Nomination of Edward Hulvey Meyers to the United States Court of Federal Claims
Questions for the Record
Submitted January 15, 2020

QUESTIONS FROM SENATOR FEINSTEIN

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

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

   To the extent the question addresses the need for judges on the Court of Federal Claims, that is a political question for the President in exercising his authority to nominate new judges and for the Senate in exercising its authority to confirm nominees. Under the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to comment on the political question of the court's need for additional judges.

   With regard to the court's current docket, there is publicly available data regarding the court's current caseload:

   1. The number of cases filed in 2019 (the most recent data available) is approximately 36% greater than 2014;

   2. There were 4,217 of cases pending as of Sept. 30, 2019, an increase of nearly 67% over the 2,528 cases pending as of Sept. 30, 2014.

   3. As of September 30, 2019, there were 4,217 pending cases before the court, an increase of roughly 15% over 2018;

   4. The Administrative Office of the U.S. Courts described new general jurisdiction cases as "of increased complexity and national significance."

See https://www.uscfc.uscourts.gov/sites/default/files/Statistical_Report_for_FY2019.pdf;

https://www.uscourts.gov/statistics-reports/us-court-federal-claims-judicial-business-2018; https://www.uscfc.uscourts.gov/sites/default/files/AO2014Stats.pdf.

b. Do you agree with Senator Cotton that "it makes no sense to spend more taxpayer dollars on judges that the court simply does not need"?

This question raises a political question for the President in exercising his authority to nominate new judges and for the Senate in exercising its authority to confirm nominees. Under the Code of Conduct for United States Judges, it would not be appropriate for me, as a judicial nominee, to comment on the political question of the court's need for additional judges.

2. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for the Court of Federal Claims to depart from Supreme Court or relevant circuit court precedent?

If there is precedent from the Supreme Court or Federal Circuit that applies to the specific facts and legal issues in a case before the Court of Federal Claims, the Court of Federal Claims must faithfully follow and apply that precedent in all cases.

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

The Supreme Court has held that its simple disagreement with one of its prior decision is generally not sufficient for the Court to reverse that prior decision. For example, the Supreme Court explained in *Pearson v. Callahan*, 555 U.S. 223 (2009), that when considering whether to modify or reverse a prior decision, "we must begin with the doctrine of *stare decisis*. *Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id*. at 233 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

That said, the Supreme Court has also made clear that "*[s]tare decisis* is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 4 (1997). The Supreme Court places varying degrees of weight on prior precedent depending on the nature of the decision. For example, the Court has held that *stare decisis* considerations are given greater weight in cases involving statutory interpretation because Congress can easily amend a law if it disagrees with the Court's interpretation. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.") (citation omitted). When addressing constitutional questions, "where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

Without expressing any view on the merits of these cases, I would, if confirmed, follow any precedent of the Supreme Court that the Court itself has not overturned.

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

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

   While I am not familiar with the term "super-stare decisis" or "superprecedent," as with all decisions of the Supreme Court I will, if confirmed, faithfully apply *Roe* in any case coming before me.

   b. Is it settled law?

   Yes, *Roe* and all Supreme Court decisions are settled law and must be faithfully applied by lower courts.

4. 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, *Obergefell* and all Supreme Court decisions are settled law and must be faithfully applied by lower courts.

5. 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 is generally inappropriate for me to state whether I agree or disagree with Supreme Court opinions or a justice who dissented from an opinion.

If confirmed, I will faithfully apply all precedent from the Supreme Court and Federal Circuit.

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

Under the Code of Conduct of United States Judges, applicable to me as a pending judicial nominee, it would not be appropriate for me to comment on a matter that is pending or impending in a federal court. That said, if confirmed I would faithfully apply the *Heller* decision, which states:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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.

District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (citations omitted).

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

The *Heller* majority answers this question in the negative: "[N]othing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). Under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it would not be appropriate for me to critique binding Supreme Court precedent or comment further.

6. 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 scope of the First Amendment protections for corporate speech, including political speech, is a subject of ongoing court litigation. Under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment or express a view on the issue. As with all cases, if confirmed, I will faithfully apply all relevant Supreme Court and Federal Circuit precedent.

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

The question of whether and how to regulate speech is a policy and political question for the Congress (or state legislatures) to determine in the first instance. This determination is, of course, subject to review for compliance with the U.S. Constitution and the First Amendment as interpreted by the Supreme Court. Because this question implicates political and policy questions that are, or are likely to be, the subject of litigation, it would be inappropriate for me under the Code of Conduct of United States Judges to comment further. As with any case, if confirmed I will faithfully apply all binding precedent on this issue.

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

Under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it would not be appropriate for me to comment on the merits of an issue that is, or is likely to be, pending before federal courts. That said, the Supreme Court has "entertained [Religious Freedom Restoration Act] and free-exercise claims brought by nonprofit corporations." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (citations omitted). If confirmed, I would faithfully apply *Hobby Lobby* as I would any other Supreme Court precedent.

7. 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 different than judicial selection in past years…"

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

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?

Nobody employed by or acting on behalf of the Federalist Society, the Heritage Foundation, or other group has asked me about my views related to administrative law.

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

There are a large number of issues that fall under administrative law, many which are frequently litigated at the Court of Federal Claims. Under the Code of Conduct for United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment on a matter that is pending or impending in federal courts. Therefore, it would not be appropriate for me to provide further comment beyond reaffirming that if confirmed, I would faithfully apply all Supreme Court and Federal Circuit precedent.

8. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2003. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I am not the author of this statement and cannot comment on what the Federalist Society meant or intended by this statement.

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

Please see my response to Question 8(a).

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

Please see my response to Question 8(a).

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

During the time that I was being considered for nomination and my nomination was announced, I spoke frequently with friends and colleagues about the process and my potential nomination. I am aware that some of these individuals are members of the Federalist Society and others may be as well.

9. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) since 2009.

a. Are you currently a member of the NRA?

Yes.

b. If confirmed to the Court of Federal Claims, will you remain a member or renew your membership with the NRA?

I am planning to resign my membership if I am confirmed.

c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?

As with any matter that might come before me if I am fortunate enough to be confirmed, I will evaluate any potential conflict according to the standards and procedures set forth in the Code of Conduct for United States Judges and 28 U.S.C. § 455. *See also* my response to Question 9(b).

d. Can you cite any issue areas where you disagree with the NRA's publicly stated positions?

Because this question implicates political and policy questions, it would be inappropriate under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, to comment beyond affirming that, if confirmed, I would faithfully apply all relevant Supreme Court and Federal Circuit precedent.

e. Why did you join the National Rifle Association?

When I was a child, I spent time each summer with my grandparents. My grandfather, a veteran of World War II, kept guns in his home and taught me from a young age both marksmanship and the critical importance of gun safety. I also attended a number of summer camps as a child that included marksmanship programs organized under guidelines established by the NRA, which included ensuring that we all knew and obeyed the rules of firearm safety. As I got older, I had other priorities and was not actively shooting for many years. When I chose to start shooting again, I joined the NRA to get discounted access to its shooting range, which was the most convenient to me at the time, and the instructors there. I took advantage of this access to get refreshed on the safe handling of firearms.

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

Because this issue is presently before the courts, under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment on this matter.

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

The Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause restrict the powers of localities, states, and the federal government from legislating in a way that deprives any person of due process or equal protection of the laws. *See Bolling v. Sharpes*, 347 U.S. 497, 499-500 (1954). Similarly, the First Amendment prohibits local, state, or federal legislation that prohibits the free exercise of religion.

The interplay between the Free Exercise Clause and other constitutional rights is the subject of active and ongoing litigation. In *Masterpiece Cakeshop*, the Supreme Court recognized that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018). Because this issue is presently pending or impending before the courts, under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment beyond reaffirming that if confirmed, I will faithfully apply all relevant precedent in this area.

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

The Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), that: "Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *See also* my response to Question 11.

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

See my response to Question 11.

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

    If a statute is clear, the interpretation of that statute begins and ends with its text. As the Supreme Court explained, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citations omitted). If, however, a statute is ambiguous, the Supreme Court has allowed lower courts to rely on "clear evidence of congressional intent [to] illuminate ambiguous text." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). But courts may "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Id*.

15. 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 any outside groups — about loyalty to President Trump? If so, please elaborate.

    No, I have never had any such conversation with anyone before or after I was nominated.

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

    I received these questions on the morning of January 16, 2020. Upon receipt of these questions, I reviewed them, conducted some research, reviewed responses from other judicial nominees, reviewed personal materials to ensure the accuracy of my responses, and drafted my responses.

Nomination of Edward H. Meyers
to the United States Court of Federal Claims
Questions for the Record
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QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you joined the Federalist Society in 2003 and continue to be a member.
    a. What was your primary motivation for joining the organization? Did you believe that being a member of the Federalist Society would improve your odds of being confirmed as a federal judge in the Trump administration?

    I joined the Federalist Society in law school because of the speakers that it invited to discuss a wide variety of issues. I also enjoyed attending debates hosted by the Federalist Society, which regularly include thought-provoking panelists on all sides on an issue. I have remained a member for the same reasons that I joined.

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

    I have attended debates and presentations hosted by the Federalist Society over many years. If confirmed, I plan to continue doing so.

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

    I currently have no plans to donate money to the Federalist Society.

    d. 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.

    During the time that I was being considered for nomination and my nomination was announced, I spoke frequently with friends and colleagues about the process and my potential nomination. I am aware that some of these individuals are members of the Federalist Society and others may be as well. But to my knowledge, none of the friends and colleagues with whom I spoke would be considered "representatives" of the Federalist Society.

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

    I am not a subscriber to the Washington Post, which limits access to this article to subscribers. I was able to access a copy of the article on the Anchorage Daily News

website, which I have read, but this version of the article does not appear to include links to audio recordings.

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.

Whether and how to regulate such spending is a political question that it would be inappropriate for me to comment upon under the Code of Conduct for United States Judges, which is applicable to me as a judicial nominee.

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 response to Question 2(b).

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

I have discussed my nomination with Ann Corkery, who is mentioned in the article. As a friend and colleague of mine at Stein Mitchell (and former law clerk at the Court of Federal Claims herself), she has been supportive of my nomination in our discussions. To my knowledge, neither she nor any of the other entities or people mentioned in the article have advocated for my nomination.

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 response to Question 2(b).

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

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

Yes. Although no metaphor is perfect, Chief Justice Roberts' metaphor does a good job of capturing the role of a judge. Like an umpire, a judge is required to apply rules and legal principles impartially (calling balls and strikes), while not allowing personal views or policy preferences to impact those decisions (pitching or batting for a team).

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

If controlling statutes or precedent require or allow a judge to consider the practical consequences of his or her ruling, a judge may do so. In all cases, however, the judge

must decide matters impartially not allow his or her personal preferences to impact the decision.

4. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

   No, the determination under Rule 56 is an objective one. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."). Rule 56 requires the analysis of the governing law, precedent, pleadings, and the evidence to determine if there is a material issue of disputed fact and whether the moving party is entitled to judgment as a matter of law. The evidence is viewed in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
   a. What role, if any, should empathy play in a judge's decision-making process?

      Empathy is important and all people, including judges. That said, the judge's decision-making process must be fair, impartial, and based on the law rather than the identity of the litigants or a judge's personal preferences.

      There may be instances where empathy properly plays a role in a judge's decision-making with regard to case management issues, *e.g.* amending a case or discovery schedule to accommodate a witness or party dealing with significant family and/or work issues, etc.

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

      Because a judge's role is to follow the law faithfully and impartially based on statute, regulation, and precedent, personal life experience cannot be given determinative weight in decision-making. Judges may, however, in appropriate circumstances look to their own experience to help understand the facts of a case. Similarly, a judge's experience in litigation may properly help inform discovery rulings.

6. 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.

7. 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?

      While the Court of Federal Claims does not hear jury trials, juries play a vital role in our constitutional system. This role is reflected by the fact that the right to a trial by jury in

criminal matters and in "suits at common law" are enshrined in the Sixth and Seventh Amendments.

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

It is my understanding that the enforceability of mandatory pre-dispute arbitration clauses is the subject of ongoing and/or impending litigation. Therefore, under the Code of Conduct of United States Judges, it would not be appropriate for me as a judicial nominee to comment or opine on this issue.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 7(b).

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

According to the Supreme Court, legislative fact-findings are reviewed "under a deferential standard," but courts do not "place dispositive weight" on legislative fact-findings. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). If confirmed, I will faithfully apply this and all other binding precedent addressing this question.

9. 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 will comply with the Code of Conduct of United States Judges, including when deciding whether to attend any educational seminars. In each circumstance, I will review the Code and the advisory opinions to ensure that my conduct complies with my obligations under the Code. To the extent that I have any questions as to whether

something complies with the Code, I will consult with the ethics attorneys at the Administrative Office of the United States 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 9(b).

Questions for Edward Hulvey Meyers
From Senator Mazie K. Hirono

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

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

   Yes.

   b. Have you ever taken such training?

   While I have taken training on race, gender, and equal opportunity issues, I do not recall these training classes including specific discussion of implicit bias.

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

   If confirmed, I plan to seek out and attend training, including on implicit bias, that will assist me in ensuring that all of my judicial actions are based solely on the merits of a party's position under the law and nothing else.

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QUESTIONS FROM SENATOR BOOKER

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

   Different people understand "originalist" to mean different things. For example, there are those who understand originalism to mean that the original intent of the drafters of the Constitution or a statute is what should control. Others understand originalism to refer to the meaning of the Constitution or statute should be determined by the public understanding at the time of adoption. In addition, the Supreme Court has relied on the original public meaning of constitutional provisions when interpreting them. *See generally District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I will faithfully apply the precedent of the Supreme Court and Federal Circuit regardless of whether such precedent was decided using an originalist methodology or not.

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

   As I understand it, like the term "originalist," the term "textualist" means different things to different people. When construing a clear statute, the interpretation of that statute begins and ends with its text. As the Supreme Court explained, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (internal citations omitted). If confirmed, I will faithfully apply the precedent of the Supreme Court and Federal Circuit regardless of whether such precedent was decided using a textualist methodology or not.

3. 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?

      If a statute is clear, the interpretation of that statute begins and ends with its text. As the Supreme Court explained, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citations omitted). If, however, a statute is ambiguous, the Supreme Court has allowed lower courts to rely on "clear evidence of congressional intent [to] illuminate ambiguous text." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). But courts may "not take the opposite tack of allowing

ambiguous legislative history to muddy clear statutory language." *Id*. If confirmed, I would apply this precedent faithfully and consider legislative history in appropriate circumstances.

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?

If confirmed, I would evaluate any relevant arguments that come before me, whether regarding legislative history or anything else. *See also* my response to Question 3(a).

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

Yes. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the Supreme Court has recognized that courts need to avoid reaching legal conclusions that are circumstances when the court should exercise restraint in deciding cases. For example, the Supreme Court has made clear that courts should not reach legal issues that are premature, unnecessary to the outcome of a case, or reach beyond what is needed to resolve the case before the court. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Similarly, it is a "fundamental rule of judicial restraint" that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (quoting *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944)) (alterations in original). Such restraint reflects not only a limited role of judges in our system, it also reflects the proper recognition that policy questions are to be left to the political branches, not the judiciary.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[1] Was that decision guided by the principle of judicial restraint?

Under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it is generally inappropriate for a lower court judge to opine about whether any particular Supreme Court precedent was rightly decided. If confirmed, I will faithfully apply *Heller* and any other decision of the Supreme Court.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[2] Was that decision guided by the principle of judicial restraint?

Under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it is generally inappropriate for a lower court judge to opine about whether any particular Supreme Court precedent was rightly decided. If confirmed, I will faithfully apply *Citizens United* and any other decision of the Supreme Court.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[3] Was that decision guided by the principle of judicial restraint?

Under the Code of Conduct of United States Judges, applicable to me as a judicial nominee, it is generally inappropriate for a lower court judge to opine about whether any particular Supreme Court precedent was rightly decided. If confirmed, I will faithfully apply *Shelby County* and any other decision of the Supreme Court.

5. 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

[1] 554 U.S. 570 (2008).
[2] 558 U.S. 310 (2010).
[3] 570 U.S. 529 (2013).

the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[4] 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.[5]

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

I have not studied this issue sufficiently to reach an informed decision. Under the Code of Conduct for United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment on a matter that is pending or impending in federal courts. Therefore, it would not be appropriate for me to provide further comment beyond reaffirming that if confirmed, I would faithfully apply all relevant Supreme Court and Federal Circuit precedent.

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

I have not studied this issue sufficiently to reach an informed decision. Under the Code of Conduct for United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment on a matter that is pending or impending in federal courts. Therefore, it would not be appropriate for me to provide further comment beyond reaffirming that if confirmed, I would faithfully apply all relevant Supreme Court and Federal Circuit precedent.

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

I have not studied this issue sufficiently to reach an informed decision. Under the Code of Conduct for United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment on a matter that is pending or impending in federal courts. Therefore, it would not be appropriate for me to provide further comment beyond reaffirming that if confirmed, I would faithfully apply all relevant Supreme Court and Federal Circuit precedent.

6. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[6] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[7] 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.[8] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[9]

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

My practice has focused almost exclusively on civil litigation matters, so I have not studied the matter sufficiently to reach an informed opinion. I have, however, read articles that indicate that implicit racial bias likely exists in our criminal justice system.

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

Yes, I believe the data show that people of color are disproportionately represented in our nation's jails and prisons.

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

I have not studied this issue prior to my nomination. That said, I am aware of the discussion of racial bias in our criminal justice system and generally recall reading articles on racial bias in the criminal justice system in legal newsletters (*e.g.*, Law360, American Bar Association, etc.).

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.[10] Why do you think that is the case?

I have not studied this issue sufficiently to reach an informed opinion.

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[4] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[5] *Id.*
[6] 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.
[7] *Id.*
[8] 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.
[9] *Id.*
[10] 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.[11] Why do you think that is the case?

I have not studied this issue sufficiently to reach an informed opinion.

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

While the Court of Federal Claims does not maintain a criminal docket, if confirmed I would remain aware of implicit racial bias and ensure that neither it nor any other bias have any place in my court. This is incumbent on judges, who take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and … faithfully and impartially discharge and perform all the duties incumbent upon [judges] under the Constitution and laws of the United States." 28 U.S.C. § 453.

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

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

I have not studied this issue sufficiently to reach an informed opinion.

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.

I have not studied this issue sufficiently to reach an informed opinion.

8. 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.

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

Yes.

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

Yes.

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

    No. The Supreme Court has made clear, and I agree, that *Plessy* was wrongly decided.

12. 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?

    As I prepared for my hearing, it was suggested that I review the Code of Conduct for United States Judges with regard to discussing court decisions, which I have done. My answers are mine alone. If confirmed, I will faithfully apply all binding precedent.

13. 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

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[11] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).
[12] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[13] *Id.*
[14] 347 U.S. 483 (1954).
[15] 163 U.S. 537 (1896).

heritage."[16] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Under the Code of Conduct for United States Judges, applicable to me as a judicial nominee, it would be inappropriate for me to comment on political matters. With regard to recusal generally, a judge's recusal in a particular case is governed by the criteria and procedures set forth in Code of Conduct for United States Judges Canon 3(C) and 28 U.S.C. § 455.

14. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[17] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Insofar as this question refers to political issues and statements, it would be inappropriate for me to comment under the Code of Conduct for United States Judges, applicable to me as a judicial nominee. That said, the Supreme Court has concluded that "once an alien enters the country, the legal circumstance changes, for 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) (citations omitted). If confirmed, I would faithfully apply all binding precedent on this matter.

[16] 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.
[17] 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 January 15, 2020
For the Nomination of:

Edward Hulvey Meyers, Judge of the United States Court Of Federal Claims

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

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

    Yes.

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

    While I have not studied this issue in detail and my practice has focused almost entirely on civil litigation matters, it is my understanding that the data show that people of color are (i) arrested more frequently than whites, (ii) are disproportionately represented in prison, and (iii) receive longer sentences that white defendants.

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

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

    Yes.

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

    If confirmed, I will give serious consideration to all qualified applicants, including women and minorities, and make all hiring decisions based on merit, and ensure that all people working with me get every opportunity for professional development available.