

Nomination of M. Miller Baker to the United States Court of International Trade
Questions for the Record
December 5, 2018

QUESTIONS FROM SENATOR FEINSTEIN

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

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

In cases involving statutory interpretation, lower courts must follow Supreme Court precedents unless the Court changes them or Congress overrules them. In cases involving constitutional interpretation, lower courts must follow Supreme Court precedents unless the Court changes them or a constitutional amendment overturns them.

b. Do you believe it is proper for a judge on the Court of International Trade to question Supreme Court precedent in an opinion?

Lower courts must apply Supreme Court precedents. It is generally not the lower courts' role to critique those precedents. That said, when an inferior court believes a precedent is unworkable, confusing, or otherwise an impediment to the "just, speedy, and inexpensive determination of every action and proceeding," USCIT R. 1, Fed. R. Civ. P. 1, it is appropriate for the inferior court to suggest that higher courts reconsider the precedent.

c. When, in your view, is it appropriate for the Court of International Trade to overturn its own precedent?

Decisions of the Court of International Trade are analogous to decisions of United States District Courts: they are persuasive, not binding, authority.

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

It is up to the Supreme Court to decide whether to overturn its precedents.

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

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

Roe v. Wade is controlling precedent insofar as lower courts are concerned. The extent to which it is stare decisis for the Supreme Court is for the Supreme Court to determine.

b. Is it settled law?

Roe v. Wade is settled law insofar as lower courts are concerned. The extent to which it is settled law for the Supreme Court is for the Supreme Court to determine.

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

The holding of *Obergefell* is settled law insofar as lower courts are concerned. The extent to which it is settled law for the Supreme Court is for the Supreme Court to determine.

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

a. Do you agree with Justice Stevens? Why or why not?

The dissent’s position was rejected by the Supreme Court in *Heller*. Lower court judges are bound to faithfully apply the Court’s decision in *Heller*, as with any Supreme Court precedent.

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

The scope of *Heller* is the subject of pending and impending litigation. Therefore, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment.

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

Heller is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully, just as I would apply all Supreme Court precedent.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The scope of corporations' First Amendment rights is the subject of pending and impending litigation. Therefore, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

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

Please see my response to question 5(a) above.

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

The existence and scope of corporations' religious freedom rights is the subject of pending and impending litigation. Therefore, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

6. According to your Senate Judiciary Questionnaire, you were admitted to practice before the Court of International Trade in 2018.

a. What month in 2018 were you admitted to practice before the Court of International Trade?

June.

b. Were you admitted to practice before the Court of International Trade before or after you began discussions with the Trump Administration about filling a vacancy on that court?

After.

c. Have you litigated a matter before the Court of International Trade? If so, what was it?

Like several sitting and former judges of the Court of the International Trade, I have never directly litigated a matter in the Court of International Trade. I have, however, represented a client in litigation in an appellate matter that originated in the Court of International Trade. In 2006, I assisted colleagues in preparing and filing a petition for certiorari in the Supreme Court seeking review of a Federal Circuit decision that

decided an appeal from a decision of the Court of International Trade. The petition was docketed as *Reenas Tech. Am., Inc. v. United States*, No. 05-986, and was denied.

d. Have you worked on trade matters (excluding policy matters) during your legal career? If so, what were they?

Please see my response to question 6(c) above.

7. Some judges on the Court of International Trade sit by designation on the circuit courts of appeals.

a. If confirmed, do you intend to try to sit by designation on courts of appeals? If so, how often?

If confirmed, I will make myself available to sit by designation on courts of appeals as my Court of International Trade caseload permits. As I understand it, sitting by designation does not reduce an active judge's regular caseload; instead, it involves taking on additional work to assist overburdened judges on other Article III courts.

b. Was the possibility of sitting by designation brought up during your discussions with the Trump Administration about filling a vacancy on the Court of International Trade? If so, what were those discussions?

Yes. It was brought to my attention that judges on the Court of International Trade may, and occasionally do, sit by designation. As a generalist litigator, I have—and have expressed—interest in the practice.

8. In 2011, you ran as a Republican for a seat in the Virginia State Senate. During the campaign, you made a number of statements in opposition to the Affordable Care Act (ACA), which you referred to as Obamacare. In one candidate forum, you called the ACA “a serious mistake” and went so far as to claim that “it was the domestic equivalent of the Iraq War.”

a. In what way was the Affordable Care Act “the domestic equivalent of the Iraq War”?

This statement was an expression of a political opinion. As a judge, I would not bring my political views to bear on the cases before me.

b. What evidence supports your conclusion that the ACA was “the domestic equivalent of the Iraq War”?

Please see my response to 8(a) above.

9. As a lawyer in private practice, you represented litigants in several challenges to state

efforts to expand access to voting. For instance, you led challenges to early voting periods in both Texas and Tennessee and you argued that Oregon’s vote-by-mail system violated federal law. (*Millsaps v. Thompson* (6th Cir. 2001); *Voting Integrity Project v. Keisling* (9th Cir. 2001); *Voting Integrity Project v. Bomer* (5th Cir. 2000))

- a. Have you ever worked on a matter in which you argued in favor of expanding voting access? If so, please note the matter(s) and the party or parties that you represented.**

My representation of individual voters in *Millsaps*, *Keisling*, and *Bomer* sought to expand my clients’ voting access by preventing the dilution of their votes through voting practices that were alleged to be contrary to law. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

In *Gutierrez v. Ada*, 528 U.S. 250 (2000), I filed an amicus curiae brief on behalf of the Voting Integrity Project supporting the Democratic nominee for Governor of Guam in a case presenting the question whether “undervotes” (blank ballots) and “overvotes” (voting for both candidates) counted as “votes cast” for purposes of an election law requiring a gubernatorial candidate to receive a majority of “votes cast” to be elected. My amicus brief argued that undervotes and overvotes were not “votes cast” and that as a result, the Democratic nominee won the election with a majority.

In *Turner v. D.C. Board of Elections*, No. 1:98-cv-02634 (D.D.C. Sept. 17, 1999), I filed an amicus brief on behalf of the Voting Integrity Project supporting the American Civil Liberty Union’s challenge to an act of Congress that appeared to prevent the District of Columbia Board of Elections from tallying votes cast in a ballot initiative. My amicus brief argued that once the initiative was lawfully placed on the ballot and voted upon, Congress could not deny the voters’ rights to have their ballots counted. See *United States v. Classic*, 313 U.S. 299, 315 (1941) (the right to vote includes the right to “cast ballots and have them counted”).

- b. For all voting-related litigation in which you have represented a client, please list that litigation and indicate the following:**

- i. Was the representation done on a pro bono basis?**
- ii. If so, how did you come to represent that client pro bono?**

I have represented clients in the following voting-related litigation:

Arizona v. InterTribal Council of Ariz., Inc., 570 U.S. 1 (2013)
Democratic Nat’l Comm. v. Republican Nat’l Comm., 543 U.S. 1304 (2004)
Voting Integrity Project, Inc. v. Keisling, 259 F.3d 1169 (9th Cir. 2001)
Millsaps v. Thompson, 259 F.3d 535 (6th Cir. 2001)
Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773 (5th Cir. 2000)
Gutierrez v. Ada, 528 U.S. 250 (2000)

Voting Integrity Project v. Fleisher, No. 2:00-cv-109 (D. Ariz. filed Jan. 21, 2000)
Turner v. D.C. Board of Elections, No. 1:98-cv-02634 (D.D.C. Sept. 17, 1999)
Jenkins v. Ousse, 1998 WL 307588 (5th Cir. 1998)
Foster v. Love, 522 U.S. 67 (1997)

D.C. Rule of Professional Conduct 1.6 bars attorneys from disclosing a client's confidences and secrets. Protected information includes the terms of my firm's engagement with the clients in the above matters and the communications between the firm and the clients prior to the commencement of engagements. Accordingly, I cannot answer question 9(b)(i) and (ii).

- c. In *Millsaps v. Thompson*, you argued that early voting compromised the overall integrity of elections. In what way does early voting compromise the overall integrity of elections? Please provide specific evidence to support your assertion.**

In *Millsaps*, I noted that the legislative history of the relevant federal statutes demonstrates that Congress selected a single day for national elections in part because of concerns that multi-day voting increased opportunities for voting fraud. I do not know whether those concerns are grounded in fact.

10. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 1985. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I did not write the quoted passage and am in no position to elaborate on it.

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

Please see my response to question 10(a) above.

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

Please see my response to question 10(a) above.

11. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

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

I recall general discussions about administrative law, but I do not recall any questions asking for my views on administrative law.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No, except that insofar as "group" includes clients of McDermott Will & Emery, I have provided legal advice to clients on various administrative law issues since 2016. That advice is protected by the attorney-client privilege.

Since 2016, I have occasionally attended the Heritage Foundation's Regulatory Reform Working Group meetings. Although the Heritage Foundation invited me to attend those meetings, no one at those meetings has asked for my views on administrative law.

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

Judges must apply the Administrative Procedure Act faithfully. Lower-court judges must follow higher-court precedents interpreting it.

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

The Supreme Court considers legislative history in statutory construction. Therefore, lower courts should not categorically reject it.

13. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I drafted the responses to these questions, and in doing so, consulted with the Justice Department's Office of Legal Policy and colleagues at McDermott Will & Emery.

Senator Dick Durbin
Written Questions for M. Miller Baker
December 5, 2018

For questions with subparts, please answer each subpart separately.

Questions for M. Miller Baker

1. When you were running for a State Senate seat in Virginia in 2011, you said at a candidate forum “I oppose Obamacare...Obamacare is an extraordinary overreach by the federal government, it’s constitutionally problematic...” **How is Obamacare constitutionally problematic?**

The statement attributed to me was an expression of political opinion in the context of a campaign for elective office. As a judicial nominee, it is not appropriate for me to comment on political matters.

2. During another candidate forum for your State Senate campaign, you also called Obamacare “the domestic equivalent of the Iraq War.” **What did you mean by this comment?**

Please see my response to question 1 above.

3. In a primary debate in 2011 you said “Judge Robert Bork is my hero.” You also said “the failure to confirm Judge Bork was a huge mistake by the United States Senate, one of the worst things the Senate has ever done in the last quarter century.” **Why was Judge Bork your hero?**

As a judicial nominee, it would be inappropriate for me to comment on a political controversy surrounding any judicial nomination.

4. **Have you ever appeared before the Court of International Trade, the court on which you have been nominated to serve? If so, please discuss the matters you handled before the court.**

Like several sitting and former judges of the Court of the International Trade, I have never directly litigated a matter in the Court of International Trade. I have, however, represented a client in litigation in an appellate matter that originated in the Court of International Trade. In 2006, I assisted colleagues in preparing and filing a petition for certiorari in the Supreme Court seeking review of a Federal Circuit decision that decided an appeal from a decision of the Court of International Trade. The petition was docketed as *Renasas Tech. Am., Inc. v. United States*, No. 05-986, and was denied.

**Nomination of M. Miller Barker, to be a Judge of the United States
Court of International Trade
Questions for the Record
Submitted December 5, 2018**

QUESTIONS FROM SENATOR COONS

1. Please describe in detail any experience you have practicing in the U.S. Court of International Trade.

Like several sitting and former judges of the Court of the International Trade, I have never directly litigated a matter in the Court of International Trade. I have, however, represented a client in litigation in an appellate matter that originated in the Court of International Trade. In 2006, I assisted colleagues in preparing and filing a petition for certiorari in the Supreme Court seeking review of a Federal Circuit decision that decided an appeal from a decision of the Court of International Trade. The petition was docketed as *Renasas Tech. Am., Inc. v. United States*, No. 05-986, and was denied.

2. Please describe in detail your experience interpreting the customs and international trade laws of the United States.

Please see my response to question 1 above.

3. If confirmed, do you intend to sit by designation on any U.S. District Court or Court of Appeals?

If confirmed, I will make myself available to sit by designation on courts of appeals and district courts as my Court of International Trade caseload permits. As I understand it, sitting by designation does not reduce an active judge's regular caseload; instead, it involves taking on additional work to assist overburdened judges on other Article III courts.

4. Did you discuss the issue of sitting by designation with anyone before or after expressing interest in this nomination? Please describe any such discussion.

Yes. It was brought to my attention that judges on the Court of International Trade may, and occasionally do, sit by designation. As a generalist litigator, I have—and have expressed—interest in the practice.

5. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

If confirmed, I will faithfully apply Supreme Court and circuit precedent regarding substantive due process.

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

Please see my response to question 5 above.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Please see my response to question 5 above.

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

Please see my response to question 5 above.

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

Please see my response to question 5 above.

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

Please see my response to question 5 above.

- f. What other factors would you consider?

Please see my response to question 5 above.

- 6. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

If confirmed, I will faithfully apply Supreme Court and circuit precedent regarding equal protection.

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my response to question 6 above.

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

Please see my response to question 6 above.

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

Please see my response to question 6 above.

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

This question is unsettled and could come before me as a judge. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me. *See* Canons 2 and 3 of the Code of Conduct for United States Judges.

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

If confirmed, I will faithfully apply Supreme Court and circuit precedent regarding substantive due process and contraceptive access.

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

If confirmed, I will faithfully apply Supreme Court and circuit precedent regarding substantive due process and abortion access.

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

If confirmed, I will faithfully apply Supreme Court and circuit precedent regarding substantive due process and sexual relationships.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

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

- 8. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

Federal courts should consider evidence is that admissible under the Federal Rules of Evidence.

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

Please see my response to question 8(a) above.

9. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Obergefell is binding Supreme Court precedent, and I will follow it faithfully.

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

Please see my response to question 9(a).

10. You have praised Justice Clarence Thomas, who embraces an "originalist" interpretation of the Constitution.

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

Brown is binding Supreme Court precedent, and I will follow it faithfully.

- b. How do you respond to the criticism of originalism that terms like "the freedom of speech," 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Dec. 4, 2018).

As a lower-court judge, I would faithfully apply the Supreme Court's precedents regarding these matters. Beyond that, it would not be appropriate for me to comment on issues that could come before me as a judge. *See* Canons 2 and 3 of the Code of Conduct for United States Judges.

- c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

In appropriate circumstances, yes. However, when higher-court precedents conflict with that understanding, lower-court judges must yield to those precedents.

- d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to question 10(c) above.

- e. What sources would you employ to discern the contours of a constitutional provision?

I would consult sources permitted by Supreme Court and circuit precedent, as well as those precedents themselves.

- 11. You have represented clients challenging Tennessee's early-voting statutes, Oregon's vote-by-mail statute, and Texas's early-voting statutes. Have you advocated for any expansions of access to the ballot box? If so, please describe this advocacy.

My representation of individual voters in *Millsaps*, *Keisling*, and *Bomer* sought to expand my clients' voting access by preventing the dilution of their votes through voting practices that were alleged to be contrary to law. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

In *Gutierrez v. Ada*, 528 U.S. 250 (2000), I filed an amicus curiae brief on behalf of the Voting Integrity Project supporting the Democratic nominee for Governor of Guam in a case presenting the question whether "undervotes" (blank ballots) and "overvotes" (voting for both candidates) counted as "votes cast" for purposes of an election law requiring a gubernatorial candidate to receive a majority of "votes cast" to be elected. My amicus brief argued that undervotes and overvotes were not "votes cast" and that as a result, the Democratic nominee won the election with a majority.

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12. Please provide a list of the most significant matters that you worked on as Special Assistant to the Assistant Attorney General for the Civil Rights Division.

The most significant matters that I recall working on in the Civil Rights Division involved formulating the CRD's views of the Department's participation in various cases on the Supreme Court's docket.

13. Please provide a list of the most significant matters that you worked on as an Attorney-Advisor in the Office of Legal Policy.

The most significant matters that I recall working on in the Office of Legal Policy involved issues associated with judicial philosophy, judicial appointments, and judicial confirmations.

14. You have previously expressed opposition to the Affordable Care Act, calling it "a serious mistake" and "the domestic equivalent of the Iraq War." Please explain what you meant when you asserted that the ACA is "the domestic equivalent of the Iraq War."

The statement attributed to me was an expression of political opinion in the context of a campaign for elective office. As a judicial nominee, it is not appropriate for me to comment on political matters.

15. In a 2011 primary debate, you called yourself, "a follower of Judge Robert Bork," and you called the failure to confirm Judge Bork to the Supreme Court "one of the worst things the Senate has ever done in the last quarter century."

- a. Please explain what you meant.

The statement attributed to me was an expression of political opinion in the context of a campaign for elective office. As a judicial nominee, it would be inappropriate for me to comment on a political controversy surrounding any judicial nomination.

- b. Do you share Judge Bork's disagreement with the right to privacy that formed the basis of *Roe v. Wade*?

If confirmed, I will faithfully apply the Supreme Court's precedents, including *Roe v. Wade*.

- c. You expressed concern that "the problem we had in this country for the last 30 years is judges making it up as they go along." Please provide an example of "judges making it up as they go along."

The statement attributed to me was an expression of political opinion in the context of a campaign for elective office. As a judicial nominee, it is not appropriate for me to comment on political matters.

**Questions for the Record for M. Miller Baker
From Senator Mazie Hirono**

1. Your Senate Judiciary Questionnaire suggests that you have little, if any, experience dealing with the U.S. Court of International Trade.

- a. **How many cases have you litigated before the U.S. Court of International Trade? Please list all such cases.**

Like several sitting and former judges of the Court of the International Trade, I have never directly litigated a matter in the Court of International Trade. I have, however, represented a client in litigation in an appellate matter that originated in the Court of International Trade. In 2006, I assisted colleagues in preparing and filing a petition for certiorari in the Supreme Court seeking review of a Federal Circuit decision that decided an appeal from a decision of the Court of International Trade. The petition was docketed as *Renesas Tech. Am., Inc. v. United States*, No. 05-986, and was denied.

- b. **What experience or expertise do you have in the area of international trade and customs?**

Please see my response to question 1(a) above.

- c. **What is your level of familiarity with the U.S. Court of International Trade's rules for its practices and procedures?**

The Rules of the United States Court of International Trade are modeled on and largely duplicate the Federal Rules of Civil Procedure. I have extensive experience in litigating issues arising under the Federal Rules of Civil Procedure.

2. In 2011, you said in a speech that you played an "important role" in getting Clarence Thomas confirmed to the Supreme Court. You further stated that Justice Thomas is "the most conservative Justice" and that you were "proud" of your role in getting Justice Thomas confirmed.

- a. **What was the "important" role you played in getting Justice Thomas confirmed to the Supreme Court?**

Senator Orrin Hatch played an important role in Justice Thomas's confirmation hearing. I assisted Senator Hatch as his Judiciary Committee counsel.

- b. **What role did you play in addressing the allegations of sexual harassment against Clarence Thomas?**

I provided advice to Senator Hatch in connection with those allegations.

- c. **You claimed you are "proud" of your role in getting Justice Thomas confirmed.**

Please explain what aspect of your involvement in the Thomas confirmation

process made you proud.

I am proud of my role in assisting Senator Hatch.

**Nomination of M. Miller Baker
United States Court of International Trade
Questions for the Record
Submitted December 5, 2018**

QUESTIONS FROM SENATOR BOOKER

1. Please describe the extent of your experience practicing before the Court of International Trade.

Like several sitting and former judges of the Court of the International Trade, I have never directly litigated a matter in the Court of International Trade. I have, however, represented a client in litigation in an appellate matter that originated in the Court of International Trade. In 2006, I assisted colleagues in preparing and filing a petition for certiorari in the Supreme Court seeking review of a Federal Circuit decision that decided an appeal from a decision of the Court of International Trade. The petition was docketed as *Reenasas Tech. Am., Inc. v. United States*, No. 05-986, and was denied.

2. What do you view as the special challenges facing lawyers who practice before the Court of International Trade?

In antidumping and countervailing-duty cases, where the court functions as an appellate court, litigants have two levels of intermediate appellate review—the Court of International Trade and the Federal Circuit—between the relevant agency and the Supreme Court, whereas most other agency appeals simply involve one level of intermediate appellate review.

3. What are your most significant experiences with international trade and customs law that would help to prepare you for this position on the Court of International Trade?

My extensive litigation experience before the U.S. Supreme Court, the federal courts of appeals, and federal district courts has prepared me to serve on the Court of International Trade.

4. What is the most difficult experience you have had making an oral argument before a federal court?

I had an argument before a federal court that did not appear to understand the distinction between policy and law.

5. In private practice, you represented clients in several legal challenges to early-voting¹ and vote-by-mail² systems. Systems like these are intended to make it easier for Americans to cast their ballots and participate in our democracy.

¹ *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001).

² *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000).

- a. Why did you think it was important to challenge these early-voting and vote-by-mail systems?

My clients' litigation goals were communicated to me in confidence and are subject to attorney-client privilege.

- b. Study after study has demonstrated that widespread voter fraud is a myth.³ In fact, an American is more likely to be struck by lightning than to impersonate a voter at the polls.⁴ One study that examined more than one billion ballots cast between 2000 and 2014 found only 31 credible instances of voter fraud.⁵ Do you believe there is widespread voter fraud in American elections today?

I lack personal knowledge of the extent to which there is fraud in American elections.

6. At a Republican primary debate for a seat in the Virginia State Senate in 2011, you said that “the failure to confirm Judge Bork was a huge mistake by the United States Senate,” and that it was “one of the worst things the Senate has ever done in the last quarter century.”⁶ You also said, “Judge Robert Bork is my hero.”⁷

- a. Why was the rejection of Judge Bork “one of the worst things the Senate has ever done in the last quarter century”?

As a judicial nominee, it would be inappropriate for me to comment on a political controversy surrounding any judicial nomination.

- b. Why do you view Judge Bork as your “hero”?

Please see my response to question 6(a) above.

- c. Judge Bork had criticized *Reynolds v. Sims*,⁸ the landmark Supreme Court case that enshrined the one-person, one-vote principle into law. He had written of that decision, “On no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed.” At his confirmation hearing, Judge Bork said, “I still think I was right.”⁹ Do you agree with Judge Bork’s criticism of *Reynolds*?

If I am confirmed, I will faithfully apply all Supreme Court precedents.

³ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31 2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf.

⁴ *Id.*

⁵ Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast>.

⁶ Speaker, Republican Primary Candidate Debate, Greenspring Retirement Community, Springfield, Va. (Aug. 2, 2011).

⁷ *Id.*

⁸ 377 U.S. 533 (1964).

⁹ *Hearings Before the S. Comm. on the Judiciary on the Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States*, pt. 1, 100th Cong. 156 (1987) [hereinafter *Bork Hearings*],

<https://www.loc.gov/law/find/nominations/bork/hearing-pt1.pdf>

- d. Judge Bork also disagreed with *Harper v. Virginia Board of Elections*,¹⁰ in which the Supreme Court had declared poll taxes unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Asked at his confirmation hearing whether he still thought that decision was "wrong," Judge Bork answered, "I think it was."¹¹ Do you agree with Judge Bork's criticism of *Harper*?

Please see my response to question 6(c) above.

- e. Judge Bork viewed *Shelley v. Kraemer*,¹² the landmark Supreme Court decision forbidding the enforcement of racially restrictive covenants in housing, as wrongly decided. He saw "no warrant anywhere" for the Court's constitutional reasoning. At his confirmation hearing, Judge Bork again expressed disapproval of the Court's "reasoning or lack of reasoning" in that decision.¹³ Do you agree with Judge Bork's criticism of *Shelley*?

Please see my response to question 6(c) above.

- f. Judge Bork criticized *Griswold v. Connecticut*,¹⁴ another landmark decision, in which the Supreme Court had ruled that a state's ban on the use of contraceptives violated the right to marital privacy. Judge Bork had called the decision "improper" and "unprincipled." At his confirmation hearing, Judge Bork added that "the right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials."¹⁵ Do you agree with Judge Bork's criticism of *Griswold*?

Please see my response to question 6(c) above.

- g. At his confirmation hearing, Judge Bork said that "*Roe v. Wade* contains almost no legal reasoning."¹⁶ Do you agree with Judge Bork's criticism of *Roe*?

Please see my response to question 6(c) above.

- h. Those are just a few of the highly controversial views espoused by Judge Bork. Especially if you cannot say whether you agree with his views on these or other issues, then what are the reasons that Judge Bork is your "hero"?

Please see my response to question 6(b) above.

7. At another candidate forum in 2011, you said: "Obamacare was a serious mistake. It was a

¹⁰ 383 U.S. 663 (1966).

¹¹ *Bork Hearings*, *supra* note 9, at 155.

¹² 334 U.S. 1 (1948).

¹³ *Bork Hearings*, *supra* note 9, at 113.

¹⁴ 381 U.S. 479 (1965).

¹⁵ *Bork Hearings*, *supra* note 9, at 116.

¹⁶ *Id.* at 184.

serious mistake. It was the domestic equivalent of the Iraq War.”¹⁷ What was the basis for that statement?

This statement was an expression of a political opinion. As a judge, I would not bring my political views to bear on the cases before me.

8. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹⁸ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁹ 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.²⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²¹

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

I lack knowledge regarding the matter.

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

I lack knowledge regarding the matter.

- 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.

No.

9. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.²² In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²³

- 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,

¹⁷ Speaker, Candidate Debate, Greenspring Retirement Community, Springfield, Va. (Oct. 4, 2011), https://www.youtube.com/watch?v=yImu_SsqF8M.

¹⁸ 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>.

¹⁹ *Id.*

²⁰ 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>.

²¹ *Id.*

²² 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>.

²³ *Id.*

please explain your views.

I lack knowledge regarding the matter.

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

I lack knowledge regarding the matter.

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

Judicial nominations and the criteria used to make such nominations are the President's prerogative.

11. Do you believe that *Brown v. Board of Education*²⁴ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

If confirmed, I will faithfully apply all Supreme Court precedents, including *Brown*.

12. Do you believe that *Plessy v. Ferguson*²⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Plessy v. Ferguson was incorrectly decided. See 163 U.S. at 562 ("The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." (Harlan, J., dissenting)).

13. 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?

In connection with responding to questions from Senators, the Department of Justice advised me to consult the Code of Conduct for United States Judges. That Code in turn counsels lower-court nominees not to express opinions on the correctness of binding Supreme Court precedent.

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."²⁶ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The rights of noncitizens that enter the United States are the subject of pending and impending

²⁴ 347 U.S. 483 (1954).

²⁵ 163 U.S. 537 (1896).

²⁶ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

litigations in numerous courts. Therefore, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment.