

**Nomination of Stephen S. Schwartz
United States Court of Federal Claims
Questions for the Record
Submitted November 13, 2019**

QUESTIONS FROM SENATOR BOOKER

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

In cases where the meaning of a statutory or constitutional text is not fixed by controlling caselaw, the proper methods for interpreting the text can generally be derived from Supreme Court or statutory authority. For example, the Supreme Court has stated that statutory terms should be interpreted “consistent with their ordinary meaning at the time Congress enacted the statute.” *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018). If I am fortunate enough to be confirmed, for any text I am called upon to interpret, I would employ interpretive methods consistent with the requirements of Supreme Court and other applicable precedent.

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

See answer to Question 1.

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

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

The Supreme Court has permitted lower courts to use “clear evidence of congressional intent” to “illuminate ambiguous text.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011). However, “legislative history is not the law ... and once [Congress] enacts a statute [courts] do not inquire what the legislature meant; [they] ask only what the statute means.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). Among other limitations on the proper use of legislative history, a court may not “allow[] ambiguous legislative history to muddy clear statutory language.” *Milner*, 562 U.S. at 572. Whether it is permissible for a court to consult or cite legislative history thus depends on the specific interpretive question at issue. If I am fortunate enough to be confirmed, I would evaluate the relevance of legislative history (and any other interpretive aids) consistently with the requirements of Supreme Court and other applicable precedent.

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

See answer to Question 3(a).

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

The Supreme Court has recognized judicial restraint as an important principle of jurisprudence that helps courts to avoid legal decisions that are premature, unnecessary, overbroad, or otherwise flawed. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). However, the Supreme Court has also maintained for more than two centuries that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In addition, federal judges take an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent upon [them] under the Constitution and laws of the United States.” 28 U.S.C. § 453. If I am fortunate enough to be confirmed, I would apply principles of judicial restraint consistently with the requirements of Supreme Court and other applicable precedent, and with my duty to apply the law.

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

Answer to Questions 4(a)–3(c): I have not had occasion to study the role of judicial restraint in these cases sufficiently to reach an informed opinion. My obligations as a judicial nominee, *see* Code of Conduct of United States Judges Canon 3(A)(6), make it inappropriate for me to answer these questions in more detail. However, I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

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

See above.

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

See above.

5. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under

¹ 554 U.S. 570 (2008).

² 558 U.S. 310 (2010).

³ 570 U.S. 529 (2013).

the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁴ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁵

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

Answer to Questions 5(a)–5(c): This question refers to matters in which I represented litigants and to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5.

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

See above.

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

See above.

6. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.⁶ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁷ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.⁸ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁹

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

I am aware of debate on the role of implicit bias in our criminal justice system, but I have not had occasion to study the issue sufficiently to reach an informed opinion. Additionally, this question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5.

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

I have not studied the issue in depth, but I understand that members of certain racial and ethnic minorities are overrepresented in our nation's jails and prisons.

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

I am aware of discussions in popular and scholarly literature regarding implicit racial bias in our criminal justice systems. I have read published works on the subject, but I do not recall any particular publications.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁰ Why do you think that is the case?

I have not had occasion to study this issue sufficiently to reach an informed opinion. Additionally, this question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5.

⁴ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁵ *Id.*

⁶ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

⁷ *Id.*

⁸ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁹ *Id.*

¹⁰ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹¹ Why do you think that is the case?

I have not had occasion to study this issue sufficiently to reach an informed opinion. Additionally, this question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5.

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

If I am fortunate enough to be confirmed, my responsibilities would not include presiding over any criminal cases. The United States Court of Federal Claims is an Article I court with limited jurisdiction over certain civil matters. *See, e.g.*, 28 U.S.C. § 1491. I consider myself obligated as a person and a United States citizen, however, to treat persons fairly and to shun racial bias. That obligation falls with special weight on individuals with legal authority, and especially on federal judges who swear to “administer justice without respect to persons[.]” 28 U.S.C. § 453.

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

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

Answer to Questions 7(a)–7(b): I have not had occasion to study this issue sufficiently to reach an informed opinion. Additionally, this question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5.

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

See above.

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

This question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5. In general, I believe a diversity of backgrounds and experiences is valuable for decision making and governance.

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

Yes, so long as doing so would not appear to pre-judge an issue that the parties might dispute. *See* Code of Conduct of United States Judges Canon 3(A)(6). If I were fortunate enough to be confirmed, I would always be mindful of a judge’s obligation to be “courteous” to those “with whom the judge deals in an official capacity.” *See* Code of Conduct for United States Judges Canon

3(A)(3).

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

Yes.

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

No.

12. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Because I originally appeared before this Committee and answered written questions more than two years ago, I do not recall all of the advice I have received. However, I do not specifically recall any such instruction or suggestion.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican

¹¹ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹² Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹³ *Id.*

¹⁴ 347 U.S. 483 (1954).

¹⁵ 163 U.S. 537 (1896).

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

This question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5. However, any judge’s potential conflict, recusal, or disqualification should be addressed according to applicable ethical, statutory, and constitutional standards.

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

This question refers to political matters about which ethically I cannot opine as a nominee. *See* Code of Conduct for United States Judges Canon 5. However, the Supreme Court has held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

¹⁶ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁷ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.