

**Nomination of Stephen Schwartz to the U.S. Court of Federal Claims
Questions for the Record
Submitted August 1, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

- 1. Is it true that you are not admitted to practice before the Court of Federal Claims?**

Response: I am not admitted to practice in the Court of Federal Claims. I am admitted in the U.S. Court of Appeals for the Federal Circuit, which resolves appeals from the Court of Federal Claims.

- 2. Have you ever litigated a case before the Court of Federal Claims?**

Response: I have not litigated in the Court of Federal Claims. I have litigated in the U.S. Court of Appeals for the Federal Circuit. I have also litigated a variety of matters that involved fields of law that the Court of Federal Claims regularly addresses, legal standards it regularly applies, and the federal trial court procedures that its cases involve.

- 3. What in your background makes you qualified to join the Court of Federal Claims at this point in your career?**

Response: My experience has included many areas of law that regularly come before the Court of Federal Claims, including Takings Clause issues, *see Horne v. U.S. Department of Agriculture*, 133 S. Ct. 2053 (2015), as well as other subjects including unconstitutional exactions and certain patent questions. A large number of my cases have involved claims under the Administrative Procedure Act, which governs many of the so-called “bid protest” cases which reach the Court of Federal Claims under the Tucker Act. *See* 28 U.S.C. § 1491(b). Most of my litigation experience, furthermore, has involved complex issues of statutory and regulatory interpretation arising from federal agencies. Those issues are comparable in subject matter and methodology to the types of cases a Court of Federal Claims judge must resolve. My experience has involved a significant amount of district court work—including pleadings, dispositive motions, written discovery, depositions, trial preparation, and presenting witness testimony—much of which I led, and all of which is applicable under the rules of the Court of Federal Claims.

My education and experience have also taught me that no attorney has all the answers relevant to every legal situation he or she might encounter. The best way to make important decisions is with humility, taking into account the views of affected parties. If confirmed, I intend to apply that lesson by managing my docket with the involvement and input of the attorneys appearing before me.

- 4. What are you already doing – and what do you plan to do – to prepare yourself to serve on this very important court if you are confirmed?**

Response: I have read recent reported decisions of every current judge on the Court and several of its senior judges, as well as every reported decision of Judge Alex Kozinski

during his time as the Court's Chief Judge. I periodically review recent opinions posted on the Court's website in order to familiarize myself with the issues that appear in the Court and with the style of its decisions.

I have relied for my preparations on the definitive modern treatise regarding the Court's jurisdiction, Matthew H. Solomson's *Court of Federal Claims: Jurisdiction, Practice, and Procedure*, and studied the principal chapters on (*inter alia*) the history of the Court, the Tucker Act, and claims involving government contracts, takings, bid protests, and illegal exactions. Reading the treatise raised various questions about the Court, which I generally researched as I thought of them. I have begun the process of reading the key Federal Circuit and Supreme Court cases governing the main areas of practice in the Court of Federal Claims, to the extent I am not already familiar with them. I have also reviewed several of the statutes governing key areas of the Court's jurisdiction, such as the Contract Disputes Act, and familiarized myself with the Federal Acquisition Regulation.

I have studied the Court's rules of practice — including Rules Committee notes explaining the differences between the Court's rules and the Federal Rules of Civil Procedure — as well as the internal case management procedures applicable to different categories of cases. I have had conversations with a number of Court practitioners, and have discussed with Chief Judge Susan G. Braden the process and logistics of starting as a new judge. I have studied the Court's website extensively, including its publicly available statistics and reports from its Advisory Council committees.

I have also collected and begun to review various materials published by the Federal Judicial Center for the use of new judges—including the Benchbook for U.S. District Court Judges and Elements of Case Management—bearing in mind the differences between the Court of Federal Claims' jurisdiction and the jurisdiction of most Article III courts.

I plan to continue reading the key cases governing the Court and to meet more extensively with the Court's judges and practitioners. I also intend to attend a trial at the Court when an appropriate circumstance arises.

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

judges that the court simply does not need.” (Floor statement, July 14, 2015)

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

Response: The Court now has six vacancies, and my understanding is that it will have eleven vacancies by July of 2018 if no new judges are confirmed. My understanding is that the Court’s current caseload justifies confirming additional judicial nominees before then.

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

Response: I am not sufficiently familiar with Senator Cotton’s statement, or the facts and circumstances at the time it was made, to state an informed opinion. I agree that public funds should be spend prudently and efficiently.

6. Thomas Halkowski was nominated by President Obama to the same seat to which you are now nominated. Mr. Halkowski began his legal career by clerking on the Court of Federal Claims; he had been admitted to practice before the Court of Federal Claims for 24 years by the time he was nominated; he had litigated numerous cases in front of the Court of Federal Claims during his time as a trial attorney at the Department of Justice (indeed, on his Senate Judiciary Questionnaire, four of his top ten cases were litigated in the Court of Federal Claims); and he had worked on almost 140 cases during his combined tenure at the Department of Justice and his law firm.

a. How do you believe your qualifications for this position compare with Mr. Halkowski’s?

Response: I am not sufficiently familiar with Mr. Halkowski or his career to offer an informed opinion.

7. In your Questionnaire, you indicated that “[o]n April 3, 2017, officials from the White House Counsel’s Office approached [you] about [your] interest in the Court of Federal Claims.” Then at your hearing, Senator Kennedy asked how it was you came “to the attention of the White House.” You replied that you “happen to know various people who went into the administration,” adding that you “talked to them as friends at various point[s].”

a. Please describe the conversations you had prior to April 3, 2017 in which you expressed interest in a position on the Court of Federal Claims or sought to take steps towards a judgeship on that court.

Response: A federal judicial appointment has long been an aspiration of mine, and I believe that most of my professional colleagues have been aware of the fact. I have taken steps toward that goal by, *inter alia*, assuming leadership roles on cases involving important and complex legal issues; working to develop a reputation for

integrity, diligence, and legal skill; and avoiding financial conflicts that would make my transition to a judicial appointment more difficult.

- b. Given your lack of relevant Court of Federal Claims experience, how did the prospect of a judgeship on this particular court arise?**

Response: Per my Questionnaire, I was approached on April 3, 2017 about my interest in the Court.

- c. At any point in that process, were you asked how you would rule on any issue that might arise before the Court of Federal Claims?**

Response: No.

- d. At any point in your nomination process, did anyone in the Administration discuss other judgeships with you? For example, was the Court of Federal Claims presented as a “stepping stone” to a future judicial appointment on a federal district or circuit court?**

Response: I have not been told that my nomination to the Court of Federal Claims is a “stepping stone” to any other appointment in the future. I have no present wish or expectation other than to seek confirmation to the Court of Federal Claims and to fulfill my oath of office in that role to the best of my ability.

8. At your hearing on July 25, Senator Kennedy asked about your interview process as part of your nomination. He specifically asked the identity of those with whom you interviewed. You said there were “at least half a dozen people” at your interview with the White House Counsel’s Office, but could only recall the name of two – Daniel Epstein and Jonathan Berry. You indicated that you would provide the name of all individuals who interviewed you as part of your nomination process in written questions.

- a. Please finish answering Senator Kennedy’s question. Who were the individuals that interviewed you as part of your nomination process and what was their affiliation and title?**

Response: I stated at my hearing that I believed I could find a record of additional interviewers if asked in a written question. I have reviewed my notes, and I have been unable to find such a record. I remember the names and affiliations of the individuals at my interview whom I knew previously, but not those of individuals I met there for the first time.

- b. Did any individual from a private or non-profit entity (i.e., non-government entity) interview you? If so, please list their names and affiliations.**

Response: No.

9. The American Bar Association (ABA) does not evaluate nominees to the Court of

Federal Claims. Nevertheless, in considering nominees for federal district and appellate courts, the ABA has stated that “a prospective nominee to the federal bench ordinarily should have at least twelve years’ experience in the practice of law.” You graduated from law school in 2008, and then clerked for one year on the Fifth Circuit Court of Appeals before starting to practice law.

- a. What is the minimum number of years of legal experience that you think federal judicial candidates ought to have?**

Response: I believe that experience, including type, time, and quality of past work, is important for judicial nominees. I was not involved in setting the American Bar Association Standing Committee’s standards, and cannot comment on their reasons.

- b. If you had been nominated to a federal district or appellate court, you would have less experience than the ABA typically expects of those nominees. Do you believe Senators should hold nominees to the Court of Federal Claims to a lower standard than nominees to other federal courts?**

Response: I have not been nominated to an Article III court, and cannot speculate on my qualifications for a nomination I did not receive. I believe that I am qualified for the position to which I have been nominated.

10. In your relatively short career, you have defended a school board’s restroom policy that discriminated against transgender students. You have defended North Carolina’s restrictive voter ID laws. And you have defended Louisiana’s broad anti-abortion measures, among other things. In short, you seem to have spent the vast majority of your time representing clients on hot-button social political issues.

- a. How can we be sure that you will approach your role as a judge on the Court of Federal Claims with the fairness and objectivity that all judges must exhibit?**

Response: Like many judicial nominees, I have represented a wide variety of clients in cases involving a wide variety of issues. While some of them have been associated with political controversy, I have also been involved in a large amount of general commercial litigation with little, if any, political salience. I have represented farmers, small-boat cod fishermen, family business owners, and an inmate of the New York State prison system. I have been both aligned with and adverse to the federal government’s positions at various times. Generally speaking, I believe that my legal career has been marked not by efforts to court political controversy, but by consistent contact with complex and unsettled legal issues across a wide range of constitutional and statutory fields. I believe that my own work has been characterized not only by integrity and careful legal reasoning, but by objectivity and fairness. The diversity of interests I have represented, and the ways that I have represented those interests, should encourage confidence that I can fulfill the obligations of a judge.

11. In defending the Gloucester County School Board’s policy requiring students to use the restroom that corresponds to their “biological sex,” you argued that overturning that policy – and deferring instead to the interpretation of the Department of Education, which held that policy to violate Title IX – “would upend the ingrained practice of nearly every school in the Nation on a matter of basic privacy and dignity.”

- a. **Do you believe that transgender students are not also entitled to “basic privacy and dignity”?**
- b. **Do you believe that the “privacy and dignity” of other students should trump the “privacy and dignity” of transgender students?**
- c. **If it is your view that schools should only concern themselves with discrimination on the basis of physiological sex, how should schools ascertain what a student’s physiological sex is?**

Response to (a)-(c): This question refers to a pending case in which I currently represent one of the parties. My obligations as an advocate make it inappropriate for me to answer this question in detail. I do believe that everyone is entitled to basic privacy and dignity.

12. You worked on the petition for certiorari that was filed by the State of North Carolina in *State of North Carolina v. North Carolina State Conference of the NAACP, et al.* regarding North Carolina’s House Bill 589, which was passed shortly after the Supreme Court’s decision in *Shelby County v. Holder*, and which restricted voting and registration in five different ways, all of which disproportionately affected African Americans. The Fourth Circuit found that the law “target[ed] African Americans with almost surgical precision.”

- a. **Your brief stated that “The Constitution does not allow the sins of Civil Rights-era legislators to be visited on their grandchildren and great-grandchildren.” What does this statement mean to you?**

Response: The section of the petition in which that statement appeared related, in part, to the Fourth Circuit’s use of historical evidence and reasoning to justify its decision. The petition argued that the panel’s decision conflicted with Supreme Court precedent.

- b. **Your brief argued that the Fourth Circuit’s decision was “an affront to North Carolina’s citizens and their elected representatives and provides a roadmap for invalidating election laws in numerous States.” Of course, the Fourth Circuit also noted that “[P]rior to and during the limited debate on [HB 589], members of the General Assembly requested and received a breakdown by race” of different voting practices and forms of government ID. If state legislators intentionally target racial minorities for voting restrictions, why shouldn’t such actions “provide a roadmap” for**

invalidating election laws in various states?

Response: The petition argued that, contrary to the decision of the Fourth Circuit, the State legislature had not acted with discriminatory intent. State voting legislation should always be evaluated in light of the Voting Rights Act and applicable precedent.

13. Among your ten most significant litigated matters, you list *June Medical Services v. Gee*, an ongoing case involving a challenge to seven restrictions Louisiana has imposed that make it harder for women to access safe and legal abortions. You represent the State of Louisiana.

a. How did you become involved with the case?

Response: The matter was pending with my firm when I joined in 2016, and I became involved with the case at that time.

On your Questionnaire, you note you “have been handling much of the dispositive motion briefing with the client, state regulators, and outside interested parties.” However, your name does not appear on any of your client’s case filings.

b. Please detail which filings you have worked on.

Response: My name appears on the docket of *June Medical Services v. Gee*, No. 3:16-cv-00444 (M.D. La.), the case identified on my Questionnaire. I was admitted *pro hac vice* on February 9, 2017. See ECF No. 31. My name appears on a number of documents submitted by the State defendants after that date. See ECF Nos. 36, 40, 50, 53, 58, 61, 65. My Questionnaire accurately describes the nature of my involvement in the case.

c. What is your understanding of the Supreme Court’s ruling in *Whole Woman’s Health v. Hellerstedt*?

Response: The scope of that case is an issue that is subject to current litigation, including litigation in which I currently represent various parties. My obligations as a judicial nominee, see Code of Conduct of United States Judges Canon 3(A)(6), and as an advocate make it inappropriate for me to answer this question in detail. However, I would apply all applicable precedents if I am fortunate enough to be confirmed.

14. You worked extensively on the case *Horne v. United States Department of Agriculture*, which presented the issue of whether a specific regulation on raisins constituted a taking under the Fifth Amendment. After the Supreme Court issued its ruling in that case, you wrote a law review article, *Horne v. USDA: An Exercise in Minamalism?*, in which you suggested that the government might be required to compensate gun owners whose firearms are removed because the owners pose a danger to themselves or to others.

- a. **Do you believe that a law requiring the removal of a firearm from the possession of an owner adjudged to be a danger to themselves or to others constitutes a taking under the Fifth Amendment? On what basis have you reached that conclusion?**

Response: This question concerns is an issue which may be presented to the Court of Federal Claims and on which it would not be appropriate for a judicial nominee to comment. However, the Supreme Court has stated that “legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment.” *United States v. Locke*, 471 U.S. 84, 106, n.15 (1985). If I am fortunate enough to be confirmed, I would apply all applicable precedents.

15. The public portion of your Facebook profile states “Progress is perverse.”

- a. **What do you mean when you write that “progress is perverse”?**

Response: That statement refers to a personal matter that occurred many years ago between me and a small number of friends. It is not a statement of my judicial philosophy, and if I am fortunate enough to be confirmed it would have no bearing on my work as a judge. As a lawyer and a student of history, I am aware of the ways in which the human condition has improved over time.

16. In your Questionnaire, you stated that you are a member of the Federalist Society, but did not provide any dates of your membership.

- a. **How long have you been a member of the Federalist Society?**

Response: To my recollection, I joined the Federalist Society in law school.

- b. **What has been the extent of your involvement? Have you served on any Federalist Society committees, working groups, or other internal boards?**

Response: I was one of several vice presidents of the University of Chicago Law School chapter as a student. To my recollection I have not been an officer or involved in any committees since then.

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

legal community.”

- a. **Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**
- b. **How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**
- c. **What “traditional values” does the Federalist society seek to place a premium on?**

Response to (a)-(c): I did not write those statements and cannot speak for the Federalist Society as to their meaning.

18. If confirmed, what are the circumstances in which you would decline to follow precedent?

Response: I cannot think of any circumstance in which it is appropriate for a federal trial court such as the Court of Federal Claims to decline to follow applicable precedent.

19. Please detail all the circumstances under which you will recuse yourself from cases litigated by Schaerr Duncan, if confirmed.

Response: I would evaluate any circumstances potentially calling for recusal with reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other applicable laws, rules, and practices governing such circumstances.

20. Please describe with particularity the process by which these questions were answered.

Response: I received these questions through the Office of Legal Policy when it received them from the Committee. I drafted the answers myself. I shared my draft answers with the Office of Legal Policy, which provided comments and suggestions. I revised my answers in light of the advice I received. After a final review of the answers, I authorized the Office of Legal Policy to submit them on my behalf.