 U.S. 310 (2010).

²⁹ 570 U.S. 529 (2013).

³⁰ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

³¹ *Id.*

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.³² Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.³³ 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.³⁴ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.³⁵

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

Yes.

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

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not studied the issue in detail though I am generally familiar with the issue of implicit racial bias in our criminal justice system. I cannot recall which documents I have read with specificity. I do not maintain a list of books, articles, or reports on this topic.

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.³⁶ Why do you think that is the case?

I am familiar with the findings of the Sentencing Commission in that report with respect to the rates of downward departures and variances. I have not studied this issue in enough detail to offer an independent judgment.

³² 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>.

³³ *Id.*

³⁴ 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>.

³⁵ *Id.*

³⁶ 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.

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.³⁷ Why do you think that is the case?

Please see my response to question 13.d.

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

Appellate judges have an important role to play in reviewing the administration of justice in trial courts to ensure that the law is applied fairly. And all judges should be mindful of the potential for implicit bias in the cases before them.

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.³⁸ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.³⁹

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

I have not had the opportunity to study that question.

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.

Yes.

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?

³⁷ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

³⁸ 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>.

³⁹ *Id.*

Yes.

17. Do you believe that *Brown v. Board of Education*⁴⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. Because of the unique place that *Brown v. Board of Education*, 347 U.S. 483 (1954), holds in our constitutional history, I believe that it is important for me to affirm that I believe that it was correctly decided. For that reason, I testified at my hearing that *Brown* was correctly decided.

18. Do you believe that *Plessy v. Ferguson*⁴¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. *Brown v. Board of Education*, 347 U.S. 483 (1954), correctly overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). As explained in my response to question 17, I testified at my hearing that I believed that *Brown v. Board of Education* was correctly decided.

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?

My responses are my own. In responding to questions at my hearing and in writing, I have been mindful of the precedent set by prior judicial nominees who have generally declined to comment on the wisdom of past Supreme Court decisions. Lawyers at the Department of Justice have provided general guidance on questions that have been asked of other nominees and on the Code of Conduct for United States Judges.

20. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, 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.”⁴² Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Consistent with the Code of Judicial Conduct, it would not be appropriate for me to comment on political statements by the President. See Canon 5, Code of Conduct for United States Judges; *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

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

⁴⁰ 347 U.S. 483 (1954).

⁴¹ 163 U.S. 537 (1896).

⁴² 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>.

them back from where they came.”⁴³ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has stated 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 binding precedent of the Supreme Court.

⁴³ 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 September 18, 2019
For the Nomination of**

Steven J. Menashi, to be United States Circuit Judge for the Second Circuit

1. At your nominations hearing, Senators Feinstein and Durbin asked whether you had worked on certain matters at the White House, including family separation, limits on the maximum number of refugees, and the denial of DACA status for undocumented immigrants who are receiving treatment for life-threatening illnesses. You responded that you could not state which matters you worked on because you had not been cleared to do so and because you owed a duty of confidentiality to the White House.

a. **Did anyone at the White House instruct you not to answer topical questions about what you worked on at the White House?**

Please see my answers to Ranking Member Feinstein's question 2 and Senator Leahy's question 4.a.

b. **Did anyone at the White House suggest that you did not have to (or should not) answer topical questions about what you worked on at the White House?**

Please see my answer to Senator Leahy's question 4.a.

c. **Did you seek authorization to discuss the specific issues that you worked on at the White House before you appeared before the Senate Judiciary Committee? If not, why not?**

Please see my answer to Senator Leahy's question 4.a.

d. **Do you believe that your duty of confidentiality extends to the topics that you worked on, as opposed to the substance or nature of your advice? If yes, please explain the basis for that assertion and provide citations.**

Please see my answer to Senator Leahy's question 4.a. and Senator Whitehouse's question 3.

2. Beginning in February 2017, the Department of Education announced that transgender students were no longer eligible to use the appropriate bathroom or locker room under Title IX. The Department also moved to rescind the prior administration's findings in a series of cases brought by transgender students who had been the victims of harassment or discriminatory school policy, and closed a number of other pending cases of a similar nature.

a. **When you served in the Department of Education, did you advise or work on the rescission of Title IX guidance regarding transgender students?**

No. The rescission to which you refer occurred in February 2017. I did not begin work at the Department until May 2017.

b. Do you agree that transgender students experience discrimination and harassment?

Yes.

c. Do you believe that Title IX, which prohibits federally funded educational institutions from discriminating on the basis of sex, covers gender identity?

Because litigation on this issue is currently pending or impending, it would not be appropriate for me to comment on this question. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

3. In September 2017, while you served as Acting General Counsel, the Department of Education announced that it was rescinding Obama-era Title IX guidance relating to sexual harassment and assault. The announcement gave schools the ability to change the standard used to decide rape cases from a “preponderance of the evidence” to “clear and convincing evidence,” essentially making it more difficult to prove that an assault occurred.

a. Did you propose or direct that the Department of Education rescind Title IX guidance relating to sexual harassment and assault?

No. As Acting General Counsel, my role was to advise policymakers about relevant legal authorities. It was not my role to propose or direct Department policy.

b. Did you advise or work on the Department of Education’s rescission of Title IX guidance relating to sexual harassment and assault?

Yes. The General Counsel for the Department of Education is the principal legal officer for the Department of Education. It is the responsibility of the General Counsel to provide legal advice on all legal matters to policymakers within the Department. Consequently during the time I served as Acting General Counsel, I was responsible for all legal advice to policymakers within the Department, including with respect to Title IX.

c. Before rescinding the Title IX guidance, did the Department of Education review or consider the impact of the new standard on survivors’ willingness to come forward with allegations of sexual misconduct?

Because the rescission of the guidance is subject to ongoing litigation, and because it would be inappropriate for me to discuss internal executive branch deliberations, I cannot comment on this question as a judicial nominee. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public

comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

The Secretary and senior policymakers at the Department met with survivors of sexual assault in July 2017 to discuss the impact of the Department’s Title IX guidance on students.

d. After the Department of Education rescinded its Title IX guidance, did you or anyone else track the number of sexual misconduct allegations and findings of responsibility as compared to prior years? If yes, what were the findings?

Please see my answer to question 3.c.