

**NOMINATIONS FOR COMMISSIONER AND FOR GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

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**HEARING**

OF THE

**COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS**

**UNITED STATES SENATE**

**ONE HUNDRED ELEVENTH CONGRESS**

**FIRST SESSION**

**ON**

**NOMINATION OF JACQUELINE R. BERRIEN TO BE CHAIR OF THE EEOC;  
CHAI R. FELDBLUM AND VICTORIA A. LIPNIC TO BE COMMISSIONERS  
OF THE EEOC; AND P. DAVID LOPEZ TO BE GENERAL COUNSEL OF  
THE EEOC**

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**NOVEMBER 19, 2009**  
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**NOMINATIONS FOR COMMISSIONER AND FOR  
GENERAL COUNSEL OF THE EQUAL EM-  
PLOYMENT OPPORTUNITY COMMISSION**

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**THURSDAY, NOVEMBER 19, 2009**

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:08 a.m. in Room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, Chairman of the committee, presiding.

Present: Senators Harkin, Murray, Hagan, Enzi, Alexander, and Isakson.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order. Our meeting this morning is a nomination hearing for Jackie Berrien to be chair of the Equal Employment Opportunity Commission, Chai Feldblum and Victoria Lipnic to be Commissioners of the EEOC, and David Lopez to be EEOC's general counsel.

Over the last 45 years, we have made great strides toward eliminating discrimination in the workplace. The Civil Rights Act of 1964 prohibited discrimination on the basis of race, sex, national origin, and religion. The Age Discrimination in Employment Act in 1967 prohibited discrimination on the basis of age, and the Americans with Disabilities Act in 1990 prohibited discrimination on the basis of disability.

These important guarantees, however, are not self-executing, as I like to say. They are only as strong as the agency charged with enforcing them, the EEOC. The EEOC's mission is simple—to promote equality of opportunity in the workplace and enforce Federal laws prohibiting employment discrimination.

While much progress has been made in recent decades, discrimination in the workplace persists. Today, too many employment decisions are based on insidious stereotypes and prejudices rather than an employee's talent, ability, and qualifications. Too many hard-working Americans face the harsh reality of getting a pink slip or not being hired at all, being subjected to harassment, or being paid less for comparable work and not because of a lack of skills or poor performance, but simply because of his or her race, sex, national origin, religion, age, disability, or some other irrelevant factor.

And sadly, in times of economic turmoil, discrimination often increases, and this deep recession has been no different. From fiscal year 2007 to the end of fiscal year 2008, overall claims filed with the EEOC increased by 28 percent to over 95,000 claims, and this includes increases in every type of case.

Moreover, as the economy continues to struggle, workers who are victims of discrimination face even greater challenges. As just one example, during this recession, older workers, who face stereotypes that they cannot learn new skills or that they are not as productive, have remained unemployed for more than twice as long as all unemployed workers.

Unfortunately, precisely when we need a vigorous enforcer of Federal law, until recently, the EEOC has been woefully underfunded. For 5 years, its budget was virtually frozen. Due to underfunding since 2001, the EEOC has lost 25 percent of its workforce, mostly frontline positions that directly serve the public.

But thankfully, we have begun to turn this around. In fiscal year 2009, under the leadership of Senator Mikulski, as chair of our Appropriations Committee on Commerce, Justice, and Science, Congress increased EEOC funding for the first time in 5 years by \$15 million. And the fiscal year 2010 CJS appropriations bill includes \$367 million for the EEOC, an increase of \$23 million.

Well, one result of the chronic underfunding has been an ever-increasing backlog of cases that need to be addressed. The EEOC now has a huge backlog of over 85,000 claims. It currently takes an average of 294 days to process a discrimination claim. Well, this situation is unacceptable. Too often justice delayed is, indeed, justice denied.

Now, more than ever, we need strong leadership at the EEOC. The nominees before us today are all extremely well qualified. All have a lifetime of commitment and service. Each possesses extraordinary skills and experience that will advance the EEOC's mission and ensure rigorous enforcement of some of our most important laws.

I look forward to working with our Ranking Member, Senator Enzi, and others on the committee to move these nominees quickly so they can get to work ensuring fairness and equal opportunity for every American worker.

And with that, I would recognize my Ranking Member, Senator Enzi.

#### STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman.

I would like to thank you for calling this hearing today on such a special day.

[Laughter.]

Happy birthday.

The CHAIRMAN. Hey, thank you very much.

Senator ENZI. I think we all ought to join in singing.

[Applause.]

The CHAIRMAN. I used to think 70 was old and decrepit. Now I think it is pretty young.

Senator ENZI. I think it is always 10 years older than whatever a person is. Would you like to join me in singing “Happy Birthday” to him?

The CHAIRMAN. Oh, come on.

[Singing.]

[Applause.]

Senator ENZI. You have got to celebrate them all. Every one of them is a blessing, and we feel blessed that you are here.

The CHAIRMAN. I have got to say I always remember what Satchel Paige once said. Satchel Paige—if any of you are baseball fans, remember Satchel Paige. Great pitcher. But when he was born, he didn’t have a birth certificate. He was born in Mississippi, had no birth certificate. They didn’t really know how old he was, and someone once said something to Satchel about, “How old are you, Satchel?”

And he said, “Well, I don’t really know.” He said, “I always felt this way. How old would you be if you didn’t know how old you were?”

[Laughter.]

If I didn’t know how old I was, I would be, oh, maybe around 40 or 35.

[Laughter.]

Senator ENZI. I think in your list, you had age discrimination in there, too, didn’t you?

I would also like to welcome the nominees—Ms. Jacqueline Berrien, Ms. Chai Feldblum, Ms. Victoria Lipnic, and Mr. David Lopez. We are glad to have you here and have this chance to visit with you a little bit.

I would also like to recognize the two current EEOC Commissioners who are sitting in the audience, the acting chair Stuart Ishimaru and Connie Barker. Thank you for being here.

It is an important part of our constitutional responsibility to review the qualifications and views of the nominees put forward by the President for Senate confirmation. When we have independent agencies with representatives from both political parties like the Equal Employment Opportunity Commission, it is generally most efficient to review them as a package, which we are doing today.

When important matters of public policy are likely going to be decided by proposed nominees, a public hearing is the right thing to do, and I appreciate the Chairman’s willingness to hold this hearing today. And I thank the nominees for all being here.

I would also like to thank all the nominees for their willingness to serve the public as part of the EEOC. The vetting process for our executive nominations is thorough and not without some degree of personal and professional sacrifice, and we thank you for making that sacrifice.

The nominees we are evaluating today are all experienced professionals, and I have no doubt that they are capable to perform the jobs they have been nominated for. Like every member of this committee, they all believe strongly in the importance of equal employment opportunity.

Today, I would also like to recognize nominee Victoria Lipnic. Formerly, Chairman Kennedy and I worked with her on a number of issues. Ms. Lipnic was previously confirmed by the HELP Com-

mittee in 2002 and took a lead role in a number of the important initiatives as Assistant Secretary of Labor for the Employment Standards Administration from 2002 to 2009.

It doesn't have anything to do with the qualifications, but I would note that her dad was the mayor of a small town. I really appreciate that, since I had that background.

In administering the Office of Federal Contractor Compliance Programs, which enforces equal employment opportunity laws for Federal contractors, her team recorded a number of all-time records. In 2008 alone, they recovered more than \$67 million in back pay, salary, and benefits for over 24,000 American workers who had been subjected to unlawful employment discrimination, and I thank her for stepping forward for a new challenge at the EEOC.

The EEOC has an important responsibility to fairly enforce our Nation's laws and to work with employers and employees to prevent discrimination. The vast majority of employers in this country want to treat their employees fairly and obey the law. As a former small businessman, however, I can tell you that sometimes these laws can be complicated and/or confusing.

In fulfilling its mission, I believe it is important that the EEOC not assume an adversarial role against small businesses and businesses in general. I am interested in learning more about each of the nominee's thoughts and would like to have a dialogue on whether it is part of the EEOC's mission to assist businesses in understanding and complying with Federal laws and any plans the nominees might have to do so. I would also like to learn more about each of your priorities during your tenure at the EEOC.

In closing, I recognize that it is unlikely I will agree with every policy issue with all of the nominees, but I am hopeful that should you be confirmed, we will find ways to achieve common goals to promote equal opportunity.

I look forward to the testimony today, and I thank the chairman.

The CHAIRMAN. Thank you very much, Senator Enzi.

And again, thank you for working together on getting this hearing and, hopefully, moving these nominees.

First, we are very honored to have here the esteemed and distinguished majority leader of the House of Representatives, someone that I was privileged to work with in the House in the last century, now that I think about it.

[Laughter.]

And for many years, just been a stalwart leader in anything dealing with human rights and civil rights, nondiscrimination, I can't think of any name that stands out there more profoundly than Steny Hoyer.

As I said, we worked in the House on some things early on, on discrimination and on things like IDEA and others, but then we really started working together in the mid-1980s on the Americans with Disabilities Act, and we formed a great bond then on that bill, of course, with Chai Feldblum at that time, and got the bill through.

Congressman Hoyer has been the leader on that issue through all these years. And then when we had to do the amendments in the last decade and getting those passed and having the second

President Bush sign those into law to overcome some of the U.S. Supreme Court decisions.

I think it is just certainly a tribute to you, Ms. Feldblum, and to all of us here that Representative Hoyer, our majority leader, would take time from his busy schedule on the House side to be here this morning. We welcome you very much. You honor us with your presence, and please proceed with your introduction of our mutual friend.

STATEMENT OF HON. STENY HOYER, U.S. REPRESENTATIVE,  
MARYLAND

Mr. HOYER. Well, thank you very much, Senator Harkin. Happy birthday to you.

The CHAIRMAN. Thank you.

Mr. HOYER. I was pleased to join in a hearty singing. Thank you, Senator Enzi, for leading us, our choir director this morning.

I want to thank both of you as well. You mentioned our work on the ADA and, of course, the ADA amendments. Senator Harkin and I, as he indicated, have had an opportunity to work very closely together. But Senator Enzi, you were very helpful on the amendments, and I want to thank you as well for the excellent work that you did in partnership with Senator Harkin and many of us in seeing those amendments adopted. So thank you very much, sir. Appreciate that.

Senator Murray, my colleague with whom I meet regularly, as she raises her eyes.

Senator MURRAY. Meeting with you, Steny, is great.

Mr. HOYER. And Senator Hagan, congratulations once again to you, and you are a wonderful addition to the ranks of the U.S. Senate.

On our side, we have some problems from time to time with your body, but we look forward to working closely with you.

[Laughter.]

Mr. Chairman, I am particularly pleased to be here and think that I can speak, as you can, with a deep reservoir of knowledge about Chai Feldblum. I do not know the other nominees as well, but Chai has just indicated to me what a uniformly high quality of individuals with whom I sit at this table, and so I am honored to be with all of them.

And Congresswoman Clarke just gave me a thumbs-up to the lady to my right, who she is a very big proponent of as well.

I want to thank you for inviting me to introduce a good friend, an outstanding scholar, and a civil rights champion, Professor Chai Feldblum. Her years of work against discrimination are grounded in an outstanding legal mind, abiding respect for the law, and an unsurpassed judicial temperament.

Senator Enzi, let me say to you, sir, that I can assure you, having worked with Chai, literally for over 100 hours, sitting in a room, figuring out how we could make ADA workable for small, medium, and large businesses that she, in fact, as I am sure the other nominees do, share your concern that we want to be assisting and helping people comply, as opposed to having to step in after noncompliance. She is that kind of personality and scholar, qualities that have made her an excellent teacher of the law at George-

town Law School, my alma mater, and which will serve the Equal Employment Opportunity Commission well.

I have long believed that disability rights are one of the greatest civil rights challenges facing our modern Nation. When those rights are denied, people with disabilities are denied an equal place in the society we share. That is why our commitment to disability rights is a powerful test of our Nation's founding promise of inclusion, and it is a test that Professor Feldblum has helped us pass again and again and again.

In 1990, as Chairman Harkin has pointed out, the Americans with Disabilities Act made our Nation a world leader in inclusion. I was proud to work with Chai Feldblum, Chairman Harkin, Senator Kennedy, and others. But Professor Feldblum, as counsel to the disability community, was an integral part of the months of negotiations that made ADA a reality.

My staff and I worked closely with her as we brought the ADA toward passage. And in that time, I found I could rely on her legal mind, her political judgment, her integrity, and her desire to make legislation and policy successful with all those who had to live within its strictures. We counted on her to keep us informed on the current law and on the legislative compromises that did and didn't make sense. She did not let us down.

In the years since the ADA's passage, Professor Feldblum has earned a reputation as a leading advocate for the LGBT community and equal rights in the workplace. And I continued to call on her expertise as our country worked to implement the ADA, as did Senator Harkin and others.

In fact, Professor Feldblum helped call Congress's attention to the courts' troubling efforts to chip away at the ADA's original intent. And when Congress worked to pass legislation that would restore the full scope and intent of the ADA, Professor Feldblum again played a key role, as I pointed out to you, Senator Harkin, and Senator Enzi and others.

I have seen firsthand her ability to work on both sides of the aisle and to engage the disability community, business leaders, Republicans, in serious dialogue, as well as Democrats. She never allowed partisanship to color her judgment. Her efforts were key to our success.

Other parts, of course, of Professor Feldblum's record are equally impressive, but I have focused on disability rights because, as I have said, they are a powerful test. They are a test of our character, but they are also a test of Professor Feldblum's commitment to opposing discrimination in all of its forms.

She is dedicated to making the civil rights laws of our country work for all Americans, and she has the character and the capacity to implement them fairly and justly.

I want to thank you again for allowing me the privilege and honor of sitting here with four extraordinary individuals, but one of whom I have worked closely with for over two decades and who I know firsthand will bring extraordinary ability, character, insight, integrity, and judgment to the job for which she has been nominated.

And I thank you again for giving me this honor.

The CHAIRMAN. Congressman Hoyer, thank you very much for gracing us with your presence. Thanks for a very excellent statement on behalf of an individual that I have worked with now for 21 years, mostly on Americans with Disabilities Act measures.

Thank you again for being here. I know you have a busy schedule being the majority leader of the House. I thank you again for being here, Steny, and—

Mr. HOYER. Well, I guess I don't have to be, but I volunteered for the job and glad I got it.

[Laughter.]

Thank you.

The CHAIRMAN. Godspeed. Thanks very much.

Again, let me welcome our nominees here, from left to right. It is not often we get the majority leader of the House over here.

[Laughter.]

It is a big deal around here.

We welcome our nominees, from left to right—Jackie Berrien. And I want to note that Senator Schumer wanted to be here to introduce Ms. Berrien, but unfortunately, he has to be in the Judiciary Committee this morning.

I note the presence of Congresswoman Yvette Clarke, who is here from New York, who wrote a letter of support. But any time a member of the House graces us with their presence, if you would like to say a few words on behalf of Ms. Berrien, we would welcome you to come to the table.

For purposes of introduction, Congresswoman Clarke, who was elected to Congress in November 2006, represents the 11th Congressional District in New York. Prior to that, she served on the New York City Council, representing the 40th District in Brooklyn. Representative Clarke sits on the House Education and Labor Committee, our sort of counterpart on the House side; the House Homeland Security Committee; and the House Small Business Committee.

So we welcome you. If you would like to say a few words on behalf of Ms. Berrien, we welcome you.

**STATEMENT OF HON. YVETTE CLARKE, U.S. REPRESENTATIVE,  
NEW YORK**

Ms. CLARKE. Certainly. Thank you very much, Chairman Harkin, to Senator Enzi, to Senator Murray, and to Senator Hagan. It is certainly my honor and my privilege to be here to both be a witness and to speak on behalf of Ms. Jacqueline A. Berrien.

I have somewhat of a much more personal relationship with Jackie Berrien beyond her outstanding credentials. Jackie Berrien was my mentor and friend, mentored me at our undergrad experience at Oberlin College, and that is where I really first got to know the character of this woman. She was an extraordinary leader and embodied that during that period of time and was very outspoken and very great at debates.

It was no wonder that at some point in her life she would be sitting at this table today. We all applauded when she came to us and told us that she was going to Harvard, when she was leaving Oberlin. We all knew that Jackie was a champion, that she looked

out for the rights of those who didn't have a voice and oftentimes were overlooked in our civil society.

She went on to become a very distinguished jurist, doing a lot of work in the civil rights organizations of note in our Nation and continues to be an advocate and a mentor to others. I speak to many of the young women in our constituency, and they see her as a role model.

As a matter of fact, I happened to hire one of those young women as a young attorney in my district office that Jackie, again, mentored. A young woman who could have gone any direction in her life, but saw the light that Jackie shown onto our community through her work with the local NAACP and her work at every level of her employment.

I have kept track of Jackie, and I have watched her as her career has progressed. Each step she took was one of pride for the community that we both come from, and certainly her expertise is one that has been noted throughout our community and certainly I am sure throughout our State and our Nation.

I am here really today as a proud supporter, to say to you all that she has definitely demonstrated that she is prepared to serve our Nation in this capacity. I have watched her and watched her deliberations. She is one who is very focused, one who understands the law intimately, pursued it with a rigor and a respect that I think will serve the EEOC quite well.

Thank you for giving me this opportunity. I certainly wasn't prepared, but I could not miss this opportunity to speak on behalf of Ms. Jacqueline A. Berrien.

Thank you all very much.

The CHAIRMAN. Congresswoman, you added greatly to our meeting here this morning. We thank you for being here and thank you for your gracious introduction of Ms. Berrien.

You are welcome, obviously, to stay if you would like, but I know how busy members of the House are.

Ms. CLARKE. I am checking my watch.

The CHAIRMAN. If you would like to be excused, please. But if you would like to stay, please. Whatever your schedule fits.

Ms. CLARKE. Thank you very much.

The CHAIRMAN. Thanks very much, Congresswoman.

We have Jackie Berrien, who has been introduced; Chai Feldblum, who has been introduced; and I just might also add about Ms. Feldblum, just to put an emphasis on what Steny Hoyer said, I have worked with Chai Feldblum. We first met in 1988 when we were working on the Americans with Disabilities Act. And a lot of times, these bills get passed and they get enacted into law, and people forget about how tough it was. I mean, this was a tough ordeal.

To bring together not only all of the disability community—each part of the disability community had their own interests—and to meld those and then to work with the business community and both Republicans and Democrats, and we were able to pull that together. And I just wanted to add an emphasis to the integral role that Chai Feldblum played in bringing those disparate groups together so that we finally got it passed.

Then on the ADA Act amendments, which we also had to get through just in the last several years, and that took a lot of doing, but we passed it unanimously, which means Republicans and Democrats, conservatives, liberals. It was interesting that the first President Bush signed the first ADA into law. The second President Bush signed the ADA Amendments Act into law. We were there for both of them.

Senator ENZI. And his dad there.

The CHAIRMAN. Hmm?

Senator ENZI. And his dad was there, too.

The CHAIRMAN. Oh, his dad was there. Oh, yes. Yes, his dad was there. Absolutely.

Victoria Lipnic, I will—again, you mentioned it. Before entering private practice at Seyfarth Shaw, she served as Assistant Secretary of Labor for Employment and Standards from 2002 until 2009 and also worked as counsel for the House Education and Labor Committee and in-house counsel for the U.S. Postal Service.

David Lopez, who has been nominated to serve as general counsel, worked for the EEOC for the past 13 years. He began in 1994 as a special assistant to Commissioner Casellas and is currently supervisory trial attorney with EEOC's Phoenix district office. Before that, before joining the EEOC, he served in the Civil Rights Division of the Department of Justice.

We welcome you all.

Senator ISAKSON. Mr. Chairman, Mr. Chairman.

The CHAIRMAN. Oh, I am sorry.

Senator Isakson.

#### STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. I deeply apologize for interrupting, but I had to be at a Commerce vote and going to be here for most of this hearing, but I wanted to just say something about Victoria Lipnic for just a minute.

You have made reference to the fact she has served on the Education and Labor Committee in the House, and she did so when I was there. She was a tremendous aid to all of us on the committee and particularly to now Minority Leader Boehner.

She is a consummate person whose knowledge of labor law and equal opportunity is tremendous. As a businessman who dealt with EEOC, she has the type of brain and the type of experience I would love to see on that board.

I just wanted to commend her to the entire committee.

The CHAIRMAN. I appreciate that very much. Any time you want to interrupt me for that kind of a statement, just go right ahead and do it, Johnny.

[Laughter.]

All of you, welcome. Your statements will be made a part of the record in their entirety. We will go from left to right. We will start with Ms. Berrien. I would ask if you could keep your statements to 5 minutes or so, I would appreciate that. Then we will open it up for questions and discussion.

Ms. Berrien, you are lead-off. Please proceed as you so desire.

**STATEMENT OF JACQUELINE A. BERRIEN, ASSOCIATE DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NY**

Ms. BERRIEN. Thank you, Senator.

Mr. Chairman, Ranking Member Enzi, members of the committee, it is truly an honor to appear before you today, and I appreciate this opportunity to speak with you concerning the important work of the Equal Employment Opportunity Commission.

I thank President Obama for nominating me to serve on the EEOC and appreciate the confidence that he has expressed in my ability to lead the Commission.

I am grateful to Congresswoman Clarke for her presence today and her support, as well as for the support of my home Representative, Congressman Ed Towns, and for Senator Schumer.

Finally, I mention Congresswoman Norton, who is the Representative of my hometown, Washington, DC, which is where many of my perspectives on public service were formed.

I have a special thank you for my husband of 22 years, Peter Williams, who traveled from our home in Brooklyn to be with me today; my brother Clifford and sister-in-law Danielle; and many members of my family, friends, and colleagues are here today in person or in spirit, and I thank all of them.

Finally, while I am keenly aware that my parents, Clifford and Anna Berrien, are not here physically, I trust that they are watching from the best seats in heaven's finest sky box, and I thank them for their unfailing love.

My perspectives on public service, as I said, were formed in part by my experiences as a native Washingtonian. As a child, I observed the hard work and dedication to public service demonstrated by many families, friends, neighbors, and other adults in this city who are very proud to say that they are Federal employees.

I am grateful that two of them, Retha and Thurlo Felton, who are both people who have worked in the Federal Government, are here with me today.

But my parents were the first and best teachers of the importance of public service and service in general for me. My mother entered Federal Government service as a student nurse at Freedmen's Hospital. She spent nearly 30 years working for the U.S. Public Health Service, Freedmen's, and Howard University Hospital until she retired into the civil service retirement system.

Even today, I can picture her leaving for work in a spotless, perfectly pressed nurse's uniform that symbolized the preparation, attention to detail, and care that she invested in her work.

My father was a World War II veteran, and after military service, he worked evenings at the State Department to pay his tuition at Howard University. His example showed me that Federal Government service could play a more limited, yet pivotal role in a person's life and career.

Like my parents, I worked for the Federal Government to help finance my college education. Starting as a clerk-typist at the very bottom of the Federal pay scale during my senior year of high school and returning to Washington to work for Government agencies, and for this Congress in one summer, almost every summer while I pursued my college degree.

I share this background with you, Senators, because it is important in helping to explain why I consider it such a tremendous privilege to be considered for the position of chair of the Equal Employment Opportunity Commission, and it also informed how I would approach my responsibilities if confirmed.

Respect for public service and appreciation for the work of Federal employees are values instilled in me from childhood. I recognize that the Congress has entrusted the EEOC with very important responsibilities and that the work performed by EEOC employees impacts the lives of many people across the United States every single day.

If confirmed by the Senate, these are principles that will guide my service as chair of the EEOC. I intend to work hard to meet the high expectations that this Congress and the people of the United States have for the EEOC, and I am confident that with the concerted effort of the entire staff of the agency and the continued support of Congress, the EEOC will be able to improve its service to the people of the United States and make substantial progress toward fulfilling its mission of ending unlawful employment discrimination.

There are a few tasks that I would prioritize if confirmed. First, it will be critical to deploy the agency's resources in the most strategic and efficient manner possible. As Chairman Harkin alluded to in his opening remarks, the rising demand for the EEOC services, coupled with a growing backlog of unresolved charges and new enforcement responsibilities, mean that I must prioritize assessment of this issue.

Second, in order to make the most efficient use of scarce resources and prevent unnecessary duplication of efforts, I will confer regularly with other Government officials responsible for overseeing enforcement of Federal laws concerning employment discrimination and ensure that enforcement activities are complementary wherever possible.

Third, I recognize that preventing violation of law in the first place is an important part of the EEOC's work. And I am very mindful—to all members of the committee, but particularly Ranking Member Enzi—that the Commission's outreach to the public, including representatives of the business community, the private bar, labor organizations, advocacy groups, and other interested parties, is a vitally important part of its work. And I will work to heighten public awareness of the requirements of Federal anti-discrimination laws.

Fourth, if confirmed, I will work to improve agency relations with Congress, and look forward to working with EEOC staff and the leadership and members of this committee and other Members of Congress to achieve this goal. In short, I welcome the opportunity to work with anyone within or outside the EEOC who is determined to fulfill the agency's mission.

Although there are challenges facing the EEOC, I am optimistic as I prepare for this opportunity. My motivation is the knowledge that the entire Nation will benefit as we move closer to fulfilling the mission that guides the EEOC—to end unlawful discrimination on the basis of race, color, national origin, sex, pregnancy, religion, and disability in the Nation's workplaces.

In more than 20 years of law practice, I have appeared before the U.S. Supreme Court, numerous Federal appellate and trial courts, Federal administrative agencies, and State trial courts. I have represented clients in a wide variety of civil and constitutional rights cases and have worked with lawyers from a wide range of practice settings, including State and Federal Government, other nonprofit organizations, large corporate law firms, legal academia, and small and solo law practices. I have also served on the adjunct faculty of New York Law School and taught trial advocacy at Fordham and Harvard Law Schools.

I am currently the associate director-counsel of the NAACP Legal Defense and Educational Fund and acknowledge the presence of our director-counsel, John Payton, here today.

The breadth and depth of my employment experience and professional and public service activities have all helped equip me to address the issues and challenges at the core of the Equal Employment Opportunity Commission's work today.

In closing, like President Obama, I was born in 1961. And coincidentally, Senator Harkin, I was born in the month of November. [Laughter.]

Four years before the Equal Employment Opportunity Commission opened its door. When President Obama signed the Lilly Ledbetter Fair Pay Act, he expressed his hope that the act would help his daughters and others who follow them "to grow up in a nation that values their contributions, where there are no limits to their dreams, and they have opportunities their mothers and grandmothers never could have imagined." I have that same desire for my two nieces, seven great-nieces and nephews, and my god-daughter.

As I appear before you today, Senators, I realize that I am here because many people who lived before me, who lived before I was born were determined that I should have opportunities that they could only witness in dreams and articulate in their prayers.

I have benefited from the sacrifices, courage, and tireless work of many people who came before me. My work has always been fueled by the passion to improve the quality of life for future generations. I will bring the same commitment and determination to my work as chair of the EEOC, if confirmed by this Senate.

Thank you.

[The prepared statement of Ms. Berrien follows:]

PREPARED STATEMENT OF JACQUELINE A. BERRIEN

Mr. Chairman, Ranking Member Enzi and members of the committee, it is truly an honor to appear before you today, and I appreciate this opportunity to speak with you concerning the important work of the Equal Employment Opportunity Commission. I thank President Obama for nominating me to serve on the Equal Employment Opportunity Commission, and I greatly appreciate the confidence that he has expressed in my ability to lead the Commission.

I especially thank my husband, Peter Williams, who is here with me today, as he has been at every important moment during 22 years of marriage. I also thank my brother Clifford and sister-in-law Danielle, and many more family members, friends, and colleagues who have provided tremendous support. My parents, Clifford and Anna Berrien, regularly sacrificed their own comfort to ensure that every need—and most of the desires—of their children would be satisfied. While I miss them tremendously today, I am blessed to carry indelible memories of their unfailing love everywhere that I go, including this committee room.

My perspectives on public service were formed, in part, by my experiences as a native Washingtonian. As a child, I observed the hard work and dedication to public service demonstrated by many family friends, neighbors, leaders of my parish and other adults who were proud to say that they were Federal employees. Most importantly, my parents were very positive role models of the best of public service. My mother entered Federal Government service as a student nurse at Freedmen's Hospital. She spent nearly 30 years as a Federal employee, working for the U.S. Public Health Service, Freedmen's and Howard University Hospital. The image of her leaving for work in a perfectly pressed, white nurse's uniform remains with me to this day. That pristine uniform symbolized the preparation, care, and attention to detail that she devoted to her work. My father was a World War II veteran, and after his military service he worked evenings at the State Department to help pay his college tuition. His example showed me that Federal Government service could play a more limited, yet pivotal role in a person's life and career. Like my parents, I worked for the Federal Government to help finance my college education. I started as a clerk-typist at the bottom of the Federal pay scale during my senior year of high school and returned to Washington to work for government agencies almost every summer while I pursued my undergraduate degree.

I share this background with you, Senators, because it helps to explain why I consider it such a tremendous privilege to be considered for the position of Chair of the Equal Employment Opportunity Commission and how I would approach my responsibilities as EEOC Chair if confirmed. I have high expectations for the EEOC, and I will work hard to meet the high expectations that Congress has for this agency. With the concerted effort of the staff and leadership of the EEOC and continued support of Congress, I believe that the agency will be able to make further progress towards fulfilling the mission of ending unlawful employment discrimination.

In an effort to make the most efficient use of scarce resources, if confirmed, I will confer regularly with other government officials responsible for overseeing enforcement of Federal employment discrimination laws, to prevent unnecessary duplication of efforts and ensure that enforcement activities are complementary wherever possible. It will be critical to work within the EEOC to deploy all of the agency's resources in the most strategic manner possible, with the goal of achieving greater impact. I also will seek ways to enhance the Commission's outreach to the public (including representatives of the private bar, business community, labor organizations, advocacy groups, and other interested parties), and heighten public awareness of the requirements of Federal anti-discrimination laws. If confirmed, I would also work to improve relations with Congress, and look forward to working with the leadership and members of this committee to achieve this goal.

In short, I welcome the opportunity to work with anyone, within or outside the EEOC, who is determined to fulfill the agency's mission. Although there are challenges facing the EEOC, I am optimistic as I prepare for this opportunity to lead the Commission. My motivation is the knowledge that the entire Nation will benefit as we move closer to fulfilling the mission that guides the EEOC: to end unlawful discrimination on the basis of race, color, national origin, sex, pregnancy, religion, and disability in the Nation's workplaces.

Since 2004, I have served as the Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, the organization founded and directed by Thurgood Marshall to wage a campaign against State-enforced racial segregation. In more than 20 years of law practice, I have appeared before the U.S. Supreme Court and numerous Federal appellate and trial courts, Federal administrative agencies, and State trial courts. I have represented clients in cases concerning subjects as varied as pregnancy discrimination, employment discrimination on the basis of immigration status, voting rights, and access to affordable housing, and have worked on cases with lawyers from a wide range of practice settings, including State and Federal Government, other non-profit organizations, large corporate law firms, legal academia, and small and solo law practices, and appeared in State and Federal courts across the country. I have also served on the adjunct faculty of New York Law School and taught trial advocacy at Fordham and Harvard Law schools. The breadth and depth of my employment experience, and professional and public service activities have all helped equip me to address the issues and challenges that are at the core of the Equal Employment Opportunity Commission's work today.

Like President Obama, I was born in 1961, 4 years before the Equal Employment Opportunity Commission opened its doors for the first time. When President Obama signed the Lilly Ledbetter Fair Pay Act, he expressed his hope that the act would help his daughters and others who follow them "to grow up in a nation that values their contributions, where there are no limits to their dreams, and they have opportunities their mothers and grandmothers never could have imagined." As I appear before you today, Senators, I am confident that I am here because many people who

lived before I was born were determined that I should have opportunities that they could only witness in dreams and articulate in prayers. Everything positive that I have achieved in my life was possible because of the tireless work and courageous efforts of people who came before me. My work has always been fueled by a passion to improve the quality of life for future generations, and if confirmed by the Senate, I will bring the same commitment and determination to my work as Chair of the EEOC.

The CHAIRMAN. Ms. Berrien, thank you very much for an excellent and very profound statement. We appreciate that very much.

Now we turn to Ms. Chai Feldblum. Ms. Feldblum, again, as I said, your statement is part of the record in its entirety. If you could sum up, we would appreciate it.

Thank you.

**STATEMENT OF CHAI R. FELDBLUM, PROFESSOR OF LAW,  
GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC**

Ms. FELDBLUM. Thank you, Chairman Harkin, Ranking Member Enzi, Senator Murray, Senator Isakson. It is an honor to appear before you today as you consider my nomination to be a commissioner of the Equal Employment Opportunity Commission.

I am happy to be joined here today by my partner, Nan Hunter, and by my nephew Ephraim Feldblum, who came down from Philadelphia to experience Congress in this way.

My parents are, unfortunately, no longer alive. But it is from them—and from their journeys in life—that I learned the passion and the commitment that, if confirmed, I will bring to the EEOC.

My mother, Esther Yolles Feldblum z'l, was brought up in a strictly Hasidic Jewish family in Philadelphia. Unlike most of her friends, she went to college and ultimately received her Ph.D. in Jewish history. She died at the early age of 41, but she had already embarked on a career focused on Jewish-Catholic relations. From my mother, I learned the importance of connecting to people and of treating people who are different from ourselves with true respect and dignity.

My father, Meyer Simcha Feldblum z'l, was born in a small town in Lithuania—a town whose entire Jewish community, save my father and one small girl, was killed during the war. My father survived by hiding in the forests in Poland and was lucky enough to come to the United States after the war. He was ordained as a rabbi and received his Ph.D. in Talmudic studies.

From my father, who died just a few years ago, I inherited my love for legal text—he studied Talmud, I study the U.S. Code—as well as a driving commitment to justice.

My entire professional life has been focused on civil rights and social welfare rights. The clients I have represented at Georgetown's Federal Legislation Clinic over the past 18 years—from Catholic Charities USA, to the David Bazelon Center for Mental Health Law and Epilepsy Foundation, to Workplace Flexibility 2010—have all been committed to making this world a better place for poor people, for people with disabilities, for workers and their families.

And in my other legal work and in my scholarship, I have sought to advance the civil rights of all Americans, no matter their race, creed, gender, sexual orientation, or gender identity.

If confirmed, my approach as Commissioner of the EEOC will be marked by the commitments I inherited from my mother. I have a strong commitment to hearing different points of view and to truly understanding where other people are coming from, and I have an abiding faith in the goodness of trying to seek common ground and honorable compromise.

That was the role I played from 1987 to 1990, while serving as a lawyer to the disability community as Congress enacted the Americans with Disabilities Act. During that time, I was privileged to work with both giants of the disability community and giants of the legislative process, including now Majority Leader Steny Hoyer, with you, Senator Harkin, and with Senators Ted Kennedy, Orrin Hatch, and Bob Dole.

During enactment of the ADA, both the business and disability community were able to have a serious and open dialogue about what would make the law work well, and I feel proud that I was a part of making that dialogue happen. Indeed, the trust and bipartisan effort of the original ADA enabled many of those same players to come back together again last year and enact the ADA Amendments Act, again, with open and thoughtful dialogue.

My effort to seek common ground and compromise does not mean that I lose sight of my core values. Those are strongly held values about equal opportunity and justice. It is for that reason that I am so grateful I had the opportunity to serve Catholic Charities USA as its pro bono lawyer for over a decade, helping them carry out their values of Catholic social teaching.

I also have a deep respect for and understanding of religious practice and a deep-seated tolerance for religious difference. I do not think it is possible to grow up as a daughter of a Holocaust survivor and not be committed to principles of pluralism and tolerance.

I have found throughout my professional career that adhering to one's values is not inconsistent with finding common ground. It requires a belief in the importance of bringing all players to the table, of listening and hearing various sides of an issue, and finding those commonalities that may exist.

Indeed, closing, in my most recent project, Workplace Flexibility 2010, I have again tried to bring employers and employees together to see if we can find common ground on workplace issues. Through that project, I had the good fortune to work with Vicki Lipnic, my colleague here on this panel, while she was at the Department of Labor under the previous Administration. I hope I am given the opportunity to work with her again as a fellow Commissioner on the EEOC.

Thank you for the opportunity to offer these opening remarks, and I welcome your questions.

[The prepared statement of Ms. Feldblum follows:]

PREPARED STATEMENT OF CHAI R. FELDBLUM

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I am happy to be joined here today by my partner, Nan Hunter, and by my nephew Ephraim Feldblum.

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My entire professional life has been focused on civil rights and social welfare rights. The clients I have represented at Georgetown's Federal Legislation Clinic over the past 18 years—from Catholic Charities USA, to the David Bazelon Center for Mental Health Law and Epilepsy Foundation, to Workplace Flexibility 2010—have all been committed to making this world a better place—for poor people, for people with disabilities, and for workers and their families. And in my other legal work and in my scholarship, I have sought to advance the civil rights of all Americans, no matter their race, creed, gender, sexual orientation or gender identity.

If confirmed, my approach as Commissioner of the EEOC will be marked by the commitments I inherited from my mother. I have a strong commitment to hearing different points of view and to truly understanding where other people are coming from. And I have an abiding faith in the goodness of trying to seek common ground and honorable compromise.

That was the role I played from 1987 to 1990, while serving as a lawyer to the disability community as Congress enacted the Americans with Disabilities Act. During that time, I was privileged to work both with heroes of the disability community and with giants of the legislative process, including now Majority Leader Steny Hoyer and, here in the Senate, with you Senator Harkin, and with Senators Ted Kennedy, Orrin Hatch and Bob Dole.

During enactment of the ADA, both the business and disability community were able to have a serious and open dialogue about what would make the law work well—and I feel proud that I was a part of making that dialogue happen. Indeed, the trust and bi-partisan effort of the original ADA enabled many of those same players to come together again last year and enact the ADA Amendments Act—again, with open and thoughtful dialogue.

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Indeed, in my most recent project, Workplace Flexibility 2010, I have again tried to bring employers and employees together to see if we can find common ground on workplace issues. Through that project, I had the good fortune to work with Vicki Lipnic, my colleague here on this panel, while she was at the Department of Labor under the previous Administration. I hope I am given the opportunity to work with her again as a fellow Commissioner on the EEOC.

Thank you for the opportunity to offer these opening remarks and I welcome your questions.

The CHAIRMAN. Thank you very much, Ms. Feldblum, for again an excellent statement.

And now we turn to Ms. Lipnic. Welcome again, Ms. Lipnic, and please proceed.

**STATEMENT OF VICTORIA A. LIPNIC, COUNSEL, SEYFARTH  
SHAW, LLP, WASHINGTON, DC**

Ms. LIPNIC. Thank you, Chairman Harkin, Ranking Member Enzi, distinguished members of the committee.

It is my honor to appear before you today as you consider my nomination to serve as a commissioner on the Equal Employment Opportunity Commission. This is the second time in my career that I have been considered by the U.S. Senate for confirmation.

I recognize the special obligations carried by the Senate in considering nominees, and I am deeply honored by President Obama's nomination of me. I am humbled and grateful for this additional opportunity for public service.

I would like to take a moment at the outset to thank my family, wonderful friends, and colleagues whose encouragement, love, support, and confidence in me over the years has brought me here today.

My thanks especially to Senator McConnell for recommending me for this position.

I would also like to acknowledge the members of the House of Representatives from the Education and Labor Committee who gave me an opportunity to work on issues of importance to all working Americans, including, as Senator Isakson mentioned, Minority Leader Boehner, former Congressman Cass Ballenger, and, God rest his soul, Charlie Norwood.

I also want to acknowledge and will be forever grateful to former Secretary of Labor Elaine Chao for making me a part of her team at the Department of Labor.

I want to recognize my fellow nominees to the Commission today. They bring a wealth of experience and commitment to civil rights for all Americans, and it is a privilege to be considered with them here.

My appreciation also extends to the current serving Commissioners—Stuart Ishimaru, Connie Barker, and Christine Griffin—for their dedication and service to the work of the EEOC.

I learned a long time ago, but especially from my tenure working in the House of Representatives and at the Department of Labor, that you are really only ever as good as the people you work with. My special thanks to the men and women of the Department of Labor, who dedicate their careers to public service, and to my former colleagues from the House Labor Committee, who work tirelessly on both sides of the aisle in support of creating fairness and opportunity in workplaces across our country.

I am deeply grateful to my colleagues at Seyfarth Shaw for their encouragement and support and the work they do every day to make many workplaces better for all. I want to thank my colleague Camille Olson for being here today, who, Senator Harkin, I know has testified in front of this committee many times. And a finer group of attorneys I could not know.

And most of all, my thanks to my parents—Janet and Ed Lipnic—for everything they ever taught me, but especially for the great gifts of a deep and abiding love of our country and belief in the dignity of public service. My mother, who is watching from home in Carrolltown, PA, and my father, like Jackie's father, a

decorated World War II veteran and long-time mayor of my hometown, who is watching from above.

As I ended my tenure at the Department of Labor and was about to embark on a new phase in my career, I was asked by many not only what I was interested in, but what I was passionate about. My response was almost instinctual. I care deeply about people's working lives.

I believe mightily in the dignity of work and the transformational power of it. And that is why I believe equal opportunity in work is critical to all Americans and to who we are and how we define ourselves as a nation. I am especially mindful of this as the country is going through a wrenching period of unemployment, when the reality of being without work is facing so many Americans.

The EEOC faces many challenges and unique opportunities as a guardian of civil rights in the 21st century. Indeed, we are a far different, more open, and tolerant country than in 1964. Yet, one need only peruse the case law to know that discrimination exists and persists in many forms and in many venues.

When you look at all of the laws the EEOC enforces, they are as relevant today as when they were first enacted. Certainly, our changing demographics, increasingly pluralistic society, aging workforce, and greater labor force participation by women have changed the circumstances and attitudes under which we all share the workplace today, but they present a different, if no less important, set of challenges to the mission of the EEOC as when the agency began.

You have my commitment to work with my fellow nominees and especially men and women who make up the Commission throughout the country as the career staff to be about its mission every day. I learned from my experience as Assistant Secretary of Labor that when you are privileged to serve in a position like that, or the one for which I am now nominated, you stand on the shoulders of all who came before you not just in your particular position, but more than that, of the legislators, activists, thought leaders, and ordinary working men and women who, at some point, took a stand against intolerance and helped us become a more generous Nation.

Mr. Chairman, should I be confirmed for this position, I can only hope that I will carry out my responsibilities in a manner that will do honor to all who have advanced the cause of civil rights in our country, with understanding and respect toward all.

Thank you, Mr. Chairman, Senator Enzi. I would be happy to take your questions.

[The prepared statement of Ms. Lipnic follows:]

The CHAIRMAN. Thank you again, Ms. Lipnic, and for your excellent statement.

And now we turn to Mr. David Lopez, nominee for general counsel. Welcome, Mr. Lopez.

**STATEMENT OF P. DAVID LOPEZ, SUPERVISORY TRIAL ATTORNEY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PHOENIX DISTRICT OFFICE, PHOENIX, AZ**

Mr. LOPEZ. Thank you, Chairman Harkin, Senator Enzi, and members of the committee. It is an honor to appear before you

today as you consider my nomination to be general counsel of the U.S. Equal Employment Opportunity Commission.

I am here alone in body, but my heart is more than 3,000 miles away in the American Southwest—Phoenix, AZ—that is home to my wife for 19 years and my cornerstone. We have been blessed with three rambunctious and opinionated boys—Javier, 14; Julian Diego, 11; and Luis Andres, who is 9. All three attend St. Gregory's Catholic School in central Phoenix.

My parents, Ernesto and Faith Lopez, are both from families that go back several hundred years and many generations in northern New Mexico. My father is a retired eighth grade schoolteacher. My mother, who is also retired, owned a small shoe store.

When I was growing up, I witnessed both my parents, guided by their faith, demonstrate the importance of service to the poor and disenfranchised. My parents worked with Cesar Chavez and the migrant farm worker community and instilled in us an awareness that we had obligations to society greater than ourselves.

When I was 14, my parents divorced, and we moved to Woodburn, OR, in the Willamette Valley. My mother worked full time, and I had obligations for my younger siblings.

When I was 16, I left high school. True, I was bored, but I had every intention of continuing with my education. I worked as a dishwasher. I listened to music. But most of all, I read, everything I could put my hands on.

Soon after dropping out of school, I started taking classes at a local community college, and when I was 17, I returned to Arizona and enrolled in Arizona State University. When I graduated, I was admitted to Harvard Law School. And at the age of 21, I went back east for the first time, without a jacket or galoshes, a child of the southwest in the New England snow, but with a plan to return to Phoenix and practice law.

Then I met Maria, Boston-born and raised, and I deferred my plans of returning home. I began my career at Spiegel & McDiarmid, and practiced energy and anti-trust law. But when they let me work on a pro bono employment discrimination case, I was reminded of my calling, and I left. I moved over to the Justice Department Civil Rights Division, Employment Litigation Section, where I was honored and had the privilege to practice in civil and Federal courts throughout this country.

In 1994, Gilbert Casellas, who had just been sworn in as the chairman of the EEOC, hired me to be one of his special assistants. This was a very exciting time at the Commission, a renaissance of ideas and activities.

Chairman Casellas and the other Commissioners brought dramatic change, streamlined the charge processing system, and developed a strategic approach to litigation. When Chairman Casellas resigned, I returned to Phoenix to work as an EEOC trial attorney. After 13 years on the east coast, I, at last, realized my dream of practicing civil rights law in my hometown.

As my wife and children will tell you, it has been challenging and rewarding. During these 11 years in the EEOC Phoenix legal unit, I have been reminded every day that discrimination can disrupt lives.

It has been a profound privilege to advocate for several individuals who have had the courage to stand up for themselves in the face of discrimination. It is for these heroes that I go to work every day. I want to tell you about a couple of them.

One hero is Chad Farr, a remarkable young man from a tiny Arizona town of Cottonwood. At the age of 9, Chad was diagnosed with retinitis pigmentosa, severe tunnel vision that is akin to looking at the world through a straw.

Chad was ambitious and worked twice as hard as everybody else. When he asked for an accommodation to bring his service dog, Harley, to work, he was given the runaround for more than a year and effectively terminated. As a result of our suit, AutoZone altered its accommodation policies and agreed to pay Chad damages. Chad used this award to start a small trucking business, which today is thriving.

Another hero I will mention is Paul Franks, a 40-year-old African-American who worked in an electronics warehouse. Soon after he was hired, a co-worker referred to him several times as “boy” and asked whether he could call him the “N” word. Mr. Franks said, “No. Please call me Paul.”

When he complained to his boss about the comments, he was fired for being a troublemaker. He suffered enormous hardship and ended up living in his car. We resolved this case with a consent decree and damages.

Senators, I am honored and humbled by President Obama’s nomination of me to be general counsel of the EEOC. It is an honor for me and my family, and it is also a great affirmation of support for the EEOC staff in the field who work to preserve the promise of this great country. Out in the trenches, in Federal courts throughout this country, hundreds of committed lawyers and support staff fight every day for workers to be assessed on their individual merit and not on stereotypes.

I certainly acknowledge Jim Lee, acting general counsel, and Ron Cooper and Eric Dreiband, the two previous EEOC general counsels. We must continue to build on the efforts of these gentlemen to build an infrastructure that supports litigation and to approach litigation strategically.

Senators, we all benefit from a strong and effective EEOC. I want to close by reading a letter I received from an eighth grade girl, Stephanie, who I met during a career day at Isaac Middle School in West Phoenix. I have posted Stephanie’s letter in my office as a daily reminder of why I practice law.

“Dear Mr. David Lopez, thank you for giving up your time to come and talk to us. I liked it when you told us about the girl and the manager touching them because when I start to work in the summer, I want to be aware of what might happen to me.

“When I asked you if lawyers were devils, it was only because when I was little and wanted to be a lawyer, my mom said lawyers were devils and God was going to get them. But I don’t believe that anymore.”

[Laughter.]

Senators, thank you for your time, and I look forward to answering any questions you might have.

[The prepared statement of Mr. Lopez follows:]

PREPARED STATEMENT OF P. DAVID LOPEZ

Thank you, Chairman Harkin, Senator Enzi, and members of the committee. It is an honor to appear before you today as you consider my nomination to be the General Counsel of the U.S. Equal Employment Opportunity Commission.

I am here alone in body, but my heart is more than 3,000 miles away in Phoenix, in the American Southwest. That's home to my life partner and wife for 19 years and my cornerstone, Maria Leyva. We have been blessed with three rambunctious, opinionated boys: Javier 14, Julian Diego 11, and Luis Andres, who is 9. All three attend St. Gregory's School in Central Phoenix.

I am the second of four children. My parents, Ernesto and Faith Lopez, are both from families that go back several hundred years and many generations in northern New Mexico. My father is a retired 8th grade teacher; my mother, who is also retired, owned a small shoe store. When I was growing up, I witnessed both my parents, guided by their faith, demonstrate the importance of service to the poor and disenfranchised. My parents worked with Cesar Chavez and the migrant farm worker community and instilled in us the awareness that we had obligations to society greater than ourselves.

When I was 14, my parents divorced and my mother, two brothers and I moved from Tucson to Woodburn, OR, a small farming community. My mother worked full-time and I had significant obligations for my younger brothers. When I was 16 I left high school, one of several schools I had attended in Oregon's Willamette Valley, and got a job as a dishwasher. I was a bit bored, but had every intention of continuing my education. I washed dishes, I listened to music, but most of all, I read. I read everything I could put my hands on.

Soon after dropping out of school, I started taking classes at a local community college and, when I was 17, I returned to Arizona and enrolled at Arizona State University to pursue a degree in political science. I worked through college. When I graduated, I was admitted to Harvard Law School and, at the age of 21, I went back East, for the first time, without a jacket or galoshes, a child of the Southwest in the New England snow. My plan was to return to Phoenix and practice civil rights law.

Then I met Maria, Boston born and raised, and I deferred my plans of returning home. I began my career with Spiegel and McDiarmid, a mid-sized Washington, DC law firm. I practiced energy law and anti-trust law. I loved the firm but when they permitted me to take an employment discrimination case pro bono, I was reminded of my calling. In response, I moved to the Department of Justice Civil Rights Division, Employment Litigation Section, where I had the opportunity to practice law on behalf of the United States in Federal courts all over the country.

In 1994, I received a call from Gilbert Casellas, who had just been sworn in as the Chairman of the EEOC. He was looking for an attorney advisor. I interviewed and eagerly accepted his job offer. This was a very exciting time at the Commission; a true renaissance in ideas and activity. During this period, Chairman Casellas and the other Commissioners brought dramatic change and efficiency to the agency. Under Chairman Casellas's leadership, the EEOC streamlined the charge processing system, developed a strategic approach to litigation and enforcement, and developed a fabulous and innovative mediation program. The Commission started again to think in earnest about the model of a national law firm.

When Chairman Casellas resigned, I returned to Phoenix to work as an EEOC trial attorney, and, after 13 years on the East coast, realized my dream of practicing civil rights law in my hometown. As my wife and children will tell you: It has been challenging and rewarding.

During these past 11 years in the EEOC Phoenix legal unit, much of it under the wonderful leadership of Regional Attorney Mary Jo O'Neill, I have been reminded every day that discrimination is something that can disrupt lives and can happen to anyone. It has been a profound privilege to advocate for several individuals who have had the courage to stand up for themselves in the face of discrimination. It is for these heroes that I go to work every day. Let me tell you about a few of my heroes:

- One hero is Chad Farr, a remarkable young man who lives in Cottonwood, AZ. At the age of 9, Chad was diagnosed with retinitis pigmentosa. This permanent and degenerative condition caused severe tunnel vision, akin to looking at the world through a straw. Chad was ambitious and worked twice as hard as everyone else. When he asked for an accommodation to bring his service animal, Harley, with him to work as a customer service representative at a local AutoZone store, he was given the runaround for more than a year and effectively terminated. As a result of our

suit, AutoZone altered its accommodation policies and agreed to pay Chad damages. Chad used this award to start his own small trucking business, which is thriving.

- Another one of my heroes is Paul Franks, a 40-year-old African-American, who worked in an electronics warehouse. Soon after he was hired, a co-worker referred to him as “boy” and asked whether he could call him the “n” word. Mr. Franks said, “No. Please call me ‘Paul.’” When he complained to his boss about the comments, he was fired for being a “troublemaker.” After losing his job, he suffered enormous hardship and ended up living in his car. We resolved the case with a consent decree and damages. This case reminds us of the need to remain forever vigilant in preventing and prosecuting race discrimination, which is the foundation of the Federal anti-discrimination laws that protect us all.

- Eight of my other heroes are people whose names I do not know, the members of a jury in Arizona, who, in June 2008, acting as the conscience of the community, stood up against religious intolerance and bigotry, and rendered a verdict, including punitive damages, to Bilan Nur. Bilan came to this country as a refugee from war-torn Somalia. Bilan had an American dream. She learned English and attended college. Bilan found a job with Alamo Rental Car as a sales agent. She asked her boss for the simple accommodation of being permitted to keep her head covered in observation of Ramadan. She was permitted to do so in 2000, but, when she attempted to do so in November 2001, right after September 11, she was fired and told “her religion would understand the need to remove her scarf to keep her job.” The heroes on the jury reminded us of the best principles for which our Nation stands.

- The final hero I will mention is Stacey Wing, a young woman with dreams of earning a paralegal license, who found herself down on her luck. She found work at an auto retailer because it was on her bus route. Immediately, her boss subjected her to the most repulsive and violative sexual harassment imaginable. When she complained to her company, her pleas for help were ignored for several months until a security camera caught her boss subjecting her to one of these acts. Last June, an Arizona jury listened to her, found the company liable for sexual harassment, and imposed damages, including punitive damages. The Court recently required additional injunctive relief, as well.

Senators, I am honored and humbled by President Obama’s nomination of me to be General Counsel of the EEOC. It is an honor for me and my family but it is also an affirmation of support for the EEOC staff, in the field fighting every day, often with meager resources, to vindicate civil rights and preserve the promise of this great country. Out in the trenches, in Federal courts throughout this country, hundreds of committed lawyers and support staff fight every day for workers to be assessed on their individual merit and not on the basis of outdated and ugly stereotypes.

Among these public servants, special acknowledgement should be made to Jim Lee, Acting General Counsel, as well as Ron Cooper and Eric Dreiband, the two previous EEOC General Counsels. All three of these gentlemen have worked hard to implement the model of a national law firm and to effectively enforce civil rights, often on a tight budget. They have also demanded the highest standards of professionalism from the EEOC staff.

If confirmed as General Counsel, I will build on the efforts by these gentlemen to create a national law firm that is able to effectively and efficiently muster its resources to combat discrimination and ensure equal opportunity throughout this Nation.

First, we must continue to build our infrastructure and eliminate the often mundane but practical impediments to effective law enforcement. This includes ensuring adequate support staff for the field. It also includes implementing advances in technology to increase the EEOC’s ability to maximize its effectiveness on a limited budget.

Second, given the budget realities, the EEOC’s litigation program should make every effort to operate efficiently and as an integrated team. We must nurture a culture of collaboration within the agency. We need to cross-pollinate ideas and strategies among districts and between headquarters and the field so we can operate not as individual offices, but as an integrated team. We have considerable expertise within the agency, and we need to ensure that a person with particular expertise is able to share it with colleagues.

Third, again given the budget realities, the EEOC litigation program should operate strategically. We need to identify emerging areas of the law, such as the coverage of people with diabetes or epilepsy under the recently enacted ADA amendments, and develop small work groups to prosecute these cases strategically. A component of a strategic litigation program involves the continued development of our systemic litigation program. In 2005, Chair Dominguez established a Systemic Task Force under the leadership of Commissioner Leslie Silverman. This task force made

several recommendations to further the creation of an effective program to attack systemic discrimination. Many of these recommendations have been implemented. Still, the EEOC must continue its efforts to create a culture of collaboration to support these systemic cases. Again, we need to make sure that EEOC resources and expertise are shared, so we can replicate the effective systemic enforcement of certain districts throughout the agency.

Senators, we all benefit from a strong and effective EEOC. Let me close by reading a letter I received from an eighth-grade girl, Stephanie, who I met during a career day at Isaac Middle School in West Phoenix. I have posted Stephanie's letter in my office to remind me every day why I practice law:

Dear Mr. David Lopez,

Thank you for giving up your time to come and talk to us. I liked it when you told us about the girl and the manager touching them because when I start to work in the summer I want to be aware of what might happen to me. When I asked you if lawyers were devils, it was only cause when I was little and wanted to be a lawyer, my mom said lawyers were devils and God was going to get them but I don't believe in that anymore.

Thank you for your time. I look forward to any questions that you may have.

The CHAIRMAN. And a little bit of humor, thank you very much.

I will start a 5-minute round, and we will just do 5-minute rounds for questions here.

My first question, Ms. Berrien, again, just to reiterate, EEOC has a backlog of 85,000 claims. The number of annual claims has increased in recent years to over 95,000. It takes an average of 294 days to process a discrimination claim. As I said in my statement, this is unacceptable.

As chair of the Commission, what steps do you intend to take to bring better management to the agency and decrease the backlog, and what recommendations or requests will you be making of Congress?

Ms. BERRIEN. Well, first of all, Senator, I recognize that behind the term "backlog" are many people who are waiting for some investigation, resolution, and assistance with a claim. So it is not a term that I take lightly.

I also understand that there are employers who are waiting for resolution of claims as well. I take it, first of all, very seriously when you speak and when other members of this body speak about the backlog that the agency faces.

As a nominee, as you know, there is a great deal of information that is within the jurisdiction of the EEOC and its employees, and I am not privy to that, of course. I am, however, already looking very carefully at the publicly available information. Information like the performance reports to this Congress, information like the budget justification that the agency has submitted, and information from hearings before this Congress to try to better understand some of the things that may be responsible for the backlog, to try to understand what measures have been taken in the past, such as the priority charge handling procedures that were put in place by Commissioner Casellas—sorry, Chair Casellas in 1995.

I am certainly looking forward to working closely with Acting Chair Ishimaru, with the other Commissioners, and staff of the agency to get a better understanding, both of the causes for that backlog and the resources available within the agency currently to address the problem.

There is no question that it is a very, very enormous challenge facing the agency and that the things that have created it are complex, as you have noted. Resources declined, according to the GAO,

approximately 25 percent in the years 2000 to 2008, at the same time that charges have increased. There are some very, very dramatic challenges.

However, one thing that I would do is—again, looking to the GAO and its assessment of the situation at the EEOC, I think it is critically important that we identify the best practices within the agency. But I wouldn't stop there. I am someone who firmly believes that you shouldn't re-invent the wheel, and if there are best practices to be gleaned and determined in other places, we should draw upon those as well, as the GAO recommended.

I am also—as I shared before, I can share with you an approach. I am willing to work hard. I have the high expectations, and I am also willing to listen and listen carefully to a full spectrum of stakeholders not only about the seriousness of the problem, but about some ways we might address it.

The CHAIRMAN. Thank you very much, Ms. Berrien.

Ms. Feldblum, now I have worked with you off and on, as I said, for 21 years. Something has come to our attention here. It is a petition that says “Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships.” It is dated July 26, 2006, some 27 pages long. You signed onto this petition at some point in time. I don't know exactly when.

As I was looking through it, one of the things that it says is that—let me read it here. It says that they support, this petition would support committed, loving “households in which there is more than one conjugal partner.” Well, that says polygamy to me. In all these years I worked with you, I didn't know you supported polygamy, Ms. Feldblum. But then again, I guess we never discussed that.

Can you please enlighten us as to whether you support polygamy or not?

Ms. FELDBLUM. Thank you, Senator, for asking me that question.

I do not support polygamy. I am sorry I signed that document, and I have asked for my name to be removed. I agreed with the general thrust of the statement that we ought to support caregiving relationships. But the statement goes beyond what I would have said to communicate that point. It was, therefore, a mistake to sign that document.

The CHAIRMAN. A lot of us get petitions to sign. Someone says, “Would you sign this? Would you sign that?” And sometimes, especially if someone that we know as a friend, someone puts something there, and you kind of glance at it, and you would say, “What is this for? OK. Oh, fine. I'm in a hurry.” Sign it.

I am just wondering how much of this you had read and gave thought to before you signed it, or was that just one of those things where you just sort of—a friend puts it out there, and you signed it. I would just like to know the genesis of that.

Ms. FELDBLUM. Sure. And it was, in fact, another academic, a law professor from Columbia University who had sent it to me. I think probably most of those 27 pages is a list of some 300 or so academics and other activists who had signed.

And as I said, I agreed with the general thrust of the statement, which I did read through, which was designed to support the range of care-giving relationships. I think this was in 2006. I was very

active doing my work in Workplace Flexibility 2010. It was very clear to me the range of different care-giving relationships that exist that we need to support.

However, as I just noted, the statement goes beyond what I would have said to make that statement of care-giving relationships, and that is why it was a mistake to sign it, and that is why I have asked for my name to be removed.

The CHAIRMAN. Thank you very much, Ms. Feldblum.

Senator ENZI.

Senator ENZI. Thank you, Mr. Chairman.

And again, I want to thank all of you for your willingness to subject yourselves to this and public service, and I appreciate that you are willing to do that. And we do have a limited time for questions. I will provide written questions to you as well.

I will begin with Ms. Berrien. As nominee for EEOC chairman, I appreciate in your statement the way you covered your work experience, your history, goals, and the duties of the position. I think you did that very precisely.

Do you believe that the EEOC receives adequate appropriations and has adequate staffing levels to accomplish the missions you outlined?

Ms. BERRIEN. Well, thank you very much for that question, Senator.

First of all, I note that the last appropriation to the agency was increased, and that was important, given the size of the backlog, given the growth of enforcement responsibility for the agency. As you know, when the agency was founded, its responsibility was to enforce Title VII of the Civil Rights Act of 1964. Since then, its charge has broadened considerably so that more and more forms of discrimination in the workforce are addressed. So its responsibilities have grown.

I can't say at this point with the information that I have available a precise amount of growth, if it were possible, that might help the agency to achieve its goals and particularly to address the concerns with operations and performance you have mentioned. But I certainly look forward to working with you, with this Congress, after I have an opportunity to review with the agency both the resources and how they are being used, do all we can to maximize efficient use of the resources, and then return to this Congress with a very specific and better-informed recommendation about how additional resources could be used to advance the mission of the agency and to better serve the public.

Senator ENZI. Thank you. Thank you.

Ms. Feldblum, as we expand the number of protected classes, it is perhaps inevitable that some of them begin to clash. And I noted in your statement the work that you have done with Catholic Charities. But while religious liberty is a cornerstone of this country, when the religious practitioner becomes an employer and the party to Government contracts, the scope of the religious freedom they may exercise has been called into question in some quarters.

How broadly do you view the religious exemption under the title VII, and if confirmed as an EEOC Commissioner, would you take actions to support the exemption?

Ms. FELDBLUM. Thank you, Senator, for raising the issue of religious liberty.

As you saw from my opening statement, it is something I am deeply steeped in, in terms of going to Orthodox Jewish elementary schools and high schools, and that was my life. It was living in a religious way.

So as a personal matter, I feel about it very strongly. And as a legal matter, I think it is very important that the protections we have in place for religious liberty are effectively enforced. For example, there is a broad religious exemption for religious organizations in title VII, where you can hire people of your own religion. That is a very important exemption for religious organizations. I feel very confident, if confirmed as a commissioner to the EEOC, strongly supporting that exemption.

In addition, there is an exemption in the Employment Non-Discrimination Act that is pending before you now that is actually going to cite a broader exemption allowing discrimination on the basis of sexual orientation and gender identity. I am comfortable with that exemption. I think it is appropriate, would have no problem at all as a commissioner of the EEOC enforcing that exemption.

Senator ENZI. Thank you.

Another question similar to what you were just talking about there, do you believe that victims of employment discrimination based upon sexual orientation or identity should be able to bring disparate impact claims based on employment rule or policy and why or why not?

Ms. FELDBLUM. As I understand it—I haven't looked at the ENDA bill recently, though I doubt that this was changed. But very early on in the early years of drafting that legislation, there was a provision that was put in that said that there would not be an allowance for there to be disparate impact on the basis of sexual orientation and gender identity. And I was comfortable with that at the time. I would be comfortable with it now.

Senator ENZI. Thank you.

And I see that time has expired, but I really need to comment that I am sure Mr. Lopez has some outstanding background if his mother owned a shoe store.

[Laughter.]

That is also some of my background, and our kids feel that they got some benefit from that as well.

I will submit questions to all of you. I have quite a few more questions just to be sure we are doing our job.

Thank you.

The CHAIRMAN. Thank you, Senator Enzi.

Senator Alexander.

#### STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks, Mr. Chairman.

Thanks to each of you for your willingness to serve. A few years ago, when Senator Harkin was even a member of the committee, I had the privilege of sitting down there and being in a confirmation hearing. And I always thought it was a trick because they make the witnesses sit way down low, and we sit way up high.

[Laughter.]

But thank you for being here.

I just have one area I would like to explore. Ms. Berrien, let me start with you. It has to do with our common language, the English language. You are aware, I assume, that since 1906 new Americans have been required to learn English?

Ms. BERRIEN. Yes, I am.

Senator ALEXANDER. And you are aware that children in our public schools are required to be tested in English, and if they don't know it, that they learn it as soon as they can?

Ms. BERRIEN. Yes.

Senator ALEXANDER. And were you aware that the U.S. Senate in June 2007 by a bipartisan majority of about 2 to 1, 64 to 33, adopted English as our national language?

Ms. BERRIEN. I don't know the specific language of that, but I certainly will look at it.

Senator ALEXANDER. Well, in light of that, do you think it is a wise policy for the EEOC to sue an employer who has required the employer's employees to speak English on the job?

Ms. BERRIEN. Senator, I am not familiar with the entire docket at this time, certainly not those charges that may be pending because, of course, those are confidential. But I do know that title VII prohibits discrimination on the basis of national origin. And my understanding of the EEOC's application and interpretation of certain employer policies related to language usage is that they have pursued cases based on concern that a violation of title VII has occurred and that the national origin of employees was the actual cause.

Now, obviously, in any particular case, the EEOC is required to investigate and only apply the law as it has been decided—

Senator ALEXANDER. Let me—but that is my point. I mean, I think that is an unwarranted policy of the EEOC, and the new Americans have to learn it. Children have to be tested in it. The Senate said it is our national language. And there is nothing in title VII by its terms that says speaking our common language is discrimination.

In fact, my own view and I think the view of every time it has come up in the Senate or in the House, it has been the view of the majority that we should be encouraging and helping people to speak our common language, not imposing on employers the burden of having to hire a lawyer to decide in that case, the case of the Salvation Army, which had in Boston a requirement that its employees speak English, gave them a period of time in which to learn it. They didn't, and so they said they couldn't work there anymore.

That brought a lawsuit, and it makes it look like to thousands of businesses across the country that you have to hire a lawyer to see whether there is a business purpose that justifies you requiring your employees to speak the language that is our common language. I think, in my view, the EEOC is way off base on a legal matter.

Now I am going to ask you another way. You were just talking about how big is the backlog of cases at the EEOC of important matters that need to be resolved?

Ms. BERRIEN. Well, as Senator Harkin observed in his comments, the current backlog is roughly 85,000 charges. The docket of litigation is substantially smaller, but it is still sizable.

Senator ALEXANDER. Well, wouldn't you think there would be more urgent cases for the EEOC to pursue than to sue an employer for requiring an employee to speak English on the job when English is our common language, and we are doing all we can to help our children learn it and to help new Americans learn it?

Ms. BERRIEN. Senator, I completely agree that English is the language of opportunity and that English and learning English is a priority for the many people who immigrate to the United States from across the world. It is today, as it has been for the many years that this Nation has been a refuge for people from across the globe.

Senator ALEXANDER. Yes, but what about suing? But my problem is why should a shoe shop owner be sued or have to hire a lawyer in order to justify a common purpose if he wants the employee to speak English on the job? That is my—and I intend to monitor that carefully as time goes on and perhaps to reintroduce my legislation.

Ms. BERRIEN. I appreciate that, and I don't want to leave you with the impression that, first of all, that I have either prejudged the issue or that I am not completely willing and expecting as the chair to take this and all concerns of this Congress very seriously and to be, in consultation with the staff and leadership of the EEOC, not just knowledgeable, but, where necessary, responsive to concerns that are raised.

Please understand that I am both mindful of the issues that you have raised, but ultimately, as everyone within the EEOC is, we are responsible with enforcing the law in the ways that the courts have interpreted them. And that would be ultimately, I believe, the guiding principle for the agency.

Senator ALEXANDER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Oh, I am sorry.

Senator Hagan.

#### STATEMENT OF SENATOR HAGAN

Senator HAGAN. Thank you, Mr. Chairman.

I just wanted to thank all of you for being here. I have had a chance to meet with a couple of you individually, and I am very impressed by all of your qualifications and your thoughtful views on what you would do in these positions that you have been nominated for.

In North Carolina, I have heard from people who think the EEOC is incorrectly perceived as an enemy, and they would like to think of the EEOC as more of a partner. What do you think we can do to change that conversation so people see the EEOC more as an ally in the fight against discrimination?

Ms. Berrien, do you want to start with that?

Ms. BERRIEN. Certainly, Senator.

As I mentioned in my statement, I consider it an absolute priority to do and to direct resources of the EEOC in ways that will prevent violation in the first place. Personally, as a lawyer and even in my own life experience, I have seen that where the law is

and can be well known and respected, long before it reaches a point of going into court or filing a charge of discrimination, that is optimal.

I witnessed it personally. My father, when he finished pharmacy school here in DC, could not get a job in a chain drugstore. They didn't hire black pharmacists at the time.

Years later, and now I realize within a year of the passage and effective date of title VII, he was hired. Employers and workforces changed in part because of knowledge of what the law required, and where that was not sufficient, then the EEOC and private lawyers and others stepped in and pursued enforcement actions.

The EEOC is also responsible for using conciliation methods wherever possible so that court is not the first resort. By the statute and by practice, court comes only after other efforts to resolve litigation or resolve charges of discrimination fail. That is the policy, and my expectation is that that would be enforced as well.

And then, finally, we have available an incredible array of resources, some of which weren't known or imagined at the time title VII was passed and the EEOC opened its doors. The Internet, online possibilities, the various social networking media, things that make it possible to communicate with large numbers of people at relatively low cost, and I think we can and should make maximum use of those as well.

I look forward to working with our communications office and staff and others to try to do that. Those are a few of the ways I think that we can move less—out of the adversarial realm as much as possible and still be effective in enforcing the law.

Senator HAGAN. Thank you.

Does anybody else want to comment on that question?

Ms. FELDBLUM. A quick statement that that is an issue very near and dear to my heart, actually, about how to have the Government and employees and employers figure out a way to work together to create a discrimination-free workplace, because a discrimination-free workplace is an effective workplace. It is a happy workplace. It is a more productive workplace.

I think about Senator Enzi talking about when you were a small business owner and running things. You don't want one of your supervisors sexually harassing someone that then is going to cause difficulties. You know, you don't want someone saying, "Can I call you 'boy'?" You don't want that.

How do we bring all of these actors together, all of which have a common interest in the ultimate goal of a discrimination-free workplace, which is an effective workplace?

Senator HAGAN. Thank you.

Recently, we passed legislation that was called the Lilly Ledbetter Fair Pay Act, primarily to ensure that someone who had suffered wage discrimination would have a chance to right the wrong within a reasonable time after each instance of discrimination. What steps do you think the EEOC should take to enforce this important law? And additionally, what else do you think the EEOC can do to target sex or gender discrimination such as, as you just mentioned, sexual harassment or pregnancy?

Ms. BERRIEN. Well, as you may know, Senator, in the latest statistics concerning the litigation docket of the EEOC, charges that

allege sex discrimination and sex harassment are actually the largest number of charges filed in part of the docket, I should say, that is litigated right now.

There is no question that sex discrimination exists and persists, if I may use or borrow the phrase from my fellow nominee, Ms. Lipnic, and that the EEOC has and must continue to work vigorously to address serious instances of sex discrimination and sex harassment.

One of the things that I have done in my career is work with the Women's Rights Project of the ACLU. I have a tremendous interest in and some background of both what the law requires in that area, but also great concern. The Ledbetter Act is now, as you know, taking effect, and it has raised consciousness and awareness about the continuing problem of women who are paid less for doing identical work.

And I was quite touched to see that Ms. Ledbetter visited the Birmingham EEOC office in March, and among other things, she acknowledged that the EEOC employees there were very responsible, very much responsible for the fact that she not only brought her case, but that she went to the U.S. Supreme Court and ultimately became the namesake of an act that could change the future work life and experience for many women in this country.

It will be an honor to be able to work with you and with the staff of the EEOC and others to ensure that the act is fully and effectively enforced.

Senator HAGAN. Ms. Lipnic.

Ms. LIPNIC. Senator Hagan, if I could answer that question by going back to your first question about how the EEOC is perceived and whether it is by employees who are seeking redress or by employers who are subject to an investigation, and I have a lot of experience having been the head of a regulatory enforcement agency, a couple of them at the Labor Department. I think you first have to keep in mind, and this is not something that is particularly welcomed by employers, but it is a regulatory enforcement agency, and the charge of the agency is to enforce the law.

Having said that, both for employees and employers, justice delayed is justice denied. And I think enforcement agencies have to be very conscious of the authority that they bring to bear on an employee's behalf, but at that workplace and how it can in pursuit of the investigation be very disruptive in terms of the discovery process, and that should be taken into consideration and the amount of time it takes to bring something to resolution.

And in addition to what Jackie said earlier, I think the conciliation process is something that I would certainly want to give a lot of attention to and make sure that that is a vigorous process at the EEOC as it fulfills its statutory obligations. And that would apply in the context also of the enforcement of the Ledbetter Act.

Senator HAGAN. Thank you.

I see that I am over my time. I did want to just agree with the other Senators about the backlog of cases. I think it is critical that we obviously begin addressing those as quickly as possible, and I thank you for your comments on that.

Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Hagan.

Well, again, if there are no further questions—do you have any follow-ups or anything?

Well, we thank you all very much for being here. It is very clear that each of you is extremely well qualified for the positions for which you have been nominated. I might add, I have always had a high esteem for dedicated public servants. And I think each of you is a great example of dedicated public servants and giving your best to our country.

And so, I thank you all very much for all you have done in the past. I thank you for your willingness to serve in this capacity. We will do all we can to move this forward as expeditiously as possible.

The record of this hearing remains open for 10 days. Members may submit questions in writing to the nominees.

And if there is no further business, the committee will stand adjourned.

[Additional material follows.]

## ADDITIONAL MATERIAL

## RESPONSE TO QUESTIONS OF THE HELP COMMITTEE BY JACQUELINE BERRIEN

*Question 1.* In Part I, page 5, question 4, under the Potential Conflicts of Interest section of the committee application, you indicate that you participated in legislative activities related to the passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, in addition to nominations to the Supreme Court. Could you please describe these activities in more detail to the committee?

Answer 1. My current employer, the NAACP Legal Defense and Educational Fund, Inc. (LDF) issued public reports in 2005 concerning the Supreme Court nominations of Chief Justice Roberts and Justice Alito. As LDF's Associate Director-Counsel, I performed supervisory functions in connection with the production of those reports (principally reviewing drafts). Members of LDF's staff advocated for reauthorization of the Voting Rights Act, and again, I performed supervisory functions in connection with that work. I also made public statements concerning LDF's work on these issues.

*Question 2.* In Part I, page 5, question 5 of the committee application, under the Potential Conflicts of Interest section, you stated that should a conflict arise you would resolve the matter in accordance with the terms of an ethics agreement in which you entered with the EEOC's designated ethics official. Could you please clarify to the committee what steps exactly would you take to resolve a potential conflict of interest?

Answer 2. As I stated in the attachment to Part I of the questionnaire that I submitted to the Health, Education, Labor, and Pensions Committee in July, as well as in the ethics agreement developed in consultation with the EEOC's designated agency ethics officials, if confirmed by the Senate, I would take the following steps to resolve potential conflicts of interest:

- Upon confirmation, I will resign my positions as Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., Trustee of Oberlin College, Oberlin, OH, Advisory Board member of the Philanthropic Initiative on Racial Equity (a project of the Tides Foundation) Washington, DC and Adjunct Professor of Law at New York Law School. Pursuant to 5 CFR 2635.502, I will not participate personally and substantially in any particular matter involving specific parties in which any of these entities is a party or represents a party for a period of 1 year after my resignation from each of those organizations unless I am authorized to participate, pursuant to 5 CFR 2635.502(d).

- I will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party, for a period of 1 year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 CFR § 2635.502(d).

- I will continue to participate in the defined benefit pension plans of the Ford Foundation and the NAACP Legal Defense and Educational Fund, Inc. and, consequently, for as long as I continue to participate in those plans, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of the Ford Foundation or the NAACP Legal Defense and Educational Fund, Inc. to provide this contractual benefit, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. 208(b)(2).

- My spouse is President and CEO of MBD Housing Corporation. I will not participate personally and substantially in any particular matter involving particular parties in which MBD Housing Corporation is a party or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d).

- I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

If confirmed, I will work with the EEOC designated agency ethics official to implement the restrictions outlined in my ethics agreement and the Ethics Pledge. Should any other questions arise, I will seek advice with the EEOC's ethics official.

*Question 3.* In Part II, page 1, under the Financial Statement section of the committee application, you indicate under accounts and bills due a total of \$9,072.25. Could you please clarify the nature of this liability?

Answer 3. At the time I submitted the committee application, \$9,072.25 was the total outstanding balance for three credit cards issued in my name.

*Question 4.* In Part II, page 1, under the Financial Statement section of the committee application, you indicate you and your husband owning a Mutual of America Mid Cap Equity Index Fund; Calvert Social Balanced Fund; Vanguard VIF International Fund; Fidelity VIP Equity-Inc Port-Init; and ING Legg Mason PRTNS Aggr Gr-Init; however, these entities are not listed in your completed SF-278 filed with the Office of Government Ethics. Can you please clarify this discrepancy?

Answer 4. I included these assets on my committee application because the application requires all retirement plan accounts and investments to be reported, regardless of the amount. However, I did not include the five items listed in Question 4 in my SF-278 because they fell below the reporting threshold for Schedule A of SF-278. When my SF-278 was completed, my husband's investments in these funds did not have "a fair market value exceeding \$1,000" nor did they "generate[] more than \$200 in income." The EEOC's ethics officer, whom I consulted before submitting the SF-278, confirmed that these items should be omitted from my SF-278.

*Question 5.* In your letter to the Designated Ethics Officer, you state that you will not participate personally and substantially in any particular matter involving specific parties in which your former employer is a party or represents a party and certain other organizations and entities you were affiliated with for a 1-year period unless you first receive a written waiver pursuant to Federal regulations. On January 21, 2009, President Obama signed Executive Order 13490, "Ethics Commitments by Executive Branch Personnel" that requires a separate 2-year recusal for any "particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." Please explain the process you will implement for ensuring both recusals are effective. Please also explain any impact that these requirements may have on your ability to fulfill duties, including whether any recusals involve entities that could appear before you in the position you are nominated for and/or if the entities have existing or potential involvement with the agency you are nominated to.

Answer 5. The Equal Employment Opportunity Commission's designated agency ethics official has reviewed my affiliations with my employer, and clients, and determined that any potential conflict of interest would be adequately addressed by the terms of my ethics agreement.

As I stated in the attachment to Part I of the questionnaire that I submitted to the Health, Education, Labor, and Pensions Committee in July, as well as in the ethics agreement developed in consultation with the EEOC's designated agency ethics officials, if confirmed by the Senate, I would take the following steps to resolve potential conflicts of interest:

- Upon confirmation, I will resign my positions as Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., Trustee of Oberlin College, Oberlin, OH, Advisory Board member of the Philanthropic Initiative on Racial Equity (a project of the Tides Foundation) Washington, DC and Adjunct Professor of Law at New York Law School. Pursuant to 5 CFR 2635.502, I will not participate personally and substantially in any particular matter involving specific parties in which any of these entities is a party or represents a party for a period of 1 year after my resignation from each of those organizations unless I am authorized to participate, pursuant to 5 CFR 2635.502(d).

- I will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party, for a period of 1 year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 CFR § 2635.502(d).

- I will continue to participate in the defined benefit pension plans of the Ford Foundation and the NAACP Legal Defense and Educational Fund, Inc. and, consequently, for as long as I continue to participate in those plans, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of the Ford Foundation or the NAACP Legal Defense and Educational Fund, Inc. to provide this contractual benefit, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. 208(b)(2).

- My spouse is President and CEO of MBD Housing Corporation. I will not participate personally and substantially in any particular matter involving particular parties in which MBD Housing Corporation is a party or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d).

- I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restric-

tions therein. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

If confirmed, I will work with the EEOC designated agency ethics official to implement the restrictions outlined in my ethics agreement and the Ethics Pledge. Should any other questions arise, I will seek advice with the EEOC's ethics official.

*Question 6.* Do you understand that it is your continuing responsibility to supplement these and all other responses if you subsequently determine that they are not complete?

Answer 6. Yes.

*Question 7.* One reason we pass a considerable amount of legislation through this committee by unanimous consent is because of the good working relationship between the majority and minority, both Senators and our staff. If confirmed, will you pledge to cooperate in this type of a working relationship with all Senators on this committee—Democrat or Republican—by promptly responding to any written or phone inquiries, sharing information as soon as it becomes available and directing your staff to do the same?

Answer 7. Yes.

*Question 8.* Have taxes always been paid on time, including Federal, State and local taxes, property taxes, business taxes and/or sales and use taxes, as well as taxes paid on behalf of any employees?

Answer 8. Yes, with the following exception. As explained in Part II of my committee application, after graduating from law school in 1986, my husband and I were beneficiaries of Harvard Law School's "Low Income Protection Plan" because I was working in public interest law. As part of this plan, we received taxable income from Harvard. We regularly paid New York State tax on this income under an installment plan. In 1992 and 1993, we were unable to keep up with the installment plan and fell behind. As a result, New York imposed three tax liens totaling approximately \$6,000. Each lien was satisfied in 6 months or less, and the last one was paid off in June 1993.

#### RESPONSE TO QUESTIONS OF SENATOR ENZI BY JACQUELINE BERRIEN

*Question 1.* At present, Commissioners may be given as few as 3 days to review and determine whether briefs should be filed on behalf of the EEOC in cases before the Supreme Court and other appellate courts. Would you be willing to expand the 3-day review period so that Commissioners, particularly minority party Commissioners, would have sufficient time to review and study the briefs and legal issues before deciding whether the EEOC should take an official position? Are there other steps that can be taken to ensure full and fair participation by minority party Commissioners?

Answer 1. I recognize that the EEOC has been a bipartisan body since its creation, and if confirmed as Chair I would strive to foster a collegial, respectful working environment for every member of the Commission, without regard to party affiliation. I am not privy to the Commission's current practices concerning the number of days allotted for review and approval of draft appellate briefs. If confirmed, I will review the existing practices and procedures for Commission review and approval of appellate filings, solicit input from the other Commissioners and the General Counsel of the EEOC, and consider proposals to modify existing procedures to facilitate full and fair participation by all Commissioners, including those representing the minority party.

*Question 2.* What is your view of the EEOC field restructuring plan which was undertaken in 2006? Will you maintain the new offices which opened? Do you have any plans to reopen offices which were closed?

Answer 2. If confirmed as Chair, I will be very attentive to the concerns of the members of this committee and give serious consideration to all matters that touch on the quality of service provided by the EEOC and the ability of members of the public to take advantage of the EEOC's resources and programs. In light of the limited information available to me as a nominee concerning the impact of the 2006 field restructuring plan, I am not yet able to fully assess its impact on EEOC services and therefore, I am unable to determine the potential need to change the status of any existing EEOC office. However, I have been advised by current EEOC staff members that while eight offices were downgraded, no offices were closed as a result of the 2006 restructuring.

*Question 3.* The EEOC has struggled with significant backlogs at various times throughout its history. According to some reports, over 12 percent of charges have been pending for 540 days or longer. What structural changes can be made to resolve this recurring issue permanently?

Answer 3. As I testified during the November 19, 2009, hearing of the Senate Committee on Health, Education, Labor, and Pensions concerning my nomination, I understand that members of the public seeking assistance from the EEOC are impacted by charge processing backlogs. Therefore, if confirmed by the Senate, I would give this issue focused attention early in my tenure. Unfortunately, though, as the members of this committee are aware, this problem is not unprecedented in the EEOC's history. The Government Accountability Office, and its predecessor, the Government Accounting Office, have studied this issue repeatedly. *See, for example*, Statement of Linda G. Morra, Director, Education and Employment Issues, Health, Education, and Human Services Division of the U.S. General Accounting Office, "EEOC Burgeoning Workload Calls for New Approaches," Testimony before the U.S. Senate Committee on Labor and Human Resources (May 23, 1995); Statement of Michael Brostek, Associate Director, Federal Management and Workforce Issues, General Government Division of the U.S. General Accounting Office, "Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention," Testimony before the Subcommittee on Civil Service of the U.S. House of Representatives Committee on Government Reform (March 29, 2000); U.S. Government Accountability Office, "Equal Employment Opportunity Commission: Sharing Promising Practices and Fully Implementing Strategic Human Capital Planning Can Improve Management of Growing Workload," Report to the Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. Senate, Report No. GAO-08-589 (June 2008).

If confirmed, I will review all GAO reports and congressional hearing records concerning the causes of, and potential responses to charge processing backlogs at the EEOC. It will also be critical to thoroughly analyze the relationship between staffing levels and the backlog, especially with the recent (and continuing) increase in the number of new charges of employment discrimination filed in the United States. In order to determine optimal staffing levels and charge processing times, it would be helpful to better understand the relationship between the dramatic decline in the number of full-time-equivalent staff between 2000 and 2007 (approximately one-quarter of the workforce) and the growing number of charges filed with the EEOC.

In conjunction with staff I would also explore whether State and local fair employment practice agencies (FEPAs) are being utilized to the maximum extent possible to reduce the backlog. Finally, as I testified on November 19, and consistent with the recommendation of the U.S. Government Accountability Office, I would work to strengthen systems for identifying "best practices" among EEOC offices. As the GAO recommended in its June 12, 2008, Briefing to Congressional Staff, the EEOC could benefit from "identifying offices that ensure quality outcomes in a timely manner and evaluat[ing] and shar[ing] promising practices across the agency." Report to the Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. Senate, GAO-08-589 at 45.

*Question 4.* Do you support the use of "testers"—individuals paid by the EEOC to pretend to seek employment in the hopes of catching employers in an act of discrimination—to develop allegations of discrimination against employers? Given the sizeable backlog that EEOC currently has, is it appropriate to manufacture allegations when EEOC cannot process the claims of employees with actual grievances in a timely manner?

Answer 4. I have been informed that the EEOC does not currently have any "testers" on its payroll, but that a State fair employment practice agency that contracts with the EEOC sponsors a small pilot project that employs testers. Before either ending or expanding the practice, I would thoroughly consider the views of Congress, study the EEOC's past practice concerning this issue, and solicit input from all Commissioners, the General Counsel, and external interested parties.

*Question 5.* A Government Accountability Office Report (GAO) published this summer outlined a number of concerns about the fairness, promptness and impartiality of the EEO complaint process (GAO-09-712). Assuming you are familiar with this report in anticipation of your service, what is your evaluation of its findings and recommendations?

Answer 5. I reviewed GAO Report 09-712 in preparation for the November 19, 2009 hearing. As you know, the report outlines some problems associated with, and potential improvements in, the system for processing discrimination charges filed by

Federal Government employees (“Federal sector charges”). Publicly available information, such as GAO Report 09–712, is a very important part of the background information that I would consider before recommending or implementing major changes to existing EEOC charge processing systems. However, as a nominee, I am sensitive to the fact that there may be information available exclusively within the agency that could help me better understand current difficulties in the Federal sector charge processing system and potential avenues for reform of the system.

*Question 6.* The Government Accountability Office’s recent report (GAO–09–712) and others have questioned whether EEOC staff members receive enough training to gain the knowledge and skills necessary to perform their job effectively. What is your view of this issue? Do you have any plans to enhance or alter training of EEOC staff?

Answer 6. I believe that the EEOC must have a well-trained, highly skilled staff in order to successfully execute its mission and meet high performance standards. To ensure that scarce agency resources are used effectively, the content and design of training programs should be closely tailored to reinforce or develop the skills that employees need in order to meet applicable performance standards. Therefore, I would first review available evaluations concerning the joint training conference for EEOC Administrative Judges and appellate attorneys conducted last July, to determine whether additional training (either for the participants in the July 2009 program or another group of EEOC employees, such as investigators) would be useful.

*Question 7.* One solution proposed in the GAO report was to establish performance-based accountability measures to enhance timeliness and quality of investigations by agency staff. Would you support enhancing EEOC services in this manner? Are there any obstacles to implementing such a plan?

Answer 7. I will give thorough consideration to policy or procedural changes suggested by Congress to improve the efficiency and effectiveness of the EEOC’s operations. I understand that the current civil service compensation and evaluation systems incorporate some performance-based accountability measures, such as allowing award of incentive pay and other forms of recognition to high-performing employees. If confirmed, I look forward to working with staff to identify ways to maximize the contribution to mission and improve the performance of individual employees, with the ultimate goal of strengthening agency performance overall. Finally, as I testified to this committee, if confirmed I intend to be very attentive to the concerns of Congress and give special consideration to matters that touch on the quality of service provided by the EEOC.

*Question 8.* Some equal employment opportunity (EEO) practitioners involved with the Federal EEO complaint process have proposed transferring the investigation responsibility to EEOC rather than the Federal agencies from which the complaint arises. Do you favor this proposal and would you implement it?

Answer 8. Published reports concerning the processing of discrimination charges filed by Federal Government employees have suggested a transfer of responsibility from agency EEO offices to the EEOC for two primary reasons: (1) to avoid the potential conflict of interest when a discrimination complaint is investigated by an employee who interacts with, and perhaps reports to, persons responsible for defending the agency against the discrimination claim; and (2) to expedite charge processing. I understand that the EEOC has been examining the issue of inappropriate interaction between agency defense counsel and the agency EEO officer investigating a charge of discrimination, and, if confirmed, I would work to ensure that any policy changes adequately resolve the conflict of interest issues identified by many observers and stakeholders. If Congress determined that this change would improve enforcement of existing Federal laws prohibiting employment discrimination, as Chair I would of course be responsible for implementing the new law. However, in light of the existing (and recurring) backlog of private sector charges, I believe that the EEOC’s ability to shorten the amount of time required for resolution of Federal sector charges would depend upon increased funding to ensure that there are adequate resources to carry out this substantial, new responsibility.

*Question 9.* All too often Federal agencies have found that their actions have unintended consequences on U.S. industries and workers that could have been discovered had the action been more completely vetted. The Administrative Procedures Act is intended to address this, but it does not cover all agency action. Will you commit to consult with all stakeholders for each particular issue when the Commission is considering regulatory or other action?

Answer 9. Yes, if confirmed, I will work in conjunction with the other Commissioners, General Counsel and agency staff to ensure that the Administrative Proce-

sure Act's requirement of notice and opportunity for public comment is complied with fully before specified regulatory actions are taken. More broadly, as I testified on November 19, I believe that efforts to prevent discrimination before it occurs are an important component of the EEOC's work. In my view, regular and open communication with stakeholders heightens public awareness of the requirements of the law and helps to ensure that the business community, workers, advocacy groups, labor organizations, and other interested parties have a common understanding of the law's requirements and measures that can be taken to prevent violation of the law in the first instance.

*Question 10.* As a former small businessman, I know how difficult it can be to navigate the bureaucratic maze of Federal agencies and regulations. Small businesses create 80 percent of our Nation's net new jobs and, in turbulent economic times such as these, I believe we should be doing everything in our power to make sure they can stay in business. Please outline what EEOC practices and policies you plan to maintain, enhance or create to assist small businesses?

*Answer 10.* If confirmed, I look forward to working with you and other members of the committee to ensure that the EEOC provides effective service to all stakeholders, including small business owners across the United States. I welcome your suggestions concerning improvements in the EEOC's outreach to small business owners and look forward to working with you, representatives of the business community and other interested parties to address the concerns that you have raised here and during the November 19 hearing.

I understand that the EEOC has already taken several steps to address the very important issue of outreach and assistance to small business owners. First, the EEOC launched a Small Business Initiative in 1999 in an effort to "improve relations between EEOC and small business." Every EEOC district office has a Small Business Liaison, and their names, telephone numbers and e-mail addresses are published in the agency's Web site ([www.eeoc.gov](http://www.eeoc.gov)). In addition, the "Small Business Information" page of the EEOC's Web site states that every EEOC field office has developed a regional small business outreach plan. Second, the EEOC was cited favorably in the latest Report to Congress by the National Ombudsman of the U.S. Small Business Administration (SBA), who is charged with "ensur[ing] a fair and effective regulatory environment that works for both small businesses and Federal agencies." National Ombudsman's 2008 Report to Congress at xi. The EEOC received an "A" grade on every performance measure included in the SBA report. *Id.* at 17. The report also noted the EEOC's outreach efforts, specifically agency employees' participation in events sponsored by the Office of the National Ombudsman, which facilitated face-to-face contact with small business owners and provided an important forum for education about the EEOC and the laws that it enforces. *Id.* at 14.

*Question 11.* What is your view of the responsibility of the EEOC District offices in the conciliation process? Are the appropriate parties being consistently involved in the process? Does EEOC management at all levels provide enough support to the conciliation process?

*Answer 11.* As a nominee, I do not have access to the information necessary to respond fully to this question. However, if confirmed, I commit to carefully examine the efficacy and quality of the EEOC's conciliation efforts across the country, and to work with you and your staff to identify areas which may require additional attention or support.

*Question 12.* Will you pledge that you will work to ensure that EEOC will vigorously support resolving charges through mediation, settlement and conciliation?

*Answer 12.* The Federal employment discrimination laws enacted by Congress and the enforcement system prescribed by the statutes which the EEOC is charged with enforcing all to encourage voluntary resolution of meritorious discrimination claims wherever possible. Consequently, mediation, conciliation, and other out-of-court settlement efforts are all authorized by existing law and agency procedures and are appropriately recognized as consistent with the legislative preference for voluntary compliance with the law. Consistent with controlling judicial decisions and the express intent of Congress, I will support efforts to resolve charges through conciliation and other mutually agreeable means that protect the rights of all parties and fulfill statutory purposes.

*Question 13.* The EEOC was charged with finalizing regulations under the Genetic Information Non-Discrimination Act (GINA) by May of this year, 1 year after enactment, but has missed this deadline. The law's mandatory compliance date is 18 months after enactment, which also happens to be the same week the HELP

Committee held your confirmation hearing. Do you believe it is fair to require employers to comply with this statute when EEOC has not yet provided final regulatory guidance? What sort of standards should employers be held to in the absence of regulatory guidance?

Answer 13. I understand that the proposed rule to implement the Genetic Information Non-Discrimination Act (GINA) is pending with the Office of Management and Budget and was submitted within the period authorized by the statute. However, I share your overall concern that employers and other interested parties receive sufficient notice concerning the impact of anti-discrimination laws passed by Congress, and if confirmed, will work with you to ensure that necessary implementing regulations are in place as soon as possible.

*Question 14.* Do you believe that an employer's use of credit or criminal background checks in hiring is or can be discriminatory? Please explain why or why not.

Answer 14. Title VII of the Civil Rights Act of 1964 prohibits a facially neutral employment practice that has a racially disparate adverse impact and is not demonstrably job-related and necessary for the conduct of the business at issue. The law does not specifically exclude the practices described above from title VII. However, several Federal courts have decided that the "disparate impact" standard of title VII should be used to evaluate employer policies concerning the use of criminal record checks in the hiring process. *See, for example, El v. SEPTA*, 479 F. 3d 232 (3d Cir. 2006). The EEOC has reached a similar conclusion on two prior occasions, as outlined in its "Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment," dated July 29, 1987, and its "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964," dated September 7, 1990. I understand that the Commission conducted a meeting on November 20, 2008, concerning "Employment Discrimination Faced by Individuals with Arrest and Conviction Records," which began its reconsideration of the earlier Commission policies concerning employers' use of criminal background checks in hiring. If confirmed, I welcome the opportunity to consider these issues more thoroughly and solicit input from a broad cross-section of stakeholders concerning these practices and the application of existing law to them.

*Question 15.* I have been told that funding for EEOC's outside mediators has been decreased over the last several years and that this has been a particularly acute problem in more rural/suburban areas. As a Senator representing one of many more rural States, this concerns me. Do you agree EEOC has a duty to ensure its services are available nationally?

Answer 15. Yes, and if confirmed, I look forward to learning more about these issues from you and working with you to ensure that your constituents and residents of the entire country are served effectively by the EEOC.

#### RESPONSE TO QUESTIONS OF SENATOR ALEXANDER BY JACQUELINE BERRIEN

*Question 1.* In the 110th Congress I introduced language that would bar the EEOC from filing lawsuits against employers that require their employees to speak English while engaged in work. This language gained bipartisan support in the U.S. Senate, as well as the U.S. House of Representatives. My interest stemmed from a March 2007 case in which the EEOC sued the Salvation Army for allegedly discriminating against two of the Army's employees in a Boston-area thrift store by requiring them to speak English on the job. This case was ultimately settled. Given the current backlog of more egregious cases at the EEOC, what priority would you provide to these cases?

Answer 1. I recognize and share the concern expressed by members of this committee that the EEOC's charge processing backlog may negatively impact people who have been discriminated against on the basis of race, color, national origin, religion, sex, pregnancy, age, disability, illegal use of genetic information and/or in retaliation for exercising rights protected by Federal laws prohibiting employment discrimination on these grounds. I, therefore, expect to give focused attention to the backlog issue early in my tenure if confirmed. I was not involved in the litigation against the Salvation Army described in the above question, and therefore am not aware of the specific strategies employed in that case by the EEOC. However, if confirmed, I would evaluate requests to file new cases on the basis of the facts of the specific case and application of controlling law to those facts.

*Question 2.* Employers argue safety and morale as the rationale for requiring English in the work place, do you believe it is appropriate for employers to do so?

Is it discriminatory for employers to require employees to speak English in the workplace?

Answer 2. "English only" policies are not illegal per se. In a case alleging disparate treatment of an employee or group of employees on any basis prohibited by title VII, existing law would not prohibit an employer from requiring employees to speak English in the workplace if that policy is adopted for reasons that are not a pretext for unlawful discrimination. However, as I testified at my confirmation hearing, I am generally aware that some courts have concluded that specific workplace rules concerning English usage violated title VII's prohibition against discrimination on the basis of national origin.

Question 3. Under what circumstances would it be appropriate for the EEOC to pursue such a suit?

Answer 3. If confirmed, I would evaluate a request for EEOC involvement in a case on the basis of the facts of the specific case and application of controlling law to those facts. I cannot determine, before a specific case is presented, whether I would support or oppose EEOC involvement in that case.

RESPONSES TO QUESTIONS OF SENATOR COBURN BY JACQUELINE A. BERRIEN

Question 1. Thank you for listing the three management positions you've held as was requested. Please also list the budget amounts and number of personnel managed for each position.

Answer 1. I am currently employed as the Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., a tax-exempt charitable organization. I report directly to the President and Director-Counsel of the organization, and assist with overall management of the organization's legal advocacy and scholarship programs. During my tenure in this position, LDF's paid staff has ranged from 50 to 74 employees. The Legal Defense Fund's current staff size is 69 employees. The total revenue and expenses for the Legal Defense Fund (as reported on Form 990) for the fiscal years in which I have served as Associate Director-Counsel were:

Year	Total Revenue (\$)	Total Expenses (\$)
2004 .....	12,812,068	11,886,539
2005 .....	12,032,309	12,607,736
2006 .....	10,524,106	9,465,598
2007 .....	12,806,294	11,201,970

I was employed by the Ford Foundation from November 2001 through August 2004, and administered grants totaling approximately \$13 million during that period. As a program officer with the Ford Foundation, I managed a grant-making team comprised of a grant administrator, a program associate, and an administrative assistant.

As Assistant Counsel and Director of the Voting Rights and Political Participation docket for the NAACP Legal Defense and Educational Fund, Inc. (September 1994 to November 2001), I supervised three attorneys, an administrative assistant, a paralegal, and a variable number of legal interns (generally 2-4 per academic term). Responsibility for financial management of legal program activities was shared by the organization's President and Director-Counsel, Associate Director-Counsel, Director of Litigation and Chief Financial Officer.

Question 2. In your response to my followup question regarding the First Amendment's Free Exercise Clause, you said you will follow U.S. Supreme Court precedent and controlling Federal circuit law. What weight, if any, will you give to the legislative history behind the Free Exercise Clause?

Answer 2. If confirmed, I would adhere to the precedents of the U.S. Supreme Court or controlling Federal court of appeals, as applicable, concerning the weight to be accorded to legislative history, and every other matter concerning interpretation of the Free Exercise Clause of the First Amendment.

RESPONSE TO QUESTIONS OF SENATOR COBURN BY JACQUELINE BERRIEN  
AND CHAI FELDBLUM

JACQUELINE BERRIEN AND CHAI FELDBLUM

*Question 1.* In your responses to my previous question regarding your policy priorities, you both focused on the enforcement duties of EEOC. As you know, the EEOC does more than enforcement, and as Chair and Commissioner you will have various opportunities to shape national discrimination protection policy. Related to those policy-related functions of the Commission, please explain any policy priorities you have considered or have interest in developing?

Answer 1. The EEOC is charged with eliminating unlawful discrimination in the workplace. Given the breadth of the EEOC's enforcement responsibility and the many competing demands for the agency's scarce resources, if confirmed I plan to consult with representatives of stakeholder communities, in addition to agency staff, before setting priorities for the agency. I recognize, however, that there are time-sensitive issues confronting the EEOC. For example, the agency must provide timely guidance to the public concerning two recently enacted pieces of legislation, the Genetic Information Non-Discrimination Act and the ADAAMA. In addition, the demand for assistance from the EEOC has increased in recent years (as reflected in the number of new charges filed), and if confirmed, I would carefully review data concerning current demand for services, with the goal of determining whether enforcement resources are adequate to meet current needs or need to be reallocated.

JACQUELINE BERRIEN

*Question 1.* In your response to my questions regarding your management experience as it relates to the daunting challenges facing EEOC, you highlighted various management experiences. Please list the top three management positions you have held related to the largest budgets you have overseen and the most number of employees you have managed.

Answer 1. The three management positions I have held with the largest budgets and highest number of employees have been:

1. Associate Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.
2. Program Officer, the Ford Foundation
3. Director of Voting Rights and Political Participation Docket, NAACP Legal Defense and Educational Fund, Inc.

As noted in my earlier response, I also acquired relevant skills through management of complex Federal litigation in connection with my employment with the NAACP Legal Defense and Educational Fund, the Lawyers' Committee for Civil Rights Under Law, and the American Civil Liberties Union.

*Question 2.* In your response to my question regarding your ideas on how to reduce the backlog, you responded by saying you will give "focused attention" to the issue, will "solicit feedback" from career staff, and are reviewing various public documents related to the issue. Other than these measures and your interest in exploring whether State/local agencies can be of assistance, please lay-out any tangible ideas or plans you have on how to address the backlog while still maintaining quality.

Answer 2. If confirmed, addressing backlogs would be a priority for me. As I noted in my hearing testimony and in response to written questions from Senator Enzi, there are several steps I plan to take to address this issue.

First, if confirmed, I will review all GAO reports and congressional hearing records concerning the causes of, and potential responses to charge processing backlogs at the EEOC. It will also be critical to thoroughly analyze the relationship between staffing levels and the backlog, especially with the recent (and continuing) increase in the number of new charges of employment discrimination filed in the United States. In order to determine optimal staffing levels and charge processing times, it would be helpful to better understand the relationship between the dramatic decline in the number of full-time-equivalent staff between 2000 and 2007 (approximately one-quarter of the workforce) and the growing number of charges filed with the EEOC.

Second, in conjunction with staff I would also explore whether State and local fair employment practice agencies (FEPAs) are being utilized to the maximum extent possible to reduce the backlog. Finally, as I testified on November 19, and consistent with the recommendation of the U.S. Government Accountability Office, I would work to strengthen systems for identifying "best practices" among EEOC offices. As the GAO recommended in its June 12, 2008, Briefing to Congressional Staff, the EEOC could benefit from "identifying offices that ensure quality outcomes in a time-

ly manner and evaluat[ing] and shar[ing] promising practices across the agency.” Report to the Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. Senate, GAO–08–589 at 45. I am also prepared to look for examples elsewhere in government for successful backlog reduction strategies.

As I testified during the November 19, 2009, hearing, the reasons for the current backlog are complex. However, one potential cause is that the resources at the EEOC have declined significantly while the number of charges has increased.

Finally, as with every matter related to the quality of service rendered to the public by EEOC employees, if confirmed I look forward to working with you and the other members of this committee to address concerns about the charge processing backlog.

*Question 3.* In your response to my question regarding the First Amendment’s free exercise clause, you stated that you were not aware of any court decisions that apply to this set of facts. Bearing that in mind, what legal and policy considerations would guide you in analyzing how to dispose of this conflict between an employee’s First Amendment liberty and an employer’s employment-related objectives.

Answer 3. The U.S. Supreme Court interprets provisions of the U.S. Constitution, including the First Amendment, and if confirmed, I would apply controlling Supreme Court precedents interpreting the Free Exercise clause. If confirmed, I will also apply the laws that Congress has passed to outlaw discrimination in the workplace, as they have been interpreted by the U.S. Supreme Court. If the Supreme Court has not addressed the issue presented in the charge, the decisions of the geographically relevant Federal Court of Appeals would be controlling.

*Question 4.* In the hearing you mentioned sexual harassment/discrimination claims are the largest part of the docket. Do you have any ideas on how to address this growing number of charges and do you have any thoughts on whether such claims need special priority in some way?

Answer 4. As I testified at the November 19 hearing, based on the latest statistics from the EEOC, sex discrimination and sex harassment cases make up the largest part of the litigation docket. Additionally, the recent passage of the Lilly Ledbetter Fair Pay Act has raised awareness of the problem of women who are paid less than men for doing identical work. The EEOC must continue to work vigorously to address sex discrimination and sexual harassment. If confirmed, I would work with the General Counsel and other headquarters and regional staff to determine if the resources devoted to these issues are being used in the most effective manner.

#### RESPONSE TO QUESTIONS OF THE HELP COMMITTEE BY CHAI FELDBLUM

*Question 1.* According to your completed Office of Government Ethics SF–278, you have been a consultant with Columbia University; however, this information is not listed in Part I, page 2 under the Employment Record section of the committee application. Are you currently employed by Columbia University? If so, do you foresee your employment with the Columbia University as an inherent or perceived conflict of interest? If so, could you please indicate to the committee exactly which steps you would take to resolve any potential or perceived conflicts, including recusal?

Answer 1. I have never been employed by Columbia University. The listing on my SF–278 cited above refers to the following: In January 2009, I reviewed three articles written by Professor Elizabeth Emens of Columbia Law School, and I wrote a letter analyzing the merits of those articles for purposes of Columbia’s tenure review process for Professor Emens. In return for that work, I received an honorarium of \$500. Law professors often perform such work to assist law schools in their tenure processes.

*Question 2.* In Part I, page 5, question 5 of the committee application, under the Potential Conflicts of Interest section, you stated that should a conflict arise you would resolve the matter in accordance with the terms of an ethics agreement in which you entered with the EEOC’s designated ethics official. Could you please clarify to the committee what steps exactly you would take to resolve a potential conflict of interest?

Answer 2. In accordance with the ethics agreement that I entered into with the EEOC’s designated ethics official, I will do the following:

As required by 18 U.S.C. 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any other person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. 208(b)(2). I understand that the financial

interests of the following are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will take an unpaid leave of absence from my position as Professor of Law at Georgetown University Law Center. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of Georgetown Law Center, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for either the exemption at 5 CFR 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. 208(b)(2).

Upon confirmation, I will resign my positions as Director of Georgetown University Law Center's Federal Legislation & Administrative Clinic, Co-Director of Georgetown University's Workplace Flexibility 2010 Initiative and Project Director of the Clinic's grant from the Alfred P. Sloan Foundation. For a 1-year period after my resignation from each of those organizations, I will not participate personally and substantially in any particular matter involving specific parties in which the Federal Legislation & Administrative Law Clinic, the Workplace Flexibility 2010 Initiative or the Alfred P. Sloan Foundation is a party or represents a party unless I am authorized to participate, pursuant to 5 CFR 2635.502(d).

In addition, I will not participate personally and substantially in any particular matter involving specific parties in which the Epilepsy Foundation (client of the Georgetown University Law Center's Federal Legislation & Administrative Clinic) is a party or represents a party, for a period of 1 year after I, as Director of the Clinic, last provided service to that client, unless I am first authorized to participate, pursuant to 5 CFR § 2635.502(d).

As co-author of "Law Making: An Introduction to Statutory and Regulatory Interpretation," I am entitled to receive royalties from Aspen Publications, Inc. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of Aspen Publications, Inc. to honor its contractual obligations regarding these royalties, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1).

If confirmed, I will work with EEOC's designated agency ethics official to establish an effective screening mechanism to implement these commitments.

*Question 3.* In Part II, page 1, under the Financial Statement schedule 3 for the committee application, you state that you own property at 328 Munson Street, Rehoboth Beach, DE 19971, currently valued at \$578,000, with a mortgage of \$417,000; however, this property and the mortgage are not disclosed on your Office of Government Ethics SF-278. Do you currently own this property? If so, could you please clarify this discrepancy between your application and the SF-278 and disclose the terms of the mortgage in accord with the requirements of the SF-278? Is this property the source of the rental fees generated in 2007 according to Schedule 8 of Part II of your committee application?

*Answer 3.* I currently own property at 328 Munson Street in Rehoboth Beach, DE. I have a 30-year mortgage of \$416,063 on that house with Wells Fargo, with a monthly payment of \$2553.62. I live in that house over the summer, and I have never rented it. I was advised by the EEOC ethics counsel that because the house in Rehoboth is a second home that is never rented, I should not list it on the SF-278.

*Question 4.* On your SF-278, you list a liability to Wells Fargo Home Mortgage in an amount between \$500,001 and \$1,000,000 for your Takoma Park, MD, residence. In Part II, Schedule 5 of the committee application, you list a mortgage in the amount of only \$175,600 for this property. Could you please clarify this discrepancy between your application and the SF-278?

*Answer 4.* On Schedule C of my SF-278, I mistakenly marked the category that corresponded to the full value of my residence in Takoma Park (approximately \$570,000), rather than the mortgage balance (\$175,600). I have filed a correction to the SF-278.

*Question 5.* According to your completed Office of Government Ethics SF-278, you list Assets and Income from rental fees from your residential property in Takoma Park, MD; however, this information does not appear to be listed in part II, page 2, under the Sources of Income section of the committee application. Can you please clarify this discrepancy to the committee?

*Answer 5.* The reporting period for the HELP committee questionnaire was 2006, 2007, and 2008. During that period I received rental income, as reported on the

questionnaire, only in 2006 and 2007. The reporting period for the SF-278 was 2008 and 2009. I received rental income in 2009 that I reported on the SF-278. I did not receive any rental income in 2008.

*Question 6.* The committee has been unable to locate copies of several publications that you listed on your committee application. Can you please provide copies of the publications listed in Attachment A?

Answer 6. I have enclosed copies of all the publications requested.

*Question 7.* In Part I of the committee application, you listed two forthcoming publications. Are you still working on these publications? When do you anticipate those publications will be issued? Are you being compensated for these items (outside of the potential royalties disclosed in your committee application for the co-authored book) and if so how? If you are being compensated, do you foresee any conflict of interest with your nominated position? Could you please also provide the committee with a copy of the abstract or other appropriate short description of the Law Review article entitled "Gay rights, religion and fear: A call for moral discourse?"

Answer 7. One of the forthcoming articles, "Gay Rights, Religion and Fear: A Call for Moral Discourse" has been completed and is attached. It is a short essay and is now titled "Gay Rights, Religion and Fear: A Call for Informed Moral Discourse." I will receive no compensation for that article.

The second forthcoming piece is a casebook for Aspen Publishing on statutory interpretation. Several co-authors are contributing to the casebook, and it is not yet complete. If I am confirmed, any remaining work on my sections of the casebook will be completed by other co-authors.

*Question 8.* In your letter to the Designated Ethics Officer, you state that you will not participate personally and substantially in any particular matter involving specific parties in which your former employer is a party or represents a party and certain other organizations and entities you were affiliated with for a 1-year period unless you first receive a written waiver pursuant to Federal regulations. On January 21, 2009, President Obama signed Executive Order 13490, "Ethics Commitments by Executive Branch Personnel" that requires a separate 2-year recusal for any "particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." Please explain the process you will implement for ensuring both recusals are effective. Please also explain any impact that these requirements may have on your ability to fulfill duties, including whether any recusals involve entities that could appear before you in the position you are nominated for and/or if the entities have existing or potential involvement with the agency you are nominated to.

Answer 8. The Equal Employment Opportunity Commission's designated agency ethics official has reviewed my affiliations and determined that any potential conflict of interest would be adequately addressed by the terms of my ethics agreement.

In accordance with my ethics agreement, upon confirmation, I will take an unpaid leave of absence from my position as Professor of Law at Georgetown University Law Center. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of Georgetown Law Center, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for either the exemption at 5 CFR 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. 208(b)(2).

Upon confirmation, I will resign my positions as Director of Georgetown University Law Center's Federal Legislation & Administrative Clinic, Co-Director of Georgetown University's Workplace Flexibility 2010 Initiative and Project Director of the Clinic's grant from the Alfred P. Sloan Foundation. For a 1-year period after my resignation from each of those organizations, I will not participate personally and substantially in any particular matter involving specific parties in which the Federal Legislation & Administrative Law Clinic, the Workplace Flexibility 2010 Initiative or the Alfred P. Sloan Foundation is a party or represents a party unless I am authorized to participate, pursuant to 5 CFR 2635.502(d).

In addition, I will not participate personally and substantially in any particular matter involving specific parties in which the Epilepsy Foundation (client of the Georgetown University Law Center's Federal Legislation & Administrative Clinic) is a party or represents a party, for a period of 1 year after I, as Director of the Clinic, last provided service to that client, unless I am first authorized to participate, pursuant to 5 CFR § 2635.502(d).

As co-author of "Law Making: An Introduction to Statutory and Regulatory Interpretation," I am entitled to receive royalties from Aspen Publications, Inc. I will not participate personally and substantially in any particular matter that has a direct

and predictable effect on the ability or willingness of Aspen Publications, Inc. to honor its contractual obligations regarding these royalties, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1).

I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

If confirmed, I will work with the EEOC designated agency ethics official to implement the restrictions outlined in my ethics agreement and the Ethics Pledge. Should any other questions arise, I will seek advice with the EEOC's ethics official.

*Question 9.* Do you understand that it is your continuing responsibility to supplement these and all other responses if you subsequently determine that they are not complete?

Answer 9. Yes.

*Question 10.* One reason we pass a considerable amount of legislation through this committee by unanimous consent is because of the good working relationship between the majority and minority, both Senators and our staff. If confirmed, will you pledge to cooperate in this type of a working relationship with all Senators on this committee, Democrat or Republican—by promptly responding to any written or phone inquiries, sharing information as soon as it becomes available—and directing your staff to do the same?

Answer 10. Yes.

*Question 11.* Have taxes always been paid on time, including Federal, State and local taxes, property taxes, business taxes and/or sales and use taxes, as well as taxes paid on behalf of any employees?

Answer 11. I have always filed and paid my taxes on time, with the following exception. I filed amended returns for 2006 and 2007, because I inadvertently did not report rental income received from friends who had stayed at my Takoma Park home. For 2006, I paid an additional \$1,373 in Federal tax and \$460 in State tax. For 2007, I paid an additional \$588 in Federal tax and \$141 in State tax.

#### ATTACHMENT A: PUBLICATIONS\*

1. *The Moral Values Project: A Call to Moral Action in Politics*, in G. Babst, E. Gill and J. Pierceson (eds.), *MORAL ARGUMENT, RELIGION AND SAME SEX-MARRIAGE: ADVANCING THE PUBLIC GOOD*, Rowman & Littlefield/Lexington (2009).

2. *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play in 2008*, in A. Booth and A. Crouter (eds.), *WORK-LIFE POLICY*, Urban Institute Press (2009).

3. *LawMaking: A Case Study of the Family and Medical Leave Act* (with Robin Appleberry), in *THE WORK-FAMILY HANDBOOK: MULTIDISCIPLINARY PERSPECTIVES, METHODS AND APPROACHES*, edited Marcie Pitt-Catsouphes, Ellen Ernst Kossek and Stephen Sweet, Mahwah NJ: Lawrence Erlbaum (2006).

4. *HIV and AIDS Infection*, ONE NATION INDIVISIBLE, Report of the Citizen's Commission on Civil Rights, April 1989.

5. *The Civil Rights Restoration Act of 1988: Covering AIDS and HIV Infection*, ACLU AIDS Project, June 1988.

6. *The Fair Housing Amendments Act of 1988*, ACLU AIDS Project, March 1989.

7. Case Comment, *Lynch v. Donnelly*, 98 HARVARD LAW REVIEW 174 (1984).

8. *The Limitations of Liberal Neutrality Arguments in Favor of Same-Sex Marriage*, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 55 (Hart Publishing 2002).

9. *The Clinton Administration and the Americans with Disabilities Act*, THE CONTINUING STRUGGLE: CIVIL RIGHTS AND THE CLINTON ADMINISTRATION, with Sharon Perley, Citizens' Commission on Civil Rights (C. Yu & N. Taylor eds. 1997).

10. *The Employment Non-Discrimination Act*, NEW CHALLENGES: THE CIVIL RIGHTS RECORD OF THE CLINTON ADMINISTRATION, with Stephen Curran, Citizens' Commission on Civil Rights (C. Yu & W. Taylor eds. 1995).

\* Note: *The Moral Values Project: Deploying Moral Discourse for LGBT Equality*, was a monograph prepared for the National Gay and Lesbian Task Force Foundation under contract in 2006 for an internal meeting. I have not been able to secure permission to release this document. The main points from that monograph have, however, been incorporated into my chapter, *The Moral Values Project: A Call to Moral Action in Politics*, which is the first publication attached.

11. *Antidiscrimination Requirements of the ADA*, IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS (L. Gostin & H. Beyer eds, 1992).

12. *Gay Rights, Religion and Fear: A Call for Informed Moral Discourse*.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY CHAI FELDBLUM

*Question 1.* You are well known for your advocacy of a number of employment discrimination laws that EEOC is charged or would be charged with enforcing. For example, your official biography for this nomination identifies your role in drafting the Americans with Disabilities Act and the ADA Amendments Act enacted last year, as well as drafting and negotiating early versions of the Employment Non-Discrimination Act (ENDA). Having operated in the role of advocate for these laws for many years, how can the committee be sure that you would not continue that advocacy as a Commissioner? Would you attempt to achieve changes you did not achieve in legislative negotiations through rulemaking and other statutory interpretation?

Answer 1. If confirmed, I would not attempt to achieve changes in any legislation through rulemaking and other statutory interpretation that were not achieved through legislative negotiations. I am acutely aware of the different role to be played by an advocate as compared to the responsibilities of a Commissioner of an independent agency. If confirmed, I will faithfully implement the laws as enacted by Congress and signed by the President.

*Question 2.* Since you participated in drafting the Employment Non-Discrimination Act (ENDA) and would be charged with enforcing it if you are confirmed and it is enacted, your views on some of the questions the bill has raised are extremely relevant. For example, in the absence of a specific employment protection for sexual orientation, some courts have interpreted title VII to provide such protection. If ENDA is enacted, is it your intention a successful plaintiff filing claims under both title VII and ENDA for the same alleged wrongful conduct could obtain a dual recovery? If not, why does ENDA contain a provision specifically providing that it does not invalidate or limit the rights, remedies, or procedures available under any other law or regulation? How are we to interpret this provision?

Answer 2. If ENDA is enacted, I would be guided by the text of the law, as enacted by Congress and signed by the President. In addition, I would study the legislative history to determine if Congress had a specific intent on the issue of coverage under both title VII and ENDA. The EEOC would have the responsibility of carrying out that intent, as long as it is consistent with the text of the law.

*Question 3.* The ENDA bill creates title VII-like employment protections for sexual orientation and sexual identity. As an expert witness testified in early November at a Health, Education, Labor, and Pensions Committee hearing on the bill, individuals protected under ENDA would actually have access to greater remedies than those protected under title VII by way of their race, color, religion, sex or national origin, or under the ADA by way of disability. Namely, ENDA claimants could recover attorney and other fees from administrative proceedings, including an EEOC determination. EEOC decisions are not considered "final orders" and so are not subject to appeal. Therefore, an employer would not be able to contest any such award and, in fact, the EEOC is not even required to provide reasons for its decisions. Do you believe that plaintiff's alleging discrimination based on sexual orientation and sexual identity should be entitled to greater remedies than title VII and ADA plaintiffs? Why would it be appropriate to deprive employers of their due process rights to contest attorney's fees awards solely for plaintiff's alleging discrimination based on sexual orientation and sexual identity?

Answer 3. In general, I do not believe that individuals who experience discrimination on the basis of sexual orientation and gender identity should be entitled to greater remedies than those who experience discrimination on the basis of disability, race, sex, color, religion and national origin. Should I be confirmed, I would be bound by the laws enacted by Congress and signed by the President, including ENDA, if enacted.

*Question 4.* In addition to prohibiting discrimination in employment on the basis of gender identity, ENDA places affirmative obligations on employers with regard to shared shower or dressing facilities in which being seen unclothed is unavoidable for individuals who have either "undergone" or who are "undergoing" transition to a different gender. The bill text currently creates a number of questions about how this requirement would work. As one of the bill drafters who would also be charged with enforcing this law if you are confirmed, what are your views on how this would be implemented? In your view, what should be the level of special consideration for

gender-transitioning employees—privacy at work? Specifically, what would constitute “notification” that private dressing and shower facilities will be required? Would the requirement also extend to bathroom facilities? The bill states that no new facilities would be required, but does that also mean employers would not be required to renovate existing facilities?

Answer 4. Questions regarding privacy and gender identity are very important. If confirmed to the EEOC, I will be guided by the text of the law, as enacted by Congress and signed by the President. In addition, I would look to the legislative history to see if Congress had a specific intent on these questions. As of this point in time, there is no committee report from either the House or Senate committees with jurisdiction over ENDA. There are several States and localities that have passed laws establishing non-discrimination protection based on gender identity, however, and the committees may be interested in studying those laws in order to provide guidance to the agency.

*Question 5.* The EEOC has struggled with significant backlogs at various times throughout its history. According to some reports, over 12 percent of charges have been pending for 540 days or longer. What structural changes can be made to resolve this recurring issue permanently?

Answer 5. I agree with the comments made by EEOC Chair nominee Jacqueline Berrien at our confirmation hearing last week with regard to addressing the backlog situation. In particular, I agree with Ms. Berrien that we must always remember that backlogs are not simply numbers—they are real people and real employers who are being affected by the delays. If confirmed, I look forward to being educated by individuals inside the agency about the challenges in the current system. And if structural changes are appropriate, based on the data regarding the current system, I look forward to working with my fellow Commissioners and the Chair in facilitating those changes.

*Question 6.* Do you support the use of “testers”—individuals paid by the EEOC to pretend to seek employment in the hopes of catching employers in an act of discrimination—to develop allegations of discrimination against employers? Given the sizeable backlog that EEOC currently has, is it appropriate to manufacture allegations when EEOC cannot process the claims of employees with actual grievances in a timely manner?

Answer 6. The issue of testers is complex. As one can imagine, it is difficult to determine whether discrimination has occurred in the hiring process, because applicants themselves often have no way of knowing whether such discrimination has occurred. That is the reason the testers concept was developed. However, if confirmed, I would want to be briefed by staff at the EEOC regarding the use of testers by the agency. In addition, I would want to engage members of the business community, to hear their views on the issue.

*Question 7.* A Government Accountability Office Report (GAO) published this summer outlined a number of concerns about the fairness, promptness and impartiality of the EEO complaint process (GAO-09-712). Assuming you are familiar with this report in anticipation of your service, what is your evaluation of its findings and recommendations?

Answer 7. Ensuring a fair, prompt, and impartial EEO complaint process is very important. I am not familiar with the GAO report cited above at this point in time. If confirmed, however, I look forward to studying it closely. I have used GAO reports often in my legal work, and I have consistently found those reports to be excellent sources of objective and useful data and analysis.

*Question 8.* The Government Accountability Office’s recent report (GAO-09-712) and others have questioned whether EEOC staff members receive enough training to gain the knowledge and skills necessary to perform their job effectively. What is your view of this issue? Do you have any plans to enhance or alter training of EEOC staff?

Answer 8. I am not currently familiar with the training that EEOC staff members receive. However, ensuring that individuals who are handling sensitive charges have the requisite knowledge and skills to perform their jobs effectively and fairly seems to me to be of paramount importance. If confirmed, I am fully committed to working closely with the Chair to ensure that EEOC staff has the necessary material support to be able to effectively carry out their mission-related responsibilities.

*Question 9.* One solution proposed in the GAO report was to establish performance-based accountability measures to enhance timeliness and quality of investiga-

tions by agency staff. Would you support enhancing EEOC services in this manner? Are there any obstacles to implementing such a plan?

Answer 9. I am not sufficiently familiar with all of the challenges of the current system to provide an opinion on establishing performance-based accountability measures. Nevertheless, as I note above, it seems of paramount importance to me that EEOC staff perform in an efficient and fair manner. I would imagine that this is exactly how most staff would want to perform, given the important responsibilities they have in dealing with sensitive charges.

*Question 10.* Some equal employment opportunity (EEO) practitioners involved with the Federal EEO complaint process have proposed transferring the investigation responsibility to EEOC rather than the Federal agencies from which the complaint arises. Do you favor this proposal and would you implement it?

Answer 10. I am aware that there is an apparatus for dealing with EEO complaints from Federal employees that uses internal agency procedures. If confirmed, I would want to be briefed on why that approach was initially adopted and the advantages and disadvantages of using internal systems at the Federal agencies against whom the charges have been lodged.

*Question 11.* All too often Federal agencies have found that their actions have unintended consequences on U.S. industries and workers that could have been discovered had the action been more completely vetted. The Administrative Procedures Act is intended to address this, but it does not cover all agency action. Will you commit to consult with all stakeholders for each particular issue when the Commission is considering regulatory or other action?

Answer 11. I am a very strong believer in consulting with all relevant stakeholders before engaging in regulatory or other action. From my perspective, this consultation is the best way to make informed decisions—by ensuring that one actually is informed.

*Question 12.* As a former small businessman, I know how difficult it can be to navigate the bureaucratic maze of Federal agencies and regulations. Small businesses create 80 percent of our Nation's net new jobs and, in turbulent economic times such as these, I believe we should be doing everything in our power to make sure they can stay in business. Please outline what EEOC practices and policies you plan to maintain, enhance or create to assist small businesses?

Answer 12. As I noted during the confirmation hearing, I am a strong believer in the usefulness for both employers and employees of having discrimination-free workplaces. Therefore, I would be very interested in working with small business to help develop the best mechanisms for enabling such businesses to maintain discrimination-free workplaces. Before recommending specific practices and policies, I would want to speak with agency officials and stakeholders and study the practices and policies that the EEOC currently uses to assist small businesses in complying with anti-discrimination laws.

*Question 13.* What is your view of the responsibility of the EEOC District offices in the conciliation process? Are the appropriate parties being consistently involved in the process? Does EEOC management at all levels provide enough support to the conciliation process?

Answer 13. I believe that the conciliation process is a very important one for both employers and employees. However, I am not sufficiently informed about the current conciliation process used by the EEOC to provide an informed view on this question. If confirmed, I would want to be briefed on how the conciliation process is currently working and to then work with my fellow Commissioners and the Chair to enhance that process.

*Question 14.* Will you pledge that you will work to ensure that EEOC will vigorously support resolving charges through mediation, settlement and conciliation?

Answer 14. I believe that mediation, settlement and conciliation are all very important processes for resolving charges without having to resort to expensive litigation. If confirmed, I would work with my fellow Commissioners and the Chair to ensure that such processes are being used in the most efficient and effective manner for both employers and employees.

*Question 15.* The EEOC was charged with finalizing regulations under the Genetic Information Non-Discrimination Act (GINA) by May of this year, 1 year after enactment, but has missed this deadline. The law's mandatory compliance date is 18 months after enactment, which also happens to be the same week the HELP Committee held your confirmation hearing. Do you believe it is fair to require em-

ployers to comply with this statute when EEOC has not yet provided final regulatory guidance? What sort of standards should employers be held to in the absence of regulatory guidance?

Answer 15. In the absence of regulations, employers are bound by the text of the law and any relevant legislative history. If confirmed to the EEOC, I look forward to helping ensure that the regulations to implement GINA are issued as soon as possible.

*Question 16.* Do you believe that an employer's use of credit or criminal background checks in hiring is or can be discriminatory? Please explain why or why not.

Answer 16. As I understand it, the EEOC has issued several policy statements about when employers' exclusion of applicants based on conviction or arrest records would amount to unlawful employment discrimination. In addition, I am aware that the EEOC has filed a lawsuit against one company based on its use of credit history and criminal charges and convictions of applicants.

I am not, however, familiar with the details of either the case or the policy statements. If confirmed, I would be interested in learning more about the details of both in order to understand the legal rationale of both the case and the policy statements.

*Question 17.* I have been told that funding for EEOC's outside mediators has been decreased over the last several years and that this has been a particularly acute problem in more rural/suburban areas. As a Senator representing one of many more rural States, this concerns me. Do you agree EEOC has a duty to ensure its services are available nationally?

Answer 17. I agree that EEOC has a duty to ensure its services are available nationally. We need workplaces that are free of discrimination across this country. Such workplaces are critical to the productivity and vitality of our Nation's workforce competing in the global marketplace. At this time, I am unfamiliar with the agency's policy concerning the use of outside mediators in rural and suburban areas. However, I am committed to making an evaluation of the agency's presence and service capacity and to working with the Chair and with Congress to ensure that the full range of agency services are available and accessible wherever needed.

#### RESPONSE TO QUESTIONS OF SENATOR COBURN BY CHAI FELDBLUM

*Question 1.* What assurances can you give the Senate that, if confirmed, your past advocacy for various groups will not cloud your objectivity or judgment in your decisionmaking process?

Answer 1. I am acutely aware of the different role to be played by an advocate as compared to the responsibilities of a Commissioner of an independent agency. If confirmed, I will faithfully implement the laws as enacted by Congress and signed by the President.

*Question 2.* President Obama has been a champion of government transparency during his time in the U.S. Senate and campaigned on a promise to make the Federal Government more transparent. What is your philosophy of transparency, accountability and management?

Answer 2. I believe it is critical that the processes of the Federal Government be transparent, that members of the Federal Government be accountable to the people, and that the Federal Government be well managed. If confirmed, I look forward to working with my fellow Commissioners and the Chair to ensure that our work at the EEOC reflects these principles.

*Question 3.* President Obama's transition Web site said this about how Cabinet agencies will operate:

Conduct Regulatory Agency Business in Public: Obama will require his appointees who lead the executive branch departments and rulemaking agencies to conduct the significant business of the agency in public, so that any citizen can see these debates in person or watch them on the Internet.

Please specify how you will implement this transparency mandate in your position should you be confirmed.

Answer 3. I believe the significant business of an agency should be conducted in public so that citizens can view these important debates. If confirmed, I look forward to learning more about how the EEOC is currently implementing any transparency requirements announced by the President, and then to working with my fellow Commissioners and the Chair to continue such efforts, or to enhance them if necessary.

*Question 4.* If confirmed, what will be your policy priorities?

Answer 4. If confirmed, my policy priorities will be to ensure that the anti-discrimination requirements set forth in our civil rights employment laws, as enacted by Congress and signed by the President, are faithfully and effectively implemented. This requires engaging with entities that have a stake in the effective and faithful implementation of such laws (including both employee and employer representatives) and to hear from them how the EEOC can best carry out its mandate.

*Question 5.* Please explain which provision(s) in the Constitution you believe authorized Congress to create the EEOC.

Answer 5. The Supreme Court ruled in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) that Congress has the power under the Commerce Clause to enact the public accommodation provisions of the Civil Rights Act of 1964. The same Commerce Clause power provides Congress with the power to enact the employment provisions of the Civil Rights Act of 1964. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 n. 6 (1979). In addition, Congress has power under Section 5 of the Fourteenth Amendment to extend the employment provisions of title VII to State employers. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n. 9 (1976).

As part of those employment provisions, Congress created the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. §2000e-4(a). Congress gave the EEOC the power to cooperate with regional, State, local, and other agencies, both public and private, and individuals; pay witnesses whose depositions are taken or who are summoned before the Commission or any of its agents; furnish to persons subject to the employment provisions of the law technical assistance as they may request it to further their compliance with law; engage in conciliation or other remedial action, upon the request of an employer or labor union, in certain circumstances; to engage in technical studies as appropriate to effectuate the purposes and policies of the employment provisions; and to intervene in civil actions brought by an aggrieved party against a respondent other than a government agency. 42 U.S.C. §2000e-4(g). These powers are similar to powers given to other independent agencies.

Article II, §2 of the Federal Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” (Emphasis added.) Thus, the Federal Constitution presumes that Congress will enact legislation that will create officers of the United States (i.e., executive personnel) who will be subject to the nomination and confirmation processes established in the Constitution.

The Supreme Court has consistently upheld the power of Congress to create both executive agencies and independent agencies. In *Hampton & Co. v. U.S.*, 276 U.S. 394 (1928), the Court upheld the validity of the Tariff Act of 1922, giving the President the power to modify tariffs, using the expertise of a Tariff Commission created by Congress in that law.<sup>1</sup> As long as Congress remains within the constraints of the non-delegation principle announced in the *Hampton* case, the Supreme Court has upheld the power of Congress to create executive and independent agencies to help faithfully implement the laws that it passes. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court upheld Congress' power to establish set terms for commissioners at independent agencies, who could not be removed by the President before the expiration of those terms, following a duly established nomination and confirmation process.

*Question 6.* What does the phrase: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” mean to you with respect to the free exercise of religion?

Answer 6. The First Amendment is an incredibly important source of protection for religious and non-religious people, in terms of both its Free Exercise and Establishment Clause purposes. As I note in my answer to the first question, if confirmed, my actions will be guided by the current state of the law and not by my personal views. Hence, what the phrase, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” means will depend on what the Supreme Court has said it means. If confirmed, and if an issue arises at

<sup>1</sup>Section 315 of the Tariff Act provided that: “Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.”

the EEOC requiring the application of the First Amendment, I will apply the law as set forth by the Supreme Court.

*Question 7.* Do you understand the First Amendment religious liberty protection to include the right of a health care worker to not have to perform or support the performance of an abortion as a condition of employment? What about a healthcare provider in a pharmacy refusing to dispense an abortifacient drug as a condition of employment?

*Answer 7.* In cases described in the question, I presume that the health care workers would seek a reasonable accommodation under title VII to accommodate their religious beliefs. The Supreme Court has constrained the scope of that reasonable accommodation provision through its interpretation of the term “undue hardship.” I am not aware of cases in which this constricted interpretation has been held to be a violation of the First Amendment. If confirmed, I would be interested in learning more about that issue.

*Question 8.* Have you considered, or have any interest in changing, modifying, or revoking Section V of the National Enforcement Plan?

*Answer 8.* I have reviewed Section V of the National Enforcement Plan in order to respond to this question. I have no basis, at this point, for thinking I would be interested in changing, modifying or revoking section 5. However, if confirmed, I look forward to learning more about how section 5 is working in practice and to working with the Chair and my fellow Commissioners in ensuring that the relationship between the EEOC’s General Counsel and the Commissioners results in the effective and thoughtful implementation of the employment non-discrimination laws enacted by Congress.

*Question 9.* Do you believe it is employment discrimination for a school principal to reassign to a high-school teaching position a kindergarten teacher who is undergoing a transgender sex change because the principal is concerned that kindergartners are not mature enough to deal with their teacher’s transformation?

*Answer 9.* The Supreme Court has ruled that discriminatory actions based on stereotypes about sex constitutes sex discrimination under title VII. In some cases, individuals who have changed their gender from the one assigned to them at birth have presented factual evidence that they have experienced discrimination based on stereotypes about sex. However, the facts presented in this question do not indicate whether such stereotypes were in play in this case.

*Question 10.* Do you understand title VII to already prohibit sexual orientation discrimination?

*Answer 10.* I do not believe that any court has held that title VII prohibits sexual orientation discrimination.

*Question 11.* If a state enacted a law or regulation requiring medical professionals to assist their patients in euthanasia, would Federal law provide any protections for the rights of conscience of these medical professionals?

*Answer 11.* I am not conversant with all the Federal laws that might exist to provide protections for such medical professionals. I am aware that the Supreme Court has constrained the scope of the reasonable accommodation provision for religious beliefs under title VII through its interpretation of the term “undue hardship.” I presume that this interpretation of “undue hardship” would apply to any accommodation sought by such medical professionals.

*Question 12.* Please explain your belief regarding when religious liberty trumps same-sex identity rights and when it does not.

*Answer 12.* Under current law, a religious organization may require that employees conform to the religious tenets of the organization. In such cases, the religious liberty of the organization will trump other identity interests of applicants or employees protected under title VII.

Current law does not permit individuals to discriminate on the basis of race, sex, religion, national origin, or disability, if they experience compliance with such laws as conflicting with their religious beliefs. *See Newman v. Piggie Park Enters.*, 256 F. Supp. 941 (D.S.C. 1966) (rejecting claim that a white person can get a personal exemption from the Civil Rights Act of 1964 because “his religious beliefs compel him to oppose any integration of the races whatever”); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (corporation owned by religious person is required to accommodate an employee, as required by title VII, even if such accommodation causes the employer “spiritual” hardship.)

*Question 13.* During the confirmation hearing you announced you had requested that your name be withdrawn from a document from a group known as “Beyond Marriage” that you signed in 2006 supporting “a new vision for securing governmental and private institutional recognition of diverse kinds of partnerships, households, kinship relationships and families. In doing so, we hope to move beyond the narrow confines of marriage politics as they exist in the United States today.” You said: “I agree with the general thrust of the statement that we ought to support care-giving relationships. But the statement goes beyond what I would have said to communicate that point.” Please explain what you would have said to communicate that point.

*Answer 13.* I would have said what I had already said in writings prior to 2006, and in writings subsequent to 2006: that a significant amount of caregiving exists in our society and it is important for society to support these caregiving relationships.

*Question 14.* The Beyond Marriage document is extensive and thoughtful presenting intellectual arguments advancing the idea that “to have our government define as ‘legitimate families’ only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households and relationships.” Please explain how much of the Beyond Marriage document you had read and gave thought to before you signed it.

*Answer 14.* I read the Beyond Same-Sex Marriage statement when it was sent to me by a fellow legal academic. I agreed with the general thrust of the document that it is important to support the types of caregiving relationships that exist in our society.

*Question 15.* Please explain why you waited 3 years, and until a few weeks before your confirmation hearing, to request that your name be withdrawn from the petition?

*Answer 15.* I did not sign the Beyond Same-Sex Marriage document in order to state a belief that the government should recognize polygamy or polyamorous relationships. I have never held such a belief, nor have I advocated for such a position in my writings in the area of LGBT rights. During the course of the nomination process, this statement in the document came to my attention. Because it did not reflect my beliefs, I asked for my name to be removed.

*Question 16.* Do you believe it is employment discrimination for an employer to refuse to extend health and other benefits to partners of an employee in a polyamorous relationship even though the employer extends such benefits to marriage partners and civil union partners?

*Answer 16.* No.

*Question 17.* In your writings you have advanced a new term known as “identity liberty.” Please explain this new “identity liberty” and explain, if confirmed, how your understanding of it will influence your decisionmaking?

*Answer 17.* In an article in Brooklyn Law Review (2007) and in a chapter in a book edited by Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson (2008), I argued that the Due Process Clause of the Federal constitution should be understood as including both identity liberty and belief liberty. If confirmed, nothing in that article or chapter that goes beyond existing constitutional law would influence my decisionmaking, since my role would be to apply existing law.

#### ADDITIONAL RESPONSE TO QUESTIONS OF SENATOR COBURN BY CHAI FELDBLUM

*Question 1.* In your responses to my previous question regarding your policy priorities, you both focused on the enforcement duties of EEOC. As you know, the EEOC does more than enforcement, and as Chair and Commissioner you will have various opportunities to shape national discrimination protection policy. Related to those policy-related functions of the Commission, please explain any policy priorities you have considered or have interest in developing?

*Answer 1.* In my response to your question regarding my policy priorities, I stated:

“If confirmed, my policy priorities will be to ensure that the anti-discrimination requirements set forth in our civil rights employment laws, as enacted by Congress and signed by the President, are faithfully and effectively implemented.”

Effective implementation of a law requires more than simply enforcement of the law. It also requires thoughtful technical assistance and public education. If con-

firmed, I look forward to working with the Chair and my fellow Commissioners on these efforts. Implementation of the law does not, however, entail shaping national discrimination policy other than in implementing the laws passed by Congress and signed by the President.

*Question 2.* You have been applauded for your work on the ADA Act and the ADA Amendments Act and have also been credited with helping to craft ENDA. If ENDA is passed with various changes that you oppose, how will you, as Commissioner, reconcile your very personal involvement in crafting the legislation and your knowledge of the legislative ideals, against what actually becomes law when the EEOC considers ENDA regulations or ENDA-related cases that may come before you as a Commissioner?

*Answer 2.* If confirmed, I will have no difficulty carrying out my role as a Commissioner of the EEOC, with regard to ENDA or any other law passed by Congress and signed by the President. My role will be to work with my fellow Commissioners to issue regulations that carry out the requirements of the law as enacted by Congress.

*Question 3.* In your response to my previous question regarding objectivity and judgment, you stated that you are aware of the different roles and will faithfully implement the law. Please explain further what principles will guide you in ensuring that you follow the letter of congressional enactments and not your policy desires of how Congress should have drafted the statute in question.

*Answer 3.* If confirmed, I will be guided by the obligations of my role as a Commissioner of the EEOC. In that role, my responsibility is to work with my fellow Commissioners in carrying out the intent of Congress as embodied in the legislation it has passed.

*Question 4.* In your response to Senator Isakson you said you support ENDA's religious liberty protection. However, various religious organizations have expressed concern that the religious liberty protection in ENDA is not extensive enough. As a crafter of ENDA, how do you respond to those criticisms?

*Answer 4.* The coverage of the religious organization provision proposed in ENDA is identical to the coverage of the religious organization provision in Title VII of the Civil Rights Act of 1964, with the exception that it goes beyond permitting discrimination based on religion and provides an allowance for discrimination based on sexual orientation and gender identity. My understanding is that many religious organizations are comfortable with the scope of this exemption.

*Question 5.* In your response to my question regarding the First Amendment's free exercise clause, you stated that the meaning of that phrase "will depend on what the Supreme Court has said it means." What weight will you give to the legislative history behind the First Amendment's free exercise clause?

*Answer 5.* If confirmed, it would not be my role to determine the meaning of the First Amendment. I and my fellow Commissioners would be guided by the Supreme Court's rulings with regard to the First Amendment. Whether individual Justices of the Supreme Court would choose to use the legislative history of the First Amendment in reaching their decisions would be their choice.

*Question 6.* In your response to my question regarding conscience protection, you stated that the right of a health care worker to not have to perform or support the performance of an abortion as a condition of employment was dependent upon the Supreme Court's constraint of the scope of that reasonable accommodation provision through its interpretation of the term "undue hardship." Do you agree with the decisions of the following courts in declaring that nurses who objected to duties related to abortion were entitled to accommodations? *Tramm v. Porter Mem'l Hosp.*, No. H87-355, 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 22, 1989); *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. App. 1981).

*Answer 6.* In *Tramm v. Porter Mem'l Hosp.*, 128 F.R.D. 666 (N.D. Ind. Dec. 22, 1989), a U.S. Magistrate issued an Order requiring that various mental health records of the plaintiff be released to the defendant and that the plaintiff be required to submit to a second deposition by the defendant's new attorney. This Order was issued in a case in which the plaintiff claimed violations of her rights under the First Amendment, Title VII of the Civil Rights Act of 1964 and the Indiana Conscience Clause after she had been terminated for refusing to clean surgical instruments that had been used in abortions. While the Magistrate never reached the merits of the case, this case provides an example of what I said in my answer to the original question: that in cases of this kind, individuals can bring claims under title VII seeking a reasonable accommodation based on their religious beliefs.

Whether such an accommodation will pose an undue hardship for the employer will depend on the facts of the case.

In *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. App. 1981), the State court applied the following provision of State law:

“No person who is a member of, or associated with, the staff of a hospital nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds, shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.”

In interpreting this provision of State law, the State court used title VII standards regarding the reasonable accommodation of religion. Based on its review of the facts, a majority of the court determined that there was no undue hardship on the employer, while one dissenting judge determined there was an undue hardship. I have no basis for determining whether the majority or the dissent was correct, given the fact-based nature of the claim.

*Question 7.* In your response to my question regarding transgender rights in employment discrimination, you responded that the Supreme Court has ruled that discriminatory actions based on stereotypes about sex constitutes sex discrimination under title VII. Do you interpret that Supreme Court ruling, or any other Federal court decision, to embrace transgender stereotypes?

*Answer 7.* To my knowledge, none of the cases that I am aware of refer to “transgender stereotypes.” Rather, several Federal courts have applied the Supreme Court’s ruling regarding stereotypes based on sex to rule in favor of plaintiffs who are transgender and who have successfully alleged discrimination based on sex stereotyping.

*Question 8.* Do you believe it is employment discrimination for an employer who extends health benefits to its employees to refuse to include contraception, birth control, and/or abortion in those benefits on the basis of the employer’s religious objection to such activities?

*Answer 8.* A December 2000 EEOC Commission Decision found reasonable cause to believe that discrimination occurred under Title VII of the Civil Rights Act in two charges challenging the exclusion of prescription contraceptives from a health insurance plan. I have not reviewed the case law in this area to know whether the courts have agreed with the EEOC in this area. I do not believe the EEOC has created a religious exemption in this area.

*Question 9.* In your response to my question regarding whether title VII already prohibits sexual orientation discrimination, you said you do not believe any court has held that. Do you understand the actual text of title VII to already prohibit sexual orientation discrimination?

*Answer 9.* The actual text of title VII prohibits discrimination based on sex and does not refer to sexual orientation.

*Question 10.* In your response to my question regarding the “Beyond Same-Sex Marriage” statement you said you only meant that it is important for society to support these caregiving relationships. Isn’t that exactly what the “Beyond Same-Sex Marriage” document is advocating? Please explain the difference between your position and the “Beyond Same-Sex Marriage” document?

*Answer 10.* The difference between my position and the “Beyond Same-Sex Marriage” document is that I advocate for government recognition and support for a range of caregiving relationships, but do not include within those caregiving relationships those that are polygamous or polyamorous.

*Question 11.* It appears that your response #14 (the first #14 . . . the responses have two #14s) is non-responsive to my question. Please explain how much of the Beyond Marriage document you had read and gave thought to before you signed it? Also, you mention that the document came to your attention during the nomination process. Please explain how it came to your attention.

*Answer 11.* I read the entire statement when it was sent to me by a fellow legal academic. The document came to my attention during the nomination process because I was astonished to find out that certain individuals believed I supported polygamy and polyamory. The source of that belief was apparently the “Beyond Same-Sex Marriage” statement.

*Question 12.* In your response to the second #14 you said that you have “never held the belief that government should recognize polygamy or polyamorous relationships . . . nor have I advocated for such a position in my writings in the area of LGBT rights.” However, in your article “Gay is Good: The Moral Case for Marriage Equality and More” you state at page 5:

“Moreover, I hope to demonstrate how the (more) judgmental moral argumentation that leads one to the conclusion that government has an affirmative obligation to recognize marriage for same sex couples *leads one equally to the conclusion that government has an affirmative obligation to recognize important social relationships outside of marriage.*” (Emphasis added.)

And at page 41:

“The same moral duty that requires the State to support marriage relationships and non-marital sexual relationships should be extended to support NSDPs (non-sexual domestic partners).”

Please explain this apparent contradiction between your response to my question for the record and your article.

Answer 12. There is no contradiction between my answer to your question and my writings. I do not believe that the government should recognize or support polygamy or polyamorous relationships, and my writings are consistent with that view.

As the first quote indicates, I believe that there are important caregiving relationships that exist outside of marriage that should be supported by the government—including grandparents caring for grandchildren, elderly people living together, or siblings living together. I do not believe that the government should support polygamous or polyamorous relationships.

With respect to the second quote, to the extent that I refer to non-marital sexual relationships, I am referring only to relationships between two people. The only relationships involving more than two individuals that I believe the government should recognize or support are *non-sexual* caregiving relationships.

*Question 13.* In your response to question #16 regarding your advancement of a new term “identity liberty” and how your understanding of that new term will influence your decisionmaking, you respond by saying that nothing in that article that “goes beyond existing constitutional law would influence my decisionmaking, since my role would be to apply existing law.” However, in addition to applying existing law, your role as a Commissioner will include policymaking. How do you intend to use your policymaking capacity as Commissioner to expand your beliefs regarding legal protections for “identity-liberty”?

Answer 13. If confirmed, I will not engage in policymaking as a Commissioner other than to implement the laws as passed by Congress and signed by the President. My views regarding the scope of the Due Process Clause of the Federal constitution would have no relevance to the implementation of such laws.

#### RESPONSE TO QUESTIONS OF SENATOR ISAKSON BY CHAI FELDBLUM

*Question 1.* You have written that “there can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win.” Can you give me an example of such a conflict and how you would attempt to resolve it?

Answer 1. I have never written the sentence that “there can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win.” Such a sentence does not accurately reflect my position on religious liberty.

The sentence you refer to appears in a quote attributed to me in an article written by Maggie Gallagher in *The Weekly Standard* in 2006. During that interview, Ms. Gallagher and I were primarily discussing situations in which individual religious people were seeking exemptions from general anti-discrimination laws because they were experiencing a conflict between their personal religious beliefs and compliance with a non-discrimination law.

I told Ms. Gallagher that, in such situations, I agreed with current Federal anti-discrimination law. That is, under current Federal law, employers may not discriminate on the basis of race, sex, religion, national origin, or disability, even if complying with such a non-discrimination law might create a conflict for them with their religious beliefs.

My quote to Ms. Gallagher indicated my agreement with current law, should a non-discrimination law such as ENDA be enacted.

In Ms. Gallagher’s article, she also discussed situations in which religious organizations, such as Catholic Charities USA, were experiencing a conflict between their religious beliefs and compliance with anti-discrimination laws.

In light of that fact, I was particularly pleased to be able to clarify my position on religious organizations in response to questions from Senator Enzi during my confirmation hearing on November 19th. To reiterate, in response to your question here, my position with regard to religious organizations and employment is the following:

I support the current exemption for religious organizations in Title VII of the Civil Rights Act, as well as the proposed exemption for religious organizations in the Employment Non-Discrimination Act. These exemptions mean that when a religious organization experiences a conflict between staying true to its religious liberty interests and complying with a non-discrimination law protecting the sexual orientation and gender identity interests of prospective employees, the religious liberty interests of the organization prevail. This is the case regardless of the position held by the employee in the organization.

*Question 2.* You have written that “religious beliefs should be accorded no more weight—and no less weight—than a belief derived from a non-religious source.” How do you reconcile this statement with the First Amendment guarantee of free exercise of religion?

*Answer 2.* I do not believe that religious beliefs should receive less weight than other beliefs when considering a free exercise claim under the First Amendment. The sentence that I wrote refers to a claim being brought under an entirely new category of protection that I was recommending the courts should recognize under the Due Process Clause. The full paragraph in which the sentence you quote appears is the following (new emphasis in bold and bold italics; italics emphasis in original):

Analyzing belief liberty under the Due Process Clause (**and not simply under the First Amendment**) serves an additional useful purpose. An individual’s deeply held beliefs may derive from religious sources, from purely secular sources or from spiritual sources that are not traditionally viewed as religious. If these beliefs are an integral part of the person’s sense of self, my argument is that they constitute belief liberty. **The particular source of the individual’s beliefs is not the barometer of their importance for due process purposes.** For belief liberty, the source of the beliefs (be it faith in God, belief in spiritual energy or a conviction of the rational five senses) has no relevance. A belief derived from a religious faith should be accorded no *more* weight—and no *less* weight—than a belief derived from a non-religious source.

To clarify my position on religious liberty, I believe the First Amendment is an incredibly important source of protection for religious and non-religious people, in terms of both its Free Exercise and Establishment Clause purposes. For that reason, I support the exemptions for religious organizations under title VII, even though it privileges religious beliefs over other beliefs. Apart from the First Amendment, I have suggested in my legal scholarship that religious beliefs also deserve protection under the Due Process Clause, just like any other important belief or liberty interest.

If confirmed, my actions will be guided by the current state of the law and not by my personal views. I am acutely aware of the different role to be played by an advocate as compared to the responsibilities of a Commissioner of an independent agency. If confirmed, I will faithfully implement the laws as enacted by Congress and signed by the President.

*Question 3.* Do you believe that, under current law, a Christian business owner retains his religious freedom when he engages in commerce? Or does he lose that right to free exercise when he hires and fires? How would passage of ENDA change this?

*Answer 3.* I believe that current law, as set forth in the case of *Newman v. Piggie Park Enters.*, 256 F. Supp. 941 (D.S.C. 1966) and in the case of *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) is correct. In the *Piggie Park Enterprise* case, a district court in South Carolina rejected a claim that a white person could get a personal exemption from the Civil Rights Act of 1964 because “his religious beliefs compel him to oppose any integration of the races whatever.” In the *Townley* case, the Ninth Circuit held that a corporation owned by a religious person was required to accommodate an employee, as required by title VII, even if such accommodation caused the employer “spiritual” hardship. I do not believe passage of ENDA would change current law in this regard. As stated above, if confirmed, my actions will be guided by the current state of the law and not by my personal views.

*Question 4.* A primary objective of EEO laws was to promote prompt and voluntary resolution of claims. Do you support that objective? Does that mean that you believe in a sincere effort at resolution through conciliation and before litigation?

*Answer 4.* The prompt and voluntary resolution of EEOC claims can significantly benefit both employers and employees. For that reason, if confirmed, I look forward to learning more about EEOC's current efforts to use conciliation prior to litigation. In addition, if confirmed, I look forward to working with my fellow Commissioners and the Chair to ensure that the processes of mediation and conciliation are used in the most efficient and effective manner for both employers and employees.

*Question 5.* Do you think the EEOC has an obligation to provide guidance to employers to facilitate voluntary compliance parallel to its law enforcement role?

*Answer 5.* Yes.

*Question 6.* Do you believe that illegal aliens are entitled to equal protection under the employment discrimination laws, even though their employment here is illegal?

*Answer 6.* I have not recently reviewed the state of constitutional doctrine regarding illegal aliens. My understanding, based on the plain text of title VII, is that EEOC is not provided with discretion to ask about the immigration status of complainants. But I have not looked into whether there would be any constitutional or statutory restrictions on EEOC choosing to do so. If confirmed, I look forward to learning more about EEOC's current policy concerning the immigration status of complainants.

#### RESPONSE TO QUESTIONS OF THE HELP COMMITTEE BY VICTORIA A. LIPNIC

*Question 1.* In your letter to the Designated Ethics Officer, you state that you will not participate personally and substantially in any particular matter involving specific parties in which your former employer is a party or represents a party and certain other organizations and entities you were affiliated with for a 1-year period unless you first receive a written waiver pursuant to Federal regulations. On January 21, 2009, President Obama signed Executive Order 13490, "Ethics Commitments by Executive Branch Personnel" that requires a separate 2-year recusal for any "particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." Please explain the process you will implement for ensuring both recusals are effective. Please also explain any impact that these requirements may have on your ability to fulfill duties, including whether any recusals involve entities that could appear before you in the position you are nominated for and/or if the entities have existing or potential involvement with the agency you are nominated to.

*Answer 1.* In addition to my letter to the Designated Ethics Officer, I have reviewed President Obama's Executive Order 13490 which requires my recusal for 2 years from any "particular matter involving specific parties that is directly and substantially related to my former employer or former clients." Consistent with this requirement, if any matter comes before me as a Commissioner of the EEOC in which my former employer or clients are either a party or are representing a party, I will recuse myself from consideration of such particular matters for 2 years from the date of my confirmation. In all cases, I will inquire as to who is representing any entity on a particular matter before the Commission which may require the attention or deliberation of the Commissioners in order to ensure I am aware of any possible conflict and need for recusal. I do not believe that these requirements for recusal as to particular matters will have a negative impact on my abilities to fulfill my duties as a Commissioner.

*Question 2.* Do you understand that it is your continuing responsibility to supplement these and all other responses if you subsequently determine that they are not complete?

*Answer 2.* Yes.

*Question 3.* One reason we pass a considerable amount of legislation through this committee by unanimous consent is because of the good working relationship between the majority and minority, both Senators and our staff. If confirmed, will you pledge to cooperate in this type of a working relationship with all Senators on this committee, Democrat or Republican—by promptly responding to any written or phone inquiries, sharing information as soon as it becomes available—and directing your staff to do the same?

*Answer 3.* Yes. As a former committee counsel in the U.S. House of Representatives and then from my service as Assistant Secretary of Labor, a position which

also required confirmation by the U.S. Senate, I have a great appreciation for the need of congressional committees and individual members of the committee to be provided with full information as quickly as possible from the executive branch or independent agencies in order to carry out the committee's business. I have always worked cooperatively with the majority and minority staffs beginning with my experience working in the House of Representatives and I would continue to do so as a Commissioner at the EEOC.

*Question 4.* Have your taxes always been paid on time, including Federal, State and local taxes, property taxes, business taxes and/or sales and use taxes, as well as taxes paid on behalf of any employees?

Answer 4. Yes.

RESPONSE TO QUESTIONS OF SENATOR COBURN BY VICTORIA A. LIPNIC

*Question 1.* What assurances can you give the Senate that, if confirmed, your past advocacy for various groups will not cloud your objectivity or judgment in your decisionmaking process?

Answer 1. I have not been an advocate for various outside interest groups in a professional capacity in my career. I am currently an attorney with the law firm Seyfarth Shaw LLP where I represent clients in employment matters. To the extent that any Seyfarth Shaw clients have matters before the EEOC I would be recused from those matters. Most recently, I served as the Assistant Secretary of Labor for Employment Standards and prior to that as Workforce Policy Counsel to the Committee on Education and the Workforce in the U.S. House of Representatives. I am well aware of the obligation of senior government officials to carry out their duties in a fair and objective manner. I have done so in the past and, if confirmed, would do so again at the EEOC.

*Question 2.* President Obama has been a champion of government transparency during his time in the U.S. Senate and campaigned on a promise to make the Federal Government more transparent. What is your philosophy of transparency, accountability and management?

Answer 2. I concur with President Obama's goal to make government more transparent, accountable and better managed. Having been the head of the largest agency at the Department of Labor I have considerable experience with these issues and the impact they have on the credibility and operational effectiveness of agencies. I believe that all personnel of Federal agencies must be held to the highest standards of accountability and that the policy and operational decisions of Federal agencies must be transparent. Should I be confirmed for this position, I would seek to work with my fellow Commissioners and the career staff to ensure the EEOC meets these goals at all levels of the agency.

*Question 3.* President Obama's transition Web site said this about how Cabinet agencies will operate: Conduct Regulatory Agency Business in Public: Obama will require his appointees who lead the executive branch departments and rulemaking agencies to conduct the significant business of the agency in public, so that any citizen can see these debates in person or watch them on the internet.

Please specify how you will implement this transparency mandate in your position should you be confirmed.

Answer 3. I will work with my fellow Commissioners and the General Counsel as well as the career staff of the EEOC to ensure this transparency is real. That includes input from the public on both formal rulemaking and the many sub-regulatory/guidance documents produced by the Commission.

*Question 4.* If confirmed, what will be your policy priorities?

Answer 4. I will first and foremost be focused on the EEOC carrying out its enforcement of the Nation's civil rights employment laws. Further, as I testified at the confirmation hearing, I would want to work with my fellow Commissioners and the career staff to ensure the EEOC has a viable and vigorous conciliation program.

*Question 5.* Please explain which provision(s) in the Constitution you believe authorized Congress to create the EEOC.

Answer 5. Article 1, Section 8, the Commerce Clause; Article 2, Section 2; Section 5 of the 14th Amendment.

RESPONSE TO QUESTIONS OF THE HELP COMMITTEE BY P. DAVID LOPEZ

*Question 1.* In Part I, page 3 under the Published Writings section of the Committee application, you provided a list of publications you have authored. Can you

please provide copies of “*Texas Case Opens Window on Sexual Harassment of Latinos*,” and “*Immigration-Related Employment Discrimination: A Practical Legal Manual*” that the committee has not been able to locate?

Answer 1. Please see attached.

*Question 2.* In your letter to the Designated Ethics Officer, you state that you will not participate personally and substantially in any particular matter involving specific parties in which your former employer is a party or represents a party and certain other organizations and entities you were affiliated with for a 1-year period unless you first receive a written waiver pursuant to Federal regulations. On January 21, 2009, President Obama signed Executive Order 13490, “Ethics Commitments by Executive Branch Personnel” that requires a separate 2-year recusal for any “particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.” Please explain the process you will implement for ensuring both recusals are effective. Please also explain any impact that these requirements may have on your ability to fulfill duties, including whether any recusals involve entities that could appear before you in the position you are nominated for and/or if the entities have existing or potential involvement with the agency you are nominated to.

Answer 2. I have been an employee of the Equal Employment Opportunity Commission, the same agency to which I have been nominated, since 1994. The Equal Employment Opportunity Commission’s designated agency ethics official has reviewed my affiliations and determined that any potential conflict of interest would be adequately addressed by the terms of my ethics agreement. In accordance with the ethics agreement that I entered into with the EEOC’s designated ethics official, I will do the following:

- As required by 18 U.S.C. 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any other person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. 208(b)(2). I understand that the financial interests of the following are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

- My spouse is employed by the Department of Public Health of Maricopa County, AZ. Pursuant to 18 U.S.C. 208, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my spouse’s compensation or employment with the Maricopa County Department of Public Health unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which the Maricopa County Department of Public Health is a party or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d).

- I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

- If confirmed, I will work with the EEOC designated agency ethics official to implement the restrictions outlined in my ethics agreement and the Ethics Pledge. Should any other questions arise, I will seek advice with the EEOC’s ethics official.

*Question 3.* Do you understand that it is your continuing responsibility to supplement these and all other responses if you subsequently determine that they are not complete?

Answer 3. Yes.

*Question 4.* One reason we pass a considerable amount of legislation through this committee by unanimous consent is because of the good working relationship between the majority and minority, both Senators and our staff. If confirmed, will you pledge to cooperate in this type of a working relationship with all Senators on this committee, Democrat or Republican—by promptly responding to any written or phone inquiries, sharing information as soon as it becomes available—and directing your staff to do the same?

Answer 4. Yes.

*Question 5.* Have your taxes always been paid on time, including Federal, State and local taxes, property taxes, business taxes and/or sales and use taxes, as well as taxes paid on behalf of any employees?

Answer 5. Yes, with the following exceptions. For tax years 1991 and 2000, my wife and I received IRS notices that we owed additional taxes, and we paid the additional amounts due. For tax year 1991, we owed and paid an additional \$191.72. Based on our records, it appears we had inadvertently failed to include one of five W-2s we received that year and a small amount of interest income. (We received multiple W-2s for 1991 because my wife and I both changed jobs that year, and the Department of Justice changed the way it handled payroll.) For tax year 2000, we owed and paid an additional \$667.52 due to our inadvertent failure to report a State income tax refund.

RESPONSE TO QUESTION OF SENATOR ENZI BY P. DAVID LOPEZ

*Question 1.* You have the most direct experience with EEOC of any of today's nominees, having worked there for the last decade. What do you view as the most important priorities for EEOC to focus on in order to achieve its organizational mission?

Answer 1. I have worked with the EEOC since 1994, both as a Special Assistant to Chairman Gilbert Casellas and as a Senior Trial Attorney/Supervisory Trial Attorney in the Phoenix District Office.

My work in the Phoenix District Office over the past 11½ years has provided me a unique perspective of the day-to-day challenges confronting a district office in realizing the Commission's goals. From my vantage point, the EEOC continues to face challenges with its backlog and full implementation of its systemic litigation program. Many of these challenges stem from staffing shortages and turnover. The EEOC needs ongoing training on the priority charge handling procedures, developed under the leadership of Chairman Casellas, to ensure the efficient processing of charges and to strengthen its strategic litigation program. These twin goals require collaborative efforts between the enforcement and legal units. If implemented fully and consistently, with adequate staffing, the priority charge handling procedures should enable the Commission to reduce its backlog and strategically develop cases to maximize the Commission's law enforcement impact.

*Question 2.* Currently, under the EEOC's National Enforcement Plan, the General Counsel has a great deal of discretion about whether to commence legal action or intervene in litigation. Would you oppose greater involvement of the Commission in determining which cases EEOC should take on?

Answer 2. Under the National Enforcement Plan (NEP), the Commission delegated significant litigation authority to the Office of General Counsel (OGC) and the field. Delegation was designed to empower staff at the lowest appropriate level coupled with the elimination of unnecessary layers of review. In Section V of the NEP, the Commission delegated litigation authority to the General Counsel "[w]ith the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of [the Commission's] litigation program." Section V provides in relevant part:

- [T]he Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

- (a) Cases involving a major expenditure of resources, e.g. cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;

- (b) Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

- (c) Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and

- (d) All recommendations in favor of Commission participation as amicus curiae which shall continue to be submitted to the Commission for review and approval.

OGC, in turn, delegated some litigation authority to the field. In my view, this current delegation has realized the original goals of eliminating additional and unnecessary layers of review, increasing efficiency and empowering the field. It has been, for the most part, a success. The exhaustive memoranda required previously for Commission review of routine litigation matters and the periodic delays required to respond to Commission inquiries created unnecessary hurdles and diverted already-stretched field resources from other enforcement activities.

If confirmed, I will address any problems arising from the delegation of litigation authority on a case-by-case and office-by-office basis. As importantly, I will consult regularly with the Commission to ensure that they have an understanding of the litigation docket and to collaboratively identify any issues that might require greater Commission involvement, such as those cases potentially implicating undeveloped legal issues or creating public controversy.

*Question 3.* Given your firsthand experience, do you believe that the EEOC has adequate staffing level to accomplish its mission? If not, how many more full time employees does EEOC need?

Answer 3. As discussed above, from my vantage point based on my experience, many of the challenges the Commission faces with its backlog and implementation of its systemic litigation program stem from chronic staffing shortages and turnover. With respect to the litigation program, I understand first-hand the difficulties presented by the lack of resources, particularly the lack of support staff in the field. Moreover, recent enactment of the Americans with Disabilities Act Amendments, the Lilly Ledbetter Fair Pay Act, and Title II of the Genetic Information Non-discrimination Act have increased the Commission's statutory enforcement responsibilities. Effective enforcement of these statutes will require additional resources.

Nevertheless, I believe that existing resources can be more efficiently and effectively used. If confirmed, I will undertake a thorough review of the Commission's litigation program for opportunities to work more efficiently, operate collaboratively as an integrated team throughout the agency, and minimize the duplication of efforts. Several meaningful steps have been taken under the leadership of Deputy General Counsel James Lee, and previous General Counsels Ron Cooper and Eric Dreiband to institute the national law firm model and achieve these goals. We owe it to the taxpayers to remain vigilant in these efforts to use our limited resources as effectively and efficiently as possible.

If confirmed as General Counsel, I look forward to fully assessing the staffing and resource needs of the General Counsel's office to ensure that existing resources are used effectively and efficiently. Furthermore, I am committed to working with the Commission and Congress to ensure appropriate staffing needs are met.

*Question 4.* Do you believe that it is the role of the Commission members or the role of the General Counsel to set EEOC policy?

Answer 4. I believe that it is the role of the Commission to set policy on legal issues pertaining to statutes under its enforcement authority. In my view, the Commission should continue to do this in consultation with General Counsel's office. The General Counsel's involvement in day-to-day litigation, including appellate litigation, provides the Commission a unique perspective on judicial interpretation of the antidiscrimination laws, important legal developments, and areas potentially requiring further Commission guidance.

Although the Commission is responsible for setting the broad general policy with respect to the anti-discrimination statutes under its authority, General Counsel provides overall guidance and management to the various components of its office, including the litigation program. This authority is appropriate.

*Question 5.* If you knew that a majority of members of the Commission opposed the EEOC taking a particular legal position, are there any circumstances under which you would proceed to take that legal position on behalf of the EEOC?

Answer 5. If confirmed as General Counsel, I will abide by the Commission's formal policy positions in litigation to the extent such position is supported by the controlling law in the jurisdiction where the issue might be implicated. At this time, I am not aware of any circumstance where General Counsel may take a legal position contrary to the express legal position of the Commission.

#### RESPONSE TO QUESTIONS OF SENATOR ALEXANDER BY P. DAVID LOPEZ

*Question 1.* In the 110th Congress I introduced language that would bar the EEOC from filing lawsuits against employers that require their employees to speak English while engaged in work. This language gained bipartisan support in the U.S. Senate, as well as the U.S. House of Representatives. My interest stemmed from a March 2007 case in which the EEOC sued the Salvation Army for allegedly discriminating against two of the Army's employees in a Boston-area thrift store by requiring them to speak English on the job. This case was ultimately settled.

Given the current backlog of more egregious cases at the EEOC, what priority would you provide to these cases?

Answer 1. If confirmed, I would not give priority to English-only cases over other types of cases. I will enforce the discrimination laws as passed by Congress, and in-

terpreted by the Federal courts, and consistent with Commission policy. My objective will be to file the most important and egregious cases. However, I do not believe the General Counsel has the discretion to refuse categorically to enforce the laws against any form of discrimination deemed actionable by the Courts and EEOC policy.

I share your belief that English is the language of opportunity in this county, and I applaud your efforts to increase funding for English language instruction. I believe the enormous demand for English language classes reflects a widespread recognition in the immigrant community that English is indispensable to participate in economic and civic society.

I have seen the importance of English proficiency in my own life. My late father-in-law, who was originally from Cuba, served with the U.S. Merchant Marines during World War II. Even though he loved his adopted country with his entire heart and soul, he struggled with little success through numerous English classes as an adult and, as a result, his economic opportunities were limited. He worked as a custodian in a Boston hospital for most of his life while living in the United States and was a valued employee. He was determined, however, to ensure that his daughter learned English and obtained a college degree. He had a tremendous mind and work ethic; he understood full well that in order to succeed in this country, one needs to speak English and have an education.

*Question 2.* Employers argue safety and morale as the rationale for requiring English in the work place, do you believe it is appropriate for employers to do so?

Answer 2. The EEOC National Origin Regulations permit an employer to "have a rule requiring that employees speak only in English at certain times" where such a rule is justified by business necessity. According to Section 13 of the EEOC Compliance Manual, the reasons justifying an English-only rule may include: (1) "For communications with customers, coworkers, or supervisors who only speak English"; (2) "In emergencies or other situations in which workers must speak a common language to promote safety"; (3) "For cooperative work assignments in which the English-only rule is needed to promote efficiency"; and (4) "To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers."

This list is not intended to be exhaustive and the EEOC Compliance Manual sets forth "best practices" to assist employers in evaluating the scope and necessity of any English-only policy. This guidance provides employers latitude to adopt English-only policies that promote legitimate business needs.

*Question 3.* Is it discriminatory for employers to require employees to speak English in the workplace?

Answer 3. Under EEOC Guidance and case law, there may be a legal issue only when an English-only policy or English fluency requirement does not relate to the employer's business needs, is overbroad, or is applied in a discriminatory manner.

The EEOC National Origin Regulations permit an employer to "have a rule requiring that employees speak only in English at certain times" where such a rule is justified by business necessity. According to Section 13 of the EEOC Compliance Manual, the reasons justifying an English-only rule may include: (1) "For communications with customers, coworkers, or supervisors who only speak English"; (2) "In emergencies or other situations in which workers must speak a common language to promote safety"; (3) "For cooperative work assignments in which the English-only rule is needed to promote efficiency"; and (4) "To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers."

This list is not intended to be exhaustive and the EEOC Compliance Manual sets forth "best practices" to assist employers in evaluating the scope and necessity of any English-only policy. The guidance provides employers with latitude to adopt English-only policies that promote legitimate business needs.

The Compliance Manual also elaborates:

"As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons. An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Navajo rule, would be unlawful."

With respect to English proficiency requirements, the EEOC Compliance Manual states:

"Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. Because the degree of fluency that may be lawfully required varies from one position to the next, em-

ployers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions.”

*Question 4.* Under what circumstances would it be appropriate for the EEOC to pursue such a suit?

*Answer 4.* As noted above, I see no basis to give priority to cases involving English-only or English proficiency policies over other cases. These policies vary significantly in breadth and application, and any assessment of whether to pursue a case is fact-specific and based on the applicable case law in that circuit. While many of these policies are based on an employer’s legitimate business needs, an employer who adopts an English-only policy that is not related to business necessity may also engage in other discrimination or retaliation. Such conduct could include national origin harassment, disparate treatment, and retaliation. If such discrimination or retaliation is egregious, that could be a factor relevant to the decision to pursue a particular case.

RESPONSE TO QUESTIONS OF SENATOR COBURN BY P. DAVID LOPEZ

*Question 1.* What assurances can you give the Senate that, if confirmed, your past advocacy for various groups will not cloud your objectivity or judgment in your decisionmaking process?

*Answer 1.* If confirmed, I will work to enforce the laws under the jurisdiction of the Equal Employment Opportunity Commission in a fair and even-handed manner. I have been employed by the EEOC since 1994 and the Federal Government since 1991. During this time I have advocated for victims of discrimination on behalf of the United States of America. As a government attorney, it is my responsibility to enforce the laws enacted by Congress and to exercise my legal judgment as objectively as possible to achieve the best results for my client. I believe I have been successful in doing so.

Given my extensive litigation and family demands, I have had little opportunity for outside activities with the limited exception of volunteer work at St. Gregory’s School, where my children attend school, or coaching youth sports. If confirmed, I will not allow outside activities to cloud my judgment in any way.

*Question 2.* President Obama has been a champion of government transparency during his time in the U.S. Senate and campaigned on a promise to make the Federal Government more transparent. What is your philosophy of transparency, accountability and management?

*Answer 2.* If confirmed, I fully intend to comply with the President’s directives about transparency in my job. As a government agency, EEOC litigates in open court. Judicial review provides an institutional check and accountability to our actions. Further, all of our litigation successes, failures, and resolutions are in a public forum to be examined by any interested group or taxpayer.

My personal belief is that public courts and judicial accountability form the basis for the greatest legal system in the world and ensures the highest degree of professionalism. If confirmed, I will stress continuously the agency’s responsibilities and accountability to the taxpayers, collaborate with other components of agency to ensure transparency and accountability, and lead through example.

*Question 3.* President Obama’s transition Web site said this about how Cabinet agencies will operate:

Conduct Regulatory Agency Business in Public: Obama will require his appointees who lead the executive branch departments and rulemaking agencies to conduct the significant business of the agency in public, so that any citizen can see these debates in person or watch them on the internet.

Please specify how you will implement this transparency mandate in your position should you be confirmed.

*Answer 3.* As noted above, if confirmed, I fully intend to comply with the President’s directives about transparency in my job. As part of a government agency, the work of the General Counsel is done in open court. Judicial review provides an institutional check and accountability to the General Counsel’s actions. Further, all of our litigation successes, failures, and resolutions are in a public forum—open to examination by any interested group or taxpayer.

If confirmed, I will examine steps the Office of General Counsel might take to ensure that information regarding its litigation activities is easily accessible to the public and to reaffirm that all resolutions remain public.

*Question 4.* If confirmed, what will be your policy priorities?

Answer 4. If confirmed, my goal will be to continue to strive to build a “national law firm” that is able to effectively and efficiently use its resources to combat discrimination and ensure equal opportunity. This includes several components.

First, we must continue to build our infrastructure and eliminate impediments to effective law enforcement. This includes ensuring that there is adequate support staff in the field to function as an effective enforcement agency. It also includes improving our technological capabilities to increase the EEOC’s ability to maximize its effectiveness on a limited budget. This would include a full evaluation of whether changes and improvements can be made with respect to litigation software, transcription software, and the existing brief bank.

Second, given the budget realities, the EEOC’s litigation program should make every effort to operate efficiently and as an integrated team. We must nurture a culture of collaboration within the agency, and share ideas and strategies among Districts and between Headquarters and the field so we can operate not as individual offices, but as an integrated team. We have considerable expertise within the agency; the appellate services division alone is a repository of vast knowledge about emerging legal issues. The EEOC needs to ensure that a person with particular expertise is able to share it with colleagues in a meaningful manner. If confirmed, I will examine how to continue to work toward the goal of national law firms. Specifically, this might include the development of a user-friendly directory of internal resources aimed at promoting collaboration and reducing the duplication of efforts in the field; the identification of small, inter-district work groups organized geographically and/or according to subject matter to identify and prosecute cases; and steps, to allow and encourage greater staff mobility between Districts and divisions.

Third, we need to operate strategically. This includes continual strengthening of the EEOC’s systemic program. In 2005, Chair Dominguez established a Systemic Task Force under the leadership of Commissioner Leslie Silverman. This task force made several recommendations to further the creation of an effective program to attack systemic discrimination. If confirmed, I will assess the progress made in implementing these recommendations, identify any impediments, and make any necessary modifications. Further, I will work with the Commission and the Office of Field Programs to reaffirm the commitment to a culture of collaboration critical to support these systemic cases.

*Question 5.* Please explain which provision(s) in the Constitution you believe authorized Congress to create the EEOC.

Answer 5. The Civil Rights Act of 1964 established the EEOC. The Civil Rights Act of 1964 constituted an exercise of congressional authority pursuant to Article I, Sec. 8, Clause 3, otherwise known as the “Commerce Clause.” The U.S. Supreme Court upheld Congress’ exercise of this authority in *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).

As part of those employment provisions of the Civil Rights Act of 1964, Congress established the EEOC and empowered the agency to, among other tasks, investigate allegations of unlawful discrimination. 42 U.S.C. § 2000e-4(a).

In addition, Article II, § 2 of the Federal Constitution provides that the President, “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”

This Article permits Congress to enact legislation, such as the Civil Rights Act, that will create officers of the United States who will be subject to nomination by the President and confirmation by the Senate. The Supreme Court has upheld the authority of the President, within certain limits, to create agencies and independent commissions, to execute the laws passed by Congress.

*Question 6.* The administrative and management challenges facing the agency are daunting. Please share with the Senate the management experience in your background that prepares you to direct the Agency/General Counsel’s Office out of its challenges.

Answer 6. I believe my work in headquarters and in the field has given me a well-rounded appreciation for the agency. In addition, I have also been fortunate enough to work with the U.S. Department of Justice, Civil Rights Division and was exposed during my tenure there to another management structure and culture that helps inform my own approach to management.

Between 1994 and 1998, I worked as an attorney advisor to Chairman Gilbert Casellas. Under Chairman Casellas’s leadership, the agency made numerous significant changes. These included the adoption of the Priority Charge Handling Procedures, creation of a model mediation program, and the establishment of a task force

to examine “Best Practices” in an effort to assist the vast majority of the business community that is interested in ensuring a discrimination-free workplace.

As Chairman Casellas’s attorney advisor, I had a broad, birds-eye view of the agency functions and had the opportunity to be involved in the Chairman’s development of a vision for the agency in collaboration with the other Commissioners and the General Counsel. In this capacity, I also co-authored and coordinated the development of the National Enforcement Plan, a fundamental document setting forth the vision for the agency.

At EEOC, the vast majority of the work enforcing the discrimination laws occurs in the field. In 1998, I moved to the Phoenix District Office and enforce civil rights law on the front lines as a Trial Attorney. This gave me a greater appreciation of the actual work performed by the agency despite its limited resources, and helped put into context the numerous policy discussions that occurred in Headquarters. Moreover, the first-hand experience enforcing civil rights laws has been invaluable to understanding the critical components of the EEOC’s law enforcement responsibilities from intake through conciliation and from discovery through trial.

I have also served as Supervisory Trial Attorney, managing a team of trial attorneys and support staff. In this capacity, I have stressed teamwork and professional commitment to the Agency’s work. My experience from Headquarters and as a Trial Attorney has enabled me to provide leadership and guidance to the team of attorneys that I manage.

*Question 7.* Please explain any ideas you have considered on how to reduce the backlog while maintaining quality.

Answer 7. If confirmed as General Counsel, I will not have direct authority over the reduction of the charge inventory. However, the Priority Charge Handling Procedures envision a collaborative approach between the Office of Field Programs and the Office of General Counsel to implement its goals. These procedures are premised on the view that if charges are prioritized at the early stages, the agency will be able to manage the charge inventory and develop cases for litigation. The EEOC has had some success with these efforts, but over the recent years the inventory has continued to grow. I believe that this has been due in large part to staffing issues.

If confirmed, I will work with the Commission and Director of the Office of Field Programs to revitalize the Priority Charge Handling Procedures and ensure that new staff are effectively trained on these procedures. It is important that attorneys in the field are trained properly in the early identification of potential litigation vehicles and systemic or policy issues. This will ensure that the EEOC’s limited resources are devoted to the most important charges.

*Question 8.* Please explain the decisionmaking process you will undertake, if confirmed, when determining how to dispose of a case presented to you.

Answer 8. If confirmed, I will continue to apply many of the factors I used as a Supervisory Trial Attorney and Trial Attorney to determine whether to recommend a case for litigation. These include: (1) assessing the credibility of the charging party and the key witnesses; (2) examining issues of law related to liability and damages; (3) evaluating the quality and admissibility of evidence; (4) evaluating potential impact of the case with respect to an industry or geographical region; (4) determining the scope of likely monetary and non-monetary damages; and (5) evaluating the appropriate circuit law to identify any problem or developing areas; and examine conciliation of case. If confirmed, this analysis will be conducted in the context of national or regional litigation developments and priorities.

*Question 9.* What changes do you believe are necessary to improve training of EEOC staff generally, as well as training related to the need to reduce the backlog?

Answer 9. If confirmed, I will evaluate the training needs in consultation with other attorneys in the agency. Over the last 3 years the Office of General Counsel has made enormous strides to improve the training to the field. OGC has worked collaboratively with the Office of Field Programs to improve this training and has evaluated the success of this training on an ongoing basis. The training included the increased use of the “webinar,” a training system that permits nationwide interactive training from an employee’s desktop; regional training; and case-based training. This is a wonderful foundation on which to build. If confirmed, I would also be interested in exploring the best ways in which to leverage technology to conduct national or regional debriefings on significant trials, resolutions, and appellate arguments. As a former trial attorney, I have found the “reverse engineering” of our successes and failures is an extremely useful tool for collecting and disseminating lessons learned. I believe this should be done on a broader basis.

With respect to reduction of backlog, if confirmed, I will evaluate whether additional training is necessary with respect to reaffirmation of the charge priority han-

dling procedures, generally, and legal/enforcement collaboration to identify cases, specifically.

*Question 10.* Do you think the charge system needs to be revamped to improve the intake process?

Answer 10. If confirmed as General Counsel, I will not have direct authority over the intake process. However, as discussed above, the invigoration of the Priority Charge Handling Procedures requires the early prioritization of cases, including potential litigation vehicles. If confirmed, I will advocate for early identification of litigation vehicles, including the identification of class or systemic issues, at the intake stage.

*Question 11.* What does the phrase: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” mean to you with respect to the free exercise of religion?

Answer 11. This language enshrines freedom of religion, one of the core values that make this country great.

Title VII of the Civil Rights Act of 1964 also codifies this value and requires that an employer reasonably accommodate sincerely-held religious beliefs unless such an accommodation results in undue burden to the employer.

As an attorney, I have prosecuted several cases under title VII’s reasonable accommodation provisions and of their relationship to these core principles of religious freedom and tolerance; I regard these as some of the most important cases I have handled. For instance, I was part of a trial team that brought a case on behalf of an Evangelical Protestant who was fired for participating in a Bible study group with other restaurant employees, off the clock and outside of the workplace. The employer argued its anti-fraternization policy prohibited the Bible study; the EEOC argued that the employer should have exempted her from the policy to allow Bible study and prayer. I also successfully tried another case against Alamo Rental Car for denying a Muslim employee’s request to keep her hair covered during Ramadan; further, I resolved a virtually identical case involving a Jewish employee who was suspended by Blockbuster for allegedly violating its prohibition against head gear when he refused to remove his yarmulke. For me, these cases reaffirm the importance of religious tolerance in matters of conscience embodied in the First Amendment and promoted by title VII.

*Question 12.* Do you understand the First Amendment religious liberty protection to include the right of a health care worker to not have to perform or support the performance of an abortion as a condition of employment? What about a healthcare provider in a pharmacy refusing to dispense an abortifacient drug as a condition of employment?

Answer 12. Analyzing the question under Title VII of the Civil Rights Act of 1964, an employer would be obligated to accommodate the employee’s sincerely-held religious beliefs including the refusal to engage in any activities contrary to his or her religious conscience, unless doing so would impose an undue burden on the employer. The U.S. Supreme Court ruled that undue burden involves more than *de minimis cost*. Determining whether a refusal to perform an abortion or to dispense abortifacient drugs may result in an undue hardship to an employer is a fact-specific question. As stated in Section 12 of the EEOC Compliance Manual:

“The determination of whether a particular proposed accommodation imposes an undue hardship ‘must be made by considering the particular factual context of each case.’ Relevant factors may include the type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.”

*Question 13.* Have you considered, or have any interest in changing, modifying, or revoking Section V of the National Enforcement Plan?

Answer 13. No. I do not believe Section V of the National Enforcement Plan should be revoked. However, if confirmed, once I have had time to examine the litigation nationally and the views of other components of the Commission, I will be able to evaluate whether any modifications might be appropriate.

Under the National Enforcement Plan (NEP), the Commission delegated significant litigation authority to the Office of General Counsel (OGC) and the field. Delegation was designed to empower staff at the lowest appropriate level coupled with the elimination of unnecessary layers of review. In Section V of the NEP, the Commission delegated litigation authority to the General Counsel “[w]ith the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effective-

ness of [the Commission's] litigation program." Section V delegates to the General Counsel litigation authority of all cases except: (a) Cases involving a major expenditure of resources; (b) Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals; (c) Cases which are likely to create public controversy; and (d) All recommendations in favor of Commission participation as *amicus curiae*. OGC, in turn, delegated some litigation authority to the field.

In my view, this current delegation has realized the original goals of eliminating additional and unnecessary layers of review, increasing efficiency and empowering attorneys in the field. Prosecutorial decisions on smaller and non-policy cases have been delegated to the actual litigators in the field. This delegation has been, for the most part, a success. The exhaustive memoranda required previously for Commission review of routine litigation matters and the periodic delays required to respond to Commission inquiries created unnecessary delays and diverted limited field resources from other enforcement activities. Delegation freed up OGC to make litigation decisions relatively quickly and for sound prosecutorial reasons and, in my view, strengthened the EEOC as a law enforcement agency.

While the system of delegation embodied by the NEP may be imperfect, delegation reduces the risk that the EEOC will compromise enforcement opportunities as additional layers in the Commission hierarchy review the litigation recommendation. If confirmed, I will address any problems arising from the delegation of litigation authority on a case-by-case and office-by-office basis to ensure good litigation decisions are made and that, as an institution, we learn from any mistakes.

As importantly, if confirmed, I will consult regularly with the Commission to ensure the Commission has an understanding of the litigation docket and to collaboratively identify any issues that might require greater Commission involvement, such as those cases potentially implicating undeveloped legal issues or creating public controversy. If confirmed, as part of the integrated team approach, I will make it an important priority to advise the Chair and Commissioners about the litigation program on an ongoing basis so that the Commission will be able to make sound policy decisions and be able to communicate effectively to the public about the many law enforcement successes achieved through the diligent work of its appellate and trial lawyers in the field.

*Question 14.* Do you believe it is employment discrimination for a school principal to reassign to a high-school teaching position a kindergarten teacher who is undergoing a transgender sex change because the principal is concerned that kindergartners are not mature enough to deal with their teacher's transformation?

Answer 14. Most courts have held that discrimination against transgendered individuals is not prohibited by title VII. However, some courts have construed title VII's prohibition against sex discrimination to prohibit taking adverse action against an applicant or employee based on "gender stereotyping" and one district court has found that discrimination against a transgendered individual may be "because of sex." In very limited circumstances, therefore, courts have held that title VII can be violated if an employer discriminates against a transgendered individual. More facts would be necessary to determine whether the action described in this question could possibly violate title VII.

*Question 15.* Do you understand title VII to already prohibit sexual orientation discrimination?

Answer 15. No.

*Question 16.* If a State enacted a law or regulation requiring medical professionals to assist their patients in euthanasia, would Federal law provide any protections for the rights of conscience of these medical professionals?

Answer 16. Examining the question under title VII, an employer should accommodate a medical professional's sincerely-held religious beliefs or practices unless such a refusal would result in an undue hardship to the individual's employer.

As noted, I have prosecuted many cases involving the reasonable accommodation of religious beliefs. When I was with the Department of Justice, I was assigned the prosecution of a case involving a Jehovah's Witness bus driver who refused, as a matter of a deeply held religious conscience, to sign the State-mandated loyalty oath. It was our position that exempting the individual from complying with the State statute was a reasonable accommodation that would not unduly burden the school district. This case was successfully resolved.

*Question 17.* Please explain any litigation priorities you've considered or have interest in implementing.

Answer 17. If confirmed, I will work in consultation with the Chair and the Commission to set litigation priorities. As an attorney for the EEOC and the U.S. Department of Justice, I have prosecuted discrimination cases under all of the relevant statutes, and I have seen the devastation discrimination, in all its forms, has on workers and their families. In my view, there is no form of discrimination that is more or less damaging or more or less deserving of attention by the agency. If confirmed, I will work in consultation with the Chair, the Commission, and other components of the agency to set litigation priorities.

*Question 18.* Have you considered or have any interest in changing, modifying, or revising the Regional Attorney's Manual.

Answer 18. I have not had the opportunity to survey the attorneys in the field or headquarters to determine whether others have specific suggestions for modifying or supplementing the Regional Attorney's Manual. If confirmed, however, I expect to conduct an in depth review of OGC's processes and procedures, including the RA Manual, to determine if there needs to be changes, additions, modifications or deletions.

[Whereupon, at 11:30 a.m., the hearing was adjourned.]

