Nomination of Eleni Roumel to the United States Court of Federal Claims
Questions for the Record
Submitted July 24, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. During your hearing before the Judiciary Committee on July 17, you stated that you have previously practiced before the U.S. Court of Federal Claims.

   a. Please detail each case and matter that have you argued or appeared in before the U.S. Court of Federal Claims.

   I appeared before the United States Court of Federal Claims in *Health Republic Insurance Company v. United States*, 16-cv-259.

   During my tenure with the U.S. House of Representatives Office of General Counsel, I was also directed by the House Bipartisan Legal Advisory Group to monitor certain cases and attend oral arguments, when held, in to determine whether to file briefing in the case in the U.S. Court of Federal Claims or U.S. Court of Appeals for the Federal Circuit, as the House did in particular matters. Though I did not enter an appearance on behalf of the House, such cases include:

   First Priority Life Insurance Company v. United States, 16-cv-587 (Fed. Cl., filed May 17, 2016).

   Moda Health Plan, Inc. v. United States, 16-cv-649 (Fed. Cl., filed June 1, 2016). Additionally, I assisted in drafting a brief in the United States Court of Appeals for the Federal Circuit related to the appeal of this matter. *Moda Health Plan, Inc. v. United States*, 17-1994, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellant and in Support of Reversal (Fed. Cir. July 17, 2017).

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   Maine Community Health Options v. United States, 16-cv-967 (Fed. Cl., filed Aug. 9, 2016).

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Related to these matters I have worked on the following briefs:

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b. For each matter detailed above, please identify each brief or motion that you contributed to or filed.

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number of counsel entering an appearance; accordingly, my name does not appear on the brief.

2. During your tenure in the House of Representatives' Office of General Counsel, you contributed to briefs in several cases defending the Defense of Marriage Act (DOMA). In one of these legal filings, you and your team claimed that Congress had merely "identified one type of relationship (traditional marriage) as especially important" without "singling out . . . homosexual relationships." Additionally, you and your team claimed that Congress afforded a "special legal status" to marriages between a man and a woman because "only a man and a woman can beget a child together, and because historical experience has shown that a family consisting of a married father and mother . . . is an effective social structure for raising children." (Memorandum of Intervenor-defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives in Support of Motion to Dismiss, *Aranas v. Napolitano*, 2012 WL 5894978 (C.D. Cal., Oct. 22, 2012))

   a. What was your role in developing and authoring the arguments made in this and other briefs submitted in *Aranas*, *Windsor*, or any other case involving DOMA?

   I joined the U.S. House of Representatives Office of General Counsel on October 9, 2012. After the Attorney General's February 23, 2011 letter regarding DOMA, and prior to my service with the Office of General Counsel, the House of Representatives Bipartisan Legal Advisory Group (BLAG) voted to intervene in lawsuits related to DOMA Section 3 and hire outside counsel to litigate those suits. The arguments noted above were developed prior to my joining the House Office of General Counsel. Generally, as a junior member of the Office of General Counsel on this and other DOMA-related cases, I assisted in editing or drafting parts of briefs and conducting legal research. Additionally, with regard to litigation on the *Windsor* case before the United States Supreme Court, I assisted primarily on the jurisdictional briefs, submitted in response to questions posed by the Court about House BLAG standing and lack of jurisdiction; those standing arguments were supported on a bipartisan basis by the House BLAG, including then-Democratic Leader Nancy Pelosi, and then-Democratic Whip Steny H. Hoyer, then-Speaker of the House John A. Boehner, then-Majority Leader Eric Cantor, and then-Majority Whip Kevin McCarthy. Finally, after the Supreme Court issued its decision in *Windsor*, I assisted in drafting motions in related matters to conclude litigation or otherwise withdraw the House's BLAG from such litigation.

   b. What study or studies did you rely on for the proposition that same-sex parents are less effective at raising children than other types of parents?

   Please see the response to question 2(a).

   c. Please provide any and all evidence you had to support the argument that same-sex parents are less effective at raising children.

Please see the response to question 2(a).

3. During your hearing, you mentioned that you handle ethics issues – among other matters – in your current role as Deputy Counsel to Vice President Pence. Pence reportedly attended nine events at Trump properties in 2018. One of those events – which took place at the Trump International Hotel in Washington, DC – was reportedly a fundraiser for Vice President's Political Action Committee, the Great America Committee. Pence also reportedly attended a gala at the Trump International Hotel held by the American Legislative Exchange Council, a conservative advocacy organization.

   Did you advise Vice President Pence on the ethics of holding events with large donors and lobbyists at Trump properties?

   It would be inappropriate for me to disclose whether the Vice President has sought legal advice on a particular subject matter.

4. 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?

   Whether the court has a need for judges is a political question committed to the President and the Senate. As a judicial nominee it would be inappropriate for me to comment on such a matter.

   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"?

   Please see the response to question 4(a).

5. 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?

Never.

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

The Supreme Court has "identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions . . . and reliance on the decision.'" *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2178 (2019), quoting *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448, 2478-79 (2018).

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

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

All Supreme Court precedent, including *Roe v. Wade*, is binding on lower court judges. If confirmed, I would fully and faithfully follow this case and all other Supreme Court precedent.

b. Is it settled law?

Please see the response to question 6(a).

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

Obergefell v. Hodges is binding Supreme Court precedent. If confirmed, I would fully and faithfully follow *Obergefell* and all other Supreme Court precedent.

8. 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?

Pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate for me to publicly offer such a personal opinion regarding Supreme Court opinions, concurrences, or dissents.

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

The Supreme Court's opinion in *Heller* noted that the "right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court further stated: "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 sales of arms." *Id*. at 626-27. As litigation concerning the constitutionality of firearms regulation is currently pending, the Code of Conduct for United States Judges, applicable to judicial nominees, restricts me from offering further comment.

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

Heller is binding Supreme Court precedent. As a judicial nominee, it would be inappropriate under the Code of Conduct for United States Judges to offer a personal opinion concerning whether *Heller* departed from prior Supreme Court precedent.

9. 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 Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." As litigation concerning the scope of *Citizens United* is currently pending, it would be inappropriate for me to offer further comment.

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

Please see the response to question 9(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court recognized such a right with regard to claims brought under the Religious Freedom Restoration Act by a closely held corporation. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." As litigation concerning the scope of *Hobby Lobby* and *Citizens United* is currently pending, it would be inappropriate for me to offer further comment.

10. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2013. 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 means by this statement.

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

Please see the response to question 10(a).

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

Please see the response to question 10(a).

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

No. To the extent "possible nomination" encompasses the time period after I learned of my nomination, but before official paperwork was sent to the Senate, I had a congratulatory conversation with an acquaintance at the Federalist Society on the day my intent to nominate was publicly announced.

11. 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?

    No.

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

    Administrative law is a broad subject matter. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." As administrative law issues are frequently litigated before the United States Court of Federal Claims, it would be inappropriate for me to provide further comment. If confirmed, I would fully and faithfully apply all binding Supreme Court and Federal Circuit precedent regarding this subject matter.

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

    I have not studied the issue of climate change sufficiently to opine on this subject.

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

    The Supreme Court has instructed that if the language of a statute is clear and unambiguous, it must be applied according to its terms, without reference to legislative history. The Court

has also instructed that it is permissible for a judge to consider reliable sources outside the statutory text where such text is ambiguous. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

14. 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.

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

    I received the questions from the Department of Justice on the evening of July 24, 2019. After reviewing the questions, I drafted responses and conducted research where appropriate. After conferring with current and former colleagues, Department of Justice Office of Legal Policy counsel, and my family to ensure the accuracy of my responses, I finalized my responses for submission to the Committee.

Written Questions for Eleni Maria Roumel
Submitted by Senator Patrick Leahy
July 24, 2019

1. **Please describe the extent of your practice before the U.S. Court of Federal Claims.**

I appeared before the United States Court of Federal Claims in *Health Republic Insurance Company v. United States*, 16-cv-259.

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2. You are currently serving as Deputy Counsel to Vice President Pence.

    (a) Can you discuss the importance of judges being free from political influence or the appearance thereof?

    Article III of the Constitution is foundational to our constitutional system and permits judges to decide matters based on the law, without regard to outside influence or criticism.

3. Chief Justice Roberts wrote in *King v. Burwell* that

    "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'"

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

    The Supreme Court has instructed that if the language of a statute is clear and unambiguous, it must be applied according to its terms. Consistent with Supreme Court precedent, a judge should examine any binding precedent on the meaning of a statutory term. The Supreme Court has also

recognized that consideration of statutory text within the structure of a statute is permissible. If confirmed, I would follow all relevant U.S. Supreme Court and Federal Circuit precedent regarding statutory interpretation.

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

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

Article III of the Constitution establishes the judiciary's independence, which is foundational to our constitutional system. While the First Amendment permits certain public commentary, including criticism, of the judiciary, Article III of the Constitution preserves judicial branch independence by ensuring federal judges may make decisions based on the law, without regard to potential criticism.

(c) 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 the response to question 4(b).

5. 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 Court has addressed this issue in varying contexts, including in *Webster v. Doe*, 486 U.S. 592 (1988) and *Clapper v. Amnesty International*, 568 U.S. 398 (2013). If confirmed, I would fully and faithfully apply all relevant U.S. Supreme Court and Federal Circuit precedent on this subject.

6. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial 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?

As when addressing any party who fails or refuses to comply with a court order, courts generally consider the parties' arguments, relevant precedent,

and relevant authorities, including constitutional or statutory provisions such as Federal Rule of Civil Procedure 37.

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

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

The Constitution provides Congress with the power of the purse and certain war powers, and also assigns the President executive power, including certain national security, military, and foreign affairs powers. The Supreme Court has addressed questions about the intersection and appropriate use of such powers, even in times of war. If confirmed, I would fully and faithfully apply all relevant U.S. Supreme Court and Federal Circuit precedent regarding this issue.

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

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

The Supreme Court has stated that executive branch actions may be enjoined and presidential authorities are not unrestricted, even in a time of war. *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952). Please see the response to question 7(a).

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

Please see the responses to questions 7(a) and (b).

8. **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 evaluating a challenge to an Executive Branch action, including with regard to national security matters, courts should consider all applicable statutes, constitutional provisions, and relevant precedent. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a

matter pending or impending in any court." Accordingly, it would be inappropriate to provide further comment.

9. 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 the Fourteenth Amendment's Equal Protection Clause requires heightened scrutiny for gender-based classifications. *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed, I would fully and faithfully apply all binding Supreme Court and Federal Circuit precedent regarding the Equal Protection Clause.

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

    I do not agree with this characterization. Justice Scalia's statement, made during oral argument, is not a holding of the Supreme Court. If confirmed, I would fully and faithfully apply all Supreme Court and Federal Circuit precedent interpreting the Voting Rights Act.

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

    Article I, Section 9, Clause 8 states that "No Title of Nobility shall be granted by the United States: And no Person holding any Office or Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State." The application of this Clause to the President is the subject of pending litigation. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." Accordingly, it would be inappropriate to provide further comment.

12. 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 a court to substitute its own factual findings for those made by Congress or the lower courts?

Trial court judges generally rely on the parties to conduct discovery and develop a factual record, consistent with the Federal Rules of Civil Procedure, Rules of the United States Court of Federal Claims, and Federal Rules of Evidence. Appellate courts generally evaluate the record on appeal, as detailed in the Federal Rules of Appellate Procedure. If confirmed, I would fully and faithfully apply all relevant U.S. Supreme Court and Federal Circuit precedent on this issue.

13. **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"?**

With respect to the Thirteenth, Fourteenth, and Fifteenth Amendments, the Constitution expressly provides Congress with authority "to enforce this article by appropriate legislation." *See* U.S. Const. amend. XIII, §2; amend. XIV, §5; amend. XV, §2.

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

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

Lawrence v. Texas is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all relevant Supreme Court and Federal Circuit precedent.

15. 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?

A lower court judge is not permitted to depart from relevant precedent of the Supreme Court or the jurisdiction's circuit court of appeals. The Supreme Court has "identified several factors to consider in deciding whether to overrule a past decision [from its own Court], including 'the quality of [its] reasoning, the workability of the rule it established, its

consistency with other related decisions . . . and reliance on the decision.'" *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2178 (2019), quoting *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448, 2478-79 (2018).

16. 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.

    Judges should consider whether recusal or disqualification is appropriate in a particular matter, including through reference to the factors set forth in 28 U.S.C. § 455. If confirmed, I would evaluate recusal and disqualification through consultation to relevant statutes and guidance.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. 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."

    (b) 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?

    Courts have an important role in protecting the constitutional rights of individuals through fair and impartial application of the law. If confirmed, I will fully and faithfully apply all relevant U.S. Supreme Court and Federal Circuit precedent considering and applying footnote 4 of *Carolene Products.* Under the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate to comment further on an issue that may be the subject of pending or impending litigation.

18. 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. 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 administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

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

    Yes.

19. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

    I have not studied this issue sufficiently to provide commentary on this subject. In the unlikely event that such an issue would arise in the United States Court of Federal Claims, I would fully and faithfully apply all relevant U.S. Supreme Court and Federal Circuit precedent.

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

    Article I of the Constitution grants Congress certain limited and enumerated powers, including those set forth in the Commerce Clause and Section 5 of the Fourteenth Amendment. The Supreme Court has addressed the scope of Congress's authority with regard to each of these constitutional provisions in several cases, including but not limited to *Wickard v. Filburn*, 217 U.S. 111 (1942), *NFIB v. Sebelius*, 567 U.S. 519 (2012), *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

21. 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? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

Trump v. Hawaii is binding Supreme Court precedent. If confirmed, I will fully and faithfully follow all relevant U.S. Supreme Court and Federal Circuit precedent on this subject. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." Accordingly, it would be inappropriate to provide further comment.

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

The Supreme Court has recognized that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden of the right." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 808 U.S. 833, 878 (1992)). In the unlikely event that such an issue would come before the United States Court of Federal Claims, I would fully and faithfully apply U.S. Supreme Court and Federal Circuit precedent on whether the regulation imposes an "undue burden." The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." Accordingly, as there is current litigation concerning this issue, it would be inappropriate to provide further comment.

23. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, 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 other startling cases.

(a) Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?

In *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the Supreme Court held that "qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Court further explained that "[q]ualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibility and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* If confirmed, I will fully and faithfully apply all relevant U.S. Supreme Court and Federal Circuit precedent.

24. 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 Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted "seismic shifts in digital technology," such as the "exhaustive chronicle of location information casually collected by wireless carriers today."

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

    The Supreme Court has acknowledged that new technological developments can raise Fourth Amendment concerns. *Carpenter v. United States*, 138 S. Ct. 2206 (2016); *Riley v. California*, 573 U.S. 373 (2014). If confirmed, I would follow all relevant U.S. Supreme Court and Federal Circuit precedent on this topic. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." Accordingly, it would be inappropriate to provide further comment.

25. 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 Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

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

    This question is currently the subject of ongoing litigation. The Code of Conduct for United States Judges, applicable to judicial nominees, states that a "judge should not make public comment on the merits of a matter pending or impending in any court." Accordingly, it would be inappropriate to provide further comment.

Senator Dick Durbin
Written Questions for Ozerden and Roumel
July 24, 2019

For questions with subparts, please answer each subpart separately.

Question for Eleni Roumel

1. Please list the policy areas and legal issues you have worked on since you became Deputy Counsel to Vice President Pence last year. Note that I am not asking you to discuss legal advice you rendered on these matters, but rather to specify the areas and issues that you have handled while serving in this position.

   In my current role, I generally provide legal, compliance, and ethics advice to the Vice President and his staff in the Office of the Vice President. To the extent I have been asked to provide legal advice on particular matters, relating to policies or otherwise, it would be inappropriate to disclose the subjects on which the Vice President and his staff have requested legal guidance.

Nomination of Eleni Maria Roumel
to the United States Court of Federal Claims
Questions for the Record
Submitted July 24, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you have been a member of the Federalist Society for Law and Public Policy Studies since 2013.
    a. What was your level of involvement with the Federalist Society over the past six years?

        I have attended the organization's lectures and continuing legal education seminars over the last six years. As reflected on my questionnaire, in May 2018, I gave a lecture at the University of Michigan Law School, through the Federalist Society Article I Initiative, on the topic of *The Power of the Purse and Congressional Oversight*.

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

        I am unsure at this time whether I will retain my membership if confirmed.

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

        I currently have no plans to donate money to this organization in the future.

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

        I have not had personal contact with representatives of the Federalist Society in preparation for my confirmation hearing.

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

        Yes.

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

        I was unfamiliar with this article and recording prior to your request and have not studied this issue sufficiently to opine on this subject. Additionally, pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate to provide a personal opinion on such a political matter.

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 the 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 do not have personal knowledge from such entities of advocacy for or against my judicial 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 the 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. The metaphor reflects foundational principals of the judicial system, including that judges should follow the law and make decisions based upon applicable precedent.

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

   A judge must follow the law and make decisions based upon applicable precedent. Where the law provides a judge with discretion to consider practical consequences in his or her decision-making, a judge may undertake such a consideration.

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?

   Rule 56 of the Federal Rules of Civil Procedure requires a judge to determine whether "a genuine dispute as to any material fact" exists. The does not require a subjective determination. Rather, such a determination under Rule 56 requires a judge to consider the parties' pleadings and briefs, relevant law, and applicable precedent. A judge is required to view the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a

young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

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

As stated during my confirmation hearing, empathy is an admirable quality. Where the law provides a judge with discretion, such as in sentencing, empathy may play a role.

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

A judge must follow the law and adhere to the oath of office to "administer justice without respect to persons and do equal right to the poor and rich." 28 U.S.C. § 453. Personal life experience in the courtroom may assist a judge in treating litigants, courtroom staff, and counsel with fairness and understanding.

c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Please see responses to questions 5(a) and (b). I have practiced law for nearly two decades. During that time, I have represented a diverse group of clients, businesses and individuals, and have handled a wide range of subject matters in my practice. If confirmed, I believe my experience in the courtroom and as an attorney will assist me in exercising my judicial role.

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?

The Court of Federal Claims does not hold jury trials. However, juries play a vital role in our judicial system to promote fairness and ensure, absent a waiver, that a litigant's peers will decide certain civil disputes and criminal matters.

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

Enforceability of mandatory pre-dispute arbitration clauses is the subject of ongoing litigation. The Code of Conduct for United States Judges, applicable to judicial nominees, restricts me from providing further comment.

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 the response to question 7(b).

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

   The Supreme Court has instructed that if the language of a statute is clear and unambiguous, it must be applied according to its terms, without reference to legislative history. The Court has also instructed that it is permissible for a judge to consider reliable sources outside the statutory text where such text is ambiguous. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

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.

         If confirmed, I will consider whether a seminar is consistent with the Code of Conduct for United States Judges, including through consultation of applicable Committee on Codes of Conduct Advisory Opinions.

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

         Please see the response to question 9(b)(i).

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

         Please see the response to question 9(b)(i).

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

         Please see the response to question 9(b)(i).

      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.

         Please see the response to question 9(b)(i).

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 the response to question 9(b)(i).

Nomination of Eleni Maria Roumel, to be
Judge of the United States Court of Federal Claims
Questions for the Record
Submitted July 24, 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?

   Although it is unlikely that such a case would arise in the United States Court of Federal Claims, I would consider factors established in several Supreme Court decisions discussing substantive due process, including *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

      Yes, as required by Supreme Court precedent in this area.

   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. In making such a determination I would follow all applicable Supreme Court precedent, including but not limited to *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

      Yes. I would fully and faithfully apply all precedent of the Supreme Court and U.S. Court of Appeals for the Federal Circuit, and would consider precedent from other courts of appeals depending upon the opinion's relevance and persuasiveness.

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

      Yes.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

I would fully and faithfully apply all applicable U.S. Supreme Court precedents, including *Casey* and *Lawrence*.

f. What other factors would you consider?

I would consider any additional factors that may be applicable under Supreme Court and Federal 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 requires application of heightened scrutiny for gender and race-based classifications. *United States v. Virginia*, 518 U.S. 515 (1996); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Loving v. Virginia*, 388 U.S. 1 (1967).

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?

United States v. Virginia, 518 U.S. 515 (1996) is binding Supreme Court precedent, regardless of its issuance over one hundred years after ratification of the Fourteenth Amendment. If confirmed I would fully and failthfully apply all binding Supreme Court and Federal Circuit precedent regarding the Equal Protection Clause, including *Virginia*.

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

Please see the response to question 2(a). Additionally, the Supreme Court addressed gender-based classifications with regard to educational opportunities prior to 1996 in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). I have not fully researched why the issues raised by *United States v. Virginia* were not addressed earlier.

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

The Supreme Court has recognized that under the Fourteenth Amendment a state may not "bar same-sex couples from marriage on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). Application of *Obergefell* in other contexts is the subject of ongoing litigation. The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits comment on matters pending or impending in any court. Accordingly, it would be inappropriate to provide further comment.

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

This question is the subject of ongoing litigation. The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits public comment on matters pending or impending in any court. Accordingly, it would be inappropriate to provide further comment.

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

The Supreme Court has ruled that such a constitutional privacy right exists. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

The Supreme Court has ruled that such a constitutional right to privacy exists. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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

The Supreme Court has ruled that such a constitutional right to privacy exists. *Lawrence v. Texas*, 539 U.S. 558 (2003).

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 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 to consider evidence that sheds light on our changing understanding of society?

It is generally appropriate for a lower court to consider such evidence if directed by the U.S. Supreme Court or relevant U.S. Court of Appeals.

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

A judge may consider such evidence and data where relevant and based on valid and reliable methodology, consistent with Rule 702 of the Federal Rules of Evidence and applicable precedent, including the reliability factors recognized by the Supreme Court in several cases including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 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?

   Obergefell is binding U.S. Supreme Court precedent. If confirmed, I would faithfully follow *Obergefell* and all binding Supreme Court and Federal Circuit precedent. The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits public comment on matters pending or impending in any court. Accordingly, as this issue may be the subject of litigation, it would be inappropriate to provide further comment.

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

   Please see the response to question 5(a).

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Brown is a seminal case in our nation's history and is binding precedent of the Supreme Court. If confirmed, I would fully and faithfully apply *Brown* and all other Supreme Court precedent.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited July 24, 2019).

I understand that this issue is the subject of academic debate. Judges must make decisions based on the law and applicable precedent. If confirmed, I would follow all binding Supreme Court and Federal Circuit precedent, including *Brown*.

7. You were admitted to the Court of Federal Claims Bar Association in 2017. Describe any experience you have practicing in the Court of Federal Claims.

I appeared before the United States Court of Federal Claims in *Health Republic Insurance Company v. United States*, 16-cv-259.

During my tenure with the U.S. House of Representatives Office of General Counsel, I was also directed by the House Bipartisan Legal Advisory Group to monitor certain cases and attend oral arguments, when held, in to determine whether to file briefing in the case in the U.S. Court of Federal Claims or U.S. Court of Appeals for the Federal Circuit, as the House did in particular matters. Though I did not enter an appearance on behalf of the House, such cases include:

First Priority Life Insurance Company v. United States, 16-cv-587 (Fed. Cl., filed May 17, 2016).

Moda Health Plan, Inc. v. United States, 16-cv-649 (Fed. Cl., filed June 1, 2016). Additionally, I assisted in drafting a brief in the United States Court of Appeals for the Federal Circuit related to the appeal of this matter. *Moda Health Plan, Inc. v. United States*, 17-1994, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellant and in Support of Reversal (Fed. Cir. July 17, 2017).

Blue Cross and Blue Shield of North Carolina v. United States, 16-cv-651 (Fed. Cl., filed June 2, 2016).

Land of Lincoln Mutual Health Insurance Company v. United States, 16-cv-744 (Fed. Cl., filed June 23, 2016). Additionally, I assisted in drafting a brief in the United States Court of Appeals for the Federal Circuit related to the appeal of this matter. *Land of Lincoln Mutual Health Insurance Company v. United States*, 17-1224, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellee and in Support of Affirmance (Fed. Cir. May 1, 2017).

Maine Community Health Options v. United States, 16-cv-967 (Fed. Cl., filed Aug. 9, 2016).

New Mexico Health Connections v. United States, 16-cv-1199 (Fed. Cl., filed Sept. 26, 2016).

BCBSM, Inc. v. United States, 16-cv-1253 (Fed. Cl., filed Oct. 3, 2016).

Montana Health Co-op v. United States, 16-cv-1427 (Fed. Cl., filed Oct. 28, 2016).

Related to these matters I have worked on the following briefs:

Health Republic Insurance Company v. United States, 16-cv-259, Motion for Leave to File Amicus Curiae on Behalf of the United States House of Representatives (Fed. Cl. filed October 13, 2016).

Health Republic Insurance Company v. United States, 16-cv-259, Amicus Curiae on Behalf of the United States House of Representatives (Fed. Cl. filed October 13, 2016).

Land of Lincoln Mutual Health Insurance Company v. United States, 17-1224, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellee and in Support of Affirmance, (Fed. Cir. May 1, 2017). The U.S. Court of Appeals for the Federal Circuit limited the number of counsel entering an appearance; accordingly, my name does not appear on the brief.

Moda Health Plan, Inc. v. United States, 17-1994, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellant and in Support of Reversal (Fed. Cir. July 17, 2017). The U.S. Court of Appeals for the Federal Circuit limited the number of counsel entering an appearance; accordingly, my name does not appear on the brief.

8. You worked on several cases regarding same-sex marriage, particularly in the context of the Defense of Marriage Act (DOMA). In *Cooper-Harris v. United States*, you represented the Bipartisan Legal Advisory Group and filed several motions and memoranda on its behalf arguing that DOMA Sections 3 and 101 were "rationally related to numerous legitimate governmental interests" and were not sex discrimination. The Supreme Court disagreed with you, ruling in *United States v. Windsor*, 570 U.S. 744 (2013), that Section 3 of DOMA was unconstitutional.
   a. Is it still your view that Section 3 of DOMA did not amount to sex discrimination?

      Windsor is binding U.S. Supreme Court precedent. If confirmed, I would fully and faithfully apply *Windsor* and other Supreme Court precedent.

   b. What are the legal standards that you would apply in sex discrimination cases?

      In the unlikely event that such a case would be litigated before the U.S. Court of Federal Claims, I would apply any relevant legal standards recognized by the U.S. Supreme Court or Federal Circuit.

9. You represented the House Committee on Oversight and Government Reform in *Committee on Oversight & Government Reform v. Holder*, where the Committee sought to enforce a subpoena that it had issued to the then-Attorney General as part of the Committee's investigation into Operation Fast and Furious. Your brief argued for a broad reading of Congress's investigative authority, saying that "[i]t is Congress's constitutional obligation to investigate Executive branch malfeasance and obstruction, . . . so that Congress may remedy by legislation or other means any serious problems that are unmasked." Should federal courts resolve disputes when assertions of executive privilege conflict with Congress's investigative authority?

   The question of whether federal courts should or may resolve such disputes is currently the subject of ongoing litigation. The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits comment on matters pending or impending in any court. Accordingly, it would be inappropriate to provide further comment.

Question for the Record for Eleni Maria Roumel
From Senator Mazie K. Hirono

1. During your confirmation hearing, I noted the specialized jurisdiction of the Court of Federal Claims—the court to which you have been nominated—and expressed my concern that you had not practiced before the court. You responded that you had, in fact, practiced before the court. You then described your litigation experience, but did not specify which of this work (if any) occurred before the Court of Federal Claims.

   Your Senate Judiciary Questionnaire states that you were not admitted to practice before the Court of Federal Claims until 2017. None of the litigated matters you identified as among your most significant were before the Court of Federal Claims. And nothing else in your Questionnaire suggests that you have practiced before the court.

   Independent research turned up a single motion submitted in a case before the Court of Federal Claims on which your name appeared. You were identified as counsel for the United States House of Representatives on a Motion for Leave to File Amicus Curiae on Behalf of the United States House of Representatives in the case *Health Republic Insurance Co. v. United States*. That motion was subsequently denied.

   What experience practicing before the Court of Federal Claims do you have beyond the submission of the above-referenced motion in *Health Republic Insurance Co. v. United States*? Please be as detailed as possible in your response.

   I appeared before the United States Court of Federal Claims in *Health Republic Insurance Company v. United States*, 16-cv-259.

   During my tenure with the U.S. House of Representatives Office of General Counsel, I was also directed by the House Bipartisan Legal Advisory Group to monitor certain cases and attend oral arguments, when held, to determine whether to file briefing in the cases in the U.S. Court of Federal Claims or U.S. Court of Appeals for the Federal Circuit, as the House did in particular matters. Though I did not enter an appearance on behalf of the House, such cases include:

   First Priority Life Insurance Company v. United States, 16-cv-587 (Fed. Cl., filed May 17, 2016).

   Moda Health Plan, Inc. v. United States, 16-cv-649 (Fed. Cl., filed June 1, 2016). Additionally, I assisted in drafting a brief in the United States Court of Appeals for the Federal Circuit related to the appeal of this matter. *Moda Health Plan, Inc. v. United States*, 17-1994, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellant and in Support of Reversal (Fed. Cir. July 17, 2017).

   Blue Cross and Blue Shield of North Carolina v. United States, 16-cv-651 (Fed. Cl., filed June 2, 2016).

Land of Lincoln Mutual Health Insurance Company v. United States, 16-cv-744 (Fed. Cl., filed June 23, 2016). Additionally, I assisted in drafting a brief in the United States Court of Appeals for the Federal Circuit related to the appeal of this matter. *Land of Lincoln Mutual Health Insurance Company v. United States*, 17-1224, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellee and in Support of Affirmance (Fed. Cir. May 1, 2017).

Maine Community Health Options v. United States, 16-cv-967 (Fed. Cl., filed Aug. 9, 2016).

New Mexico Health Connections v. United States, 16-cv-1199 (Fed. Cl., filed Sept. 26, 2016).

BCBSM, Inc. v. United States, 16-cv-1253 (Fed. Cl., filed Oct. 3, 2016).

Montana Health Co-op v. United States, 16-cv-1427 (Fed. Cl., filed Oct. 28, 2016).

Related to these matters I have worked on the following briefs:

Health Republic Insurance Company v. United States, 16-cv-259, Motion for Leave to File Amicus Curiae on Behalf of the United States House of Representatives (Fed. Cl. filed October 13, 2016).

Health Republic Insurance Company v. United States, 16-cv-259, Amicus Curiae on Behalf of the United States House of Representatives (Fed. Cl. filed October 13, 2016).

Land of Lincoln Mutual Health Insurance Company v. United States, 17-1224, Brief of *Amicus Curiae* United States House of Representatives in Support of Defendant-Appellee and in Support of Affirmance, (Fed. Cir. May 1, 2017). The U.S. Court of Appeals for the Federal Circuit limited the number of counsel entering an appearance; accordingly, my name does not appear on the brief.

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Nomination of Eleni M. Roumel to the United States Court of Federal Claims Questions for the Record Submitted July 24, 2019

QUESTIONS FROM SENATOR BOOKER

1. During your hearing, you stated that you have practiced before the U.S. Court of Federal Claims.

    a. Approximately how many times have you appeared before the U.S. Court of Federal Claims?

    I appeared before the United States Court of Federal Claims in *Health Republic Insurance Company v. United States*, 16-cv-259.

    During my tenure with the U.S. House of Representatives Office of General Counsel, I was also directed by the House Bipartisan Legal Advisory Group to monitor certain cases and attend oral arguments, when held, to determine whether to file briefing in the cases in the U.S. Court of Federal Claims or U.S. Court of Appeals for the Federal Circuit, as the House did in particular matters. Though I did not enter an appearance on behalf of the House, such cases include:

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b. Please describe the type of involvement you have had in your appearances before the U.S. Court of Federal Claims.

Please see the response to question 1(a).

c. Approximately how many cases have you argued before the U.S. Court of Federal Claims?

Over my nineteen year legal career, I have appeared before over twenty different federal courts, including district courts, courts of appeal, and the Supreme Court. While I have argued numerous motions in federal and state courts, including in civil and criminal jury trials, as a partner at Nelson, Mullins, Riley & Scarborough, LLP and as an Assistant General Counsel at the U.S. House of Representatives, I have not yet had the opportunity to personally conduct oral argument before this court.

d. If you have argued before the Court of Federal Claims, please list and describe the types of cases you have argued before the court.

Please see responses to questions 1(a), (b), and (c).

2. During your time with the Office of General Counsel, you represented the Bipartisan Legal Advisory Group (BLAG) in several cases regarding same-sex marriage and the Defense of Marriage Act (DOMA), including *United States v. Windsor,* in which the Supreme Court ruled Section 3 of DOMA unconstitutional.[1] In each of the DOMA cases, you made arguments related to both equal protection and policy concerns. For instance, in *Aranas v. Napolitano*, you submitted a memorandum which argued that DOMA satisfied equal protection principles because it stood on "common federal-state interests."[2] Specifically, you argued that the proposition that "parenting by same-sex couples is interchangeable with parenting by a child's biological mother and father" is "to say the least,

[1] *United States v. Windsor*, 570 U.S. 744 (2013).

[2] Memorandum of Intervenor-defendant the Bipartisan legal Advisory Group of the U.S. House of Representatives in Support of Motion to Dismiss, *Aranas v. Napolitano*, 2012 WL 5894978 (Oct. 22, 2012).

insufficiently well- established."[3] You also argued that "biological differentiation in the roles of mothers and fathers make it fully rational to encourage family situations that allow children have [*sic*] one of each" and "the different challenges faced by boys and girls as they grow to adulthood make it eminently rational to think that children benefit from being raised by role models of both sexes."[4]

a. If confirmed, would you adhere fully to the letter and spirit of all Supreme Court decisions, including *United States v. Windsor*?

If confirmed, I would fully and faithfully apply all U.S. Supreme Court precedent, including *Windsor*.

b. Do you believe that the Supreme Court's ruling in *Obergefell v. Hodges*, which upheld a constitutional right for same-sex couples to marry, is settled law?

Obergefell is binding U.S. Supreme Court precedent. If confirmed, I would fully and faithfully apply all U.S. Supreme Court precedent, including *Obergefell*.

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

I do not subscribe to any particular label.

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

Please see the response to question 3.

5. 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 instructed that if the language of a statute is clear and unambiguous, it must be applied according to its terms, without reference to legislative history. The Court has also instructed that it is permissible for a judge to consider reliable sources outside the statutory text where such text is ambiguous. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

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?

[3] *Id.*
[4] *Id.*

Please see the response to question 5(a).

6. 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?

   While I am nominated to the U.S. Court of Federal Claims, which is not an appellate court, judicial restraint is an important concept. Generally, judicial restraint reflects that a judge should follow the law and decide all cases and controversies within the court's jurisdiction, fairly and impartially, by following applicable precedent.

   a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[5] Was that decision guided by the principle of judicial restraint?

      The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits me from publicly offering such personal commentary. *Heller* is binding U.S. Supreme Court precedent. If confirmed, I would fully and faithfully apply *Heller.*

   b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[6] Was that decision guided by the principle of judicial restraint?

      The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits me from publicly offering such personal commentary. *Citizens United* is binding U.S. Supreme Court precedent. If confirmed, I would fully and faithfully apply *Citizens United.*

   c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[7] Was that decision guided by the principle of judicial restraint?

      The Code of Conduct for United States Judges, applicable to judicial nominees, prohibits me from publicly offering such personal commentary. *Shelby County* is binding U.S. Supreme Court precedent. If confirmed, I would fully and faithfully apply *Shelby County.*

7. 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.[8] 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.[9]

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

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[5] 554 U.S. 570 (2008).
[6] 558 U.S. 310 (2010).
[7] 570 U.S. 529 (2013).
[8] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[9] *Id.*

I have not studied this issue sufficiently to provide commentary on this subject. Additionally, as the Code of Conduct for United States Judges, applicable to judicial nominees, prohibits "public comment on the merits of a matter pending or impending in any court," it would be inappropriate to provide further comment.

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

Please see the response to question 7(a).

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

Please see the response to question 7(a).

8. 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.[10] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[11] 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.[12] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[13]

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

Yes. Based on personal experience representing clients in the criminal justice system, I believe there are instances where implicit racial bias exists in the criminal justice system.

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

I have not studied this issue sufficiently to provide commentary on this subject.

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.

While practicing law in South Carolina, I attended a training course on implicit racial bias.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[14] Why do you think that is the case?

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[10] 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.
[11] *Id.*
[12] 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.
[13] *Id.*
[14] 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.

I have not studied this issue sufficiently to provide commentary on this subject.

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

I have not studied this issue sufficiently to provide commentary on this subject.

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?

Education of and awareness by judges and their staff can help in addressing implicit racial bias in the criminal justice system.

9. 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.[16] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[17]

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 or research sufficiently to provide an opinion on this matter.

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 the response to question 9(a).

10. 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.

11. 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.

[15] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)
[16] 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.
[17] *Id.*

12. Do you believe that *Brown v. Board of Education*[18] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

13. Do you believe that *Plessy v. Ferguson*[19] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. In *Brown v. Board of Education*, the U.S. Supreme Court overruled *Plessy v. Ferguson.*

14. 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?

During preparation for my hearing, officials provided advice regarding the potential effect of responses to such questions. However, any response regarding such questions are mine alone.

15. 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."[20] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Judges should consider whether recusal or disqualification is appropriate in a particular matter, including through reference to the factors set forth in 28 U.S.C. § 455. If confirmed, I would evaluate recusal and disqualification through consultation to relevant statutes and guidance.

16. 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."[21] 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). As the extent and nature of such due process is currently the subject of litigation, I am prohibited by the Code of Conduct for United States Judges, applicable to judicial nominees, from providing further comment.

[18] 347 U.S. 483 (1954).
[19] 163 U.S. 537 (1896).
[20] 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.
[21] 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 July 24, 2019
For the Nomination of

Eleni M. Roumel, to the U.S. 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.

2. If confirmed, 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 would give serious consideration to all qualified candidates, including minorities and women.