

**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 Minimalism?*, 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 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.

Senator Dick Durbin
Written Questions for Brian Benczkowski, Dabney Friedrich and Stephen Schwartz
August 1, 2017

For questions with subparts, please answer each subpart separately.

Questions for Stephen Schwartz

1. The American Bar Association's Standing Committee on the Federal Judiciary does not typically review the qualifications of nominees to the Court of Federal Claims. This is fortunate for you, because the ABA believes that nominees ordinarily should have at least 12 years of practical legal experience before they can be considered for the federal bench. You do not have 12 years of practical legal experience. You only graduated law school in 2008.

a. **Do you agree with the American Bar Association's Standing Committee on the Federal Judiciary that candidates for federal judgeships should have at least 12 years of practical legal experience?**

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. **Do you believe that you are better qualified to serve on the Court of Federal Claims than other candidates who have more practical legal experience than you? If so, why?**

Response: I believe that I am qualified for the position to which I have been nominated.

2. You have advocated a number of controversial positions in litigation.

a. **Did you disagree with any of the litigation positions you advocated on behalf of your clients? If so, please list the positions you advocated with which you disagreed.**

Response: On a number of occasions, my obligation of zealous advocacy on behalf of my clients called on me to argue positions that I believed were warranted under the law, *see* Fed. R. Civ. P. 11, but which I believed, in my professional judgment, that the forum court was unlikely to agree with. My obligations as an attorney to my clients preclude me from disclosing any particular circumstance where that was the case.

b. **What can you point to in your record to provide reassurance that, if confirmed, you could set aside your personal views and serve as an impartial and non-ideological judge?**

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, 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.

3. **Have you ever litigated a case before the Court of Federal Claims? If so, please list the case(s) and a short description of each case.**

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, which resolves appeals from the Court of Federal Claims. 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.

4. **Why did you list *Brewer v. Arizona Dream Act Coalition* as the most significant matter which you personally handled?**

Response: I did not list matters strictly in order of significance, but also roughly in reverse chronological order. I had recently completed the *amicus* brief in that matter at the time I began the Questionnaire.

5. You say in your questionnaire that you have been a member of the Federalist Society. **Why did you join the Federalist Society?**

Response: I joined the Federalist Society in order to hear a variety of perspectives on important legal issues, delivered by knowledgeable scholars and legal advocates.

6. **Do you agree with the statements espoused by the Federalist Society on its website?**
- Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?**
 - Do you believe that the President's announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?**
 - Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?**

Response to (a)-(c): I do not know the exact statements to which this question refers or their context and circumstances. I therefore cannot comment on my opinions of them. Further, this question refers to political matters about which ethically I cannot opine as a judicial nominee. *See* Canon 5 of the Code of Conduct for United States Judges.

7. The Federalist Society website lists the organization’s statement of purpose. That statement begins with the following: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.” **Do you agree or disagree with this statement? Please explain your answer.**

Response: I was not involved in writing that statement, and do not know precisely what it means or whether I agree with the statement.

8. **Please list all years in which you attended the Federalist Society’s annual national convention.**

Response: To my recollection, I attended parts of the national convention several times between 2009 and 2016. On some occasions I was a registered attendee, and on other occasions I was a guest at the annual dinner at a table purchased by Kirkland & Ellis LLP, my former firm. I have reviewed my records and have not been able to determine precisely which years I attended.

9. **Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?**

Response: I have no information that would allow me to form an opinion as to the accuracy of this statement. Additionally, this question refers to political matters about which ethically I cannot opine as a judicial nominee. *See* Canon 5 of the Code of Conduct for United States Judges.

10. **Do you agree with President Trump’s 2014 statement that “Global warming is an expensive hoax”?**

Response: I have no information that would allow me to form an opinion as to the accuracy of this statement. Additionally, this question refers to political matters about which ethically I cannot opine as a judicial nominee. *See* Canon 5 of the Code of Conduct for United States Judges.

11. **Do you believe that human activity is changing our climate?**

Response: I regard the role of human activity in climate change as a matter of scientific evidence, not of personal belief. I have not studied the evidence and therefore cannot comment on it.

12. **Do you believe that the right to vote is fundamental?**

Response: The Supreme Court has stated that “the political franchise of voting ... is regarded as a fundamental political right, because preservative of all rights.” *Yick Wo v.*

Hopkins, 118 U.S. 356, 370 (1886). I would apply all applicable precedents if I am fortunate enough to be confirmed.

13. **Please summarize the holding of the Supreme Court's decision in *Shelby County v. Holder*.**

Response: The Supreme Court in *Shelby County* invalidated the coverage formula for preclearance under Section 5 of the Voting Rights Act.

14. **Please summarize the holding of the Fourth Circuit's decision in *North Carolina v. North Carolina State Conference of the NAACP*, a case for which you filed an unsuccessful cert petition on behalf of North Carolina.**

Response: The Fourth Circuit held that certain North Carolina voting reforms were motivated by intent to discriminate on the basis of race.

**Nomination of Stephen S. Schwartz,
to be a Judge of the United States Court of Federal Claims
Questions for the Record
Submitted August 1, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Based on your record, it does not appear that you have ever litigated a case before the Court of Federal Claims. Is that the case?

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, which resolves appeals from the Court of Federal Claims. 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.

2. You wrote an amicus brief in support of Hobby Lobby in *Burwell v. Hobby Lobby* arguing that the Government’s position “threatens not only to strip for-profit activities of free exercise protection, but to undermine the doctrinal basis of free exercise protections for religious bodies themselves.”
 - a. In your view, to what extent does the law protect a for-profit organization’s speech rights?

Response: The Supreme Court has held as recently as this year that for-profit organizations have free speech rights protected by the First Amendment. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). It has also explained that “[t]he proper question ... is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [a given law] abridges expression that the First Amendment was meant to protect.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

- b. What are the legal differences, if any, between a corporate and natural person?

Response: The Supreme Court has held that the answer to that question depends on the precise legal context. Where constitutional rights are concerned, “[w]hether or not a particular guarantee” protects both corporations and natural persons “depends on the nature, history, and purpose of the particular constitutional provision.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). No comprehensive accounting of the differences is possible. In any event, many such issues are subject to litigation and it would not be appropriate for a judicial nominee to comment on them. I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

3. In *Horne v. United States Department of Agriculture*, you represented California-based farmers in a Supreme Court case arguing that the Takings Clause applies not just to real property, but also to personal property. You've since written that the government might be required to compensate gun owners whose firearms are removed because the owners pose a danger to themselves or others.

- a. Are there any instances in which you understand the government to legally be able to take control of private property without compensation?

Response: This question concerns 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). I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

- b. In the aftermath of *Horne*, are personal and real property synonymous for takings purposes?

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.

4. You represented the Gloucester County School Board in an effort to maintain its discriminatory policy of preventing transgender students from using the restroom of their choice.

- a. In a brief you filed in *G.G. v. Gloucester County School Board*, you claimed that Title IX is a “straightforward prohibition intended to erase discrimination against women in classrooms, facilities, and athletics” and suggested that Title IX protects nothing beyond that interpretation. Do you understand the law to be, as several courts have held, that the sex discrimination prohibited by Title IX includes not only discrimination for being a particular gender, but also sexual harassment and discrimination for failing to conform to gender stereotypes?
- b. In the same brief, you argued that the Fourth Circuit erred in affording *Auer* deference to the Department of Education. Do you believe that *Auer* remains valid law? Do you believe there are situations—as you wrote “theoretically” may be the case in your brief—where *Auer* deference extends to a greater degree than *Chevron* deference would under similar circumstances?
- c. As a judge, would you follow *Auer* and give executive agencies deference when interpreting their own regulations?

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. If I am fortunate enough to be confirmed, I will afford executive agencies the level of deference called for by all applicable precedents of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit.

5. You wrote an amicus brief criticizing the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) program, which protects from deportation certain undocumented immigrants who entered the country as minors. You argued that the program was an unconstitutional extension of executive power.
- What about the DACA program is unconstitutional in your view?
 - How far do you understand executive power on immigration to extend? Do you agree with the Fourth and Ninth Circuit opinions concerning President Trump’s Muslim travel ban?
 - If not, please explain how you distinguish those cases from your view of President Obama’s action with the DACA program.

Response to (a)-(c): This question refers to a pending case in which I represent a client as an *amicus*. My obligations as an advocate make it inappropriate for me to answer this question in detail.

6. In a cert petition to the Supreme Court arguing for reversal of the Fourth Circuit in *North Carolina v. North Carolina State Conference of the NAACP*, you recently defended restrictive voting regulations implemented by North Carolina, including a photo-ID requirement. The Supreme Court denied certiorari.
- Do you believe fraudulent voting is a major problem affecting our elections today? If so, on what evidence do you base your conclusion?

Response: 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* Canon 5 of the Code of Conduct for United States Judges.

- Do you believe that millions of fraudulent votes were cast in last year’s election? If so, on what evidence do you base your conclusion?

Response: 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* Canon 5 of the Code of Conduct for United States Judges.

- Do you believe that Hillary Clinton legitimately won the popular vote in last year’s election?

Response: I understand that, according to the vote totals certified by United States jurisdictions, a plurality of votes cast in the 2016 general election appear to have been for electors pledged to support Hillary Clinton. I understand that a majority of the electors chosen by the people in the 2016 general election cast their votes for Donald J. Trump, who was accordingly elected president.

- The court found that North Carolina’s restrictions “target[ed] African Americans with almost surgical precision,” but you argued that the court’s finding of discriminatory intent by the North Carolina legislature was in error. Under what

circumstances would you have been satisfied that discriminatory intent was present?

Response: The Supreme Court has established a test for evaluating claims of discriminatory intent under the Voting Rights Act. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Claims of discriminatory intent should be evaluated consistently with all applicable precedents. If I am fortunate enough to be confirmed, I will faithfully do so.

7. Your work at Kirkland & Ellis LLP included representing clients such as BP.
 - a. Will you commit to recusing yourself on any cases that concern BP or other former clients that come before you as a judge?

Response: If confirmed, I will address circumstances potentially calling for recusal under 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.

8. Besides your work on *Goethel v. Pritzker* and *Rhea Lana, Inc. v. Department of Labor*, what other matters did you work on while at the Cause of Action Institute?

Response: While at Cause of Action Institute, I was regularly called upon for analysis and assistance in pending or potential matters involving novel or complex legal issues. Other matters where I recall that my name appeared on briefs included *Cause of Action Institute v. Eggleston*, No. 1:16-cv-871 (D.D.C), *United States ex rel. Cause of Action v. Chicago Transit Authority*, No. 16-131 (S. Ct.), and *United States v. Sierra Pacific Industries, Inc.* No. 15-15779 (9th Cir.). I was also involved in a number of investigations under the Freedom of Information Act that did not involve litigation.

9. Please explain the significance of your argument in *Mutual Pharmaceutical Co. v. Bartlett*, as adopted by Justice Alito’s opinion for the Court, for future state law-based product defect suits.

Response: The application of that case is subject to current litigation, and is therefore not an appropriate subject for comment by a judicial nominee.

10. Please explain more fully your argument that the Constitution’s Supremacy Clause does not provide citizens a “free-standing cause of action,” as you wrote in an amicus brief in the *Douglas v. Independent Living Center* case.

Response: As the Supreme Court later held in *Armstrong v. Exceptional Child Center, Inc.*, where I assisted in submitting a similar amicus brief, “the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.” 135 S. Ct. 1378, 1383 (2015) (quotes and citation omitted). The arguments I made on behalf of certain clients in the Supreme Court in the referenced *amicus* brief speak for themselves. The

applicable law in the area comes not from the *amicus* brief, but from the binding decisions of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents, regardless of the arguments I previously made on behalf of clients.

11. On your public Facebook page you write, under the “About Stephen” section, “[p]rogress is perverse.”
- a. What is the meaning of that statement?

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.

- b. Do you think that is an appropriate statement for a would-be judge to make publicly?

Response: Public statements by judges are governed by a body of rules, practice, and custom including Canon 5 of the Code of Conduct for United States Judges. If I am fortunate enough to be confirmed, I will ensure that my public statements conform to those standards.

12. You list as one your ten most significant cases your representation of the State of Louisiana in *June Medical Services v. Gee*. You write that 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 briefs or motion that have been filed in the Middle District of Louisiana or the Fifth Circuit in this case.

- a. Please explain the nature of your involvement in this case, given your apparent lack of documented participation.

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.

- b. How do you understand the Supreme Court’s decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) to affect *Gee* and similar abortion cases?

Response: The scope of that decision 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 faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

Senate Judiciary Committee
“Nominations”
Questions for the Record
July 25, 2017
Senator Amy Klobuchar

Question for Mr. Schwartz, Nominee to be Judge of the United States Court of Federal Claims:

The Court of Federal Claims has special jurisdiction, hearing claims brought under the Constitution, federal statutes, regulations, and contracts with the United States. The court’s cases include takings claims, government contracts, military pay claims, and certain patent and copyright matters.

· Can you comment as to whether you have extensive legal experience with the types of cases that fall within the Court’s jurisdiction? Do you believe that your past experiences have prepared you to handle the subject matter that will come before you in the position to which you have been nominated?

Response: I believe that my past experiences have prepared me to handle the subject matter that would come before me as a judge on the Court of Federal Claims. 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.

You recently represented the state of North Carolina, defending a number of restrictions the state placed on voting following the Supreme Court’s *Shelby County* decision. The Fourth Circuit described these restrictions as “target[ing] African Americans with almost surgical precision.” I have been deeply troubled that many states have moved to restrict access to voting since the Supreme Court decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act.

- Can you describe your role in representing North Carolina in this case?

Response: My firm was hired to represent North Carolina after the Fourth Circuit's decision. The matter was pending with my firm when I joined in 2016, and I became involved with the case at that time. I was responsible for drafting and editing the State's petition-stage filings, in cooperation with my firm colleagues and local counsel. We presented arguments that the Fourth Circuit's factual conclusions, which overturned contrary conclusions by the district court, were premised on several significant legal errors.

- Do you consider protecting the right to vote and guarding against voter discrimination to be an important responsibility of the Department of Justice?

Response: Yes. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." The Fourteenth Amendment guarantees "due process of law" and "the equal protection of the laws." Both amendments grant Congress the authority to enforce those guarantees through legislation. Congress has legislated extensively in the field of voting rights, and has delegated authority to enforce those rights to the Department of Justice.

**Nomination of Stephen Schwartz to be
Judge of the United States Court of Federal Claims
Questions for the Record
Submitted August 1, 2017**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
 - a. Would you consider whether the right is expressly enumerated in the Constitution?
 - 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?
 - c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the decisions of other courts of appeals?
 - d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?
 - 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*).
 - f. What other factors would you consider?

Response to (a)-(f): The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The Supreme Court's cases applying that test, as well as relevant controlling decisions of the U.S. Court of Appeals for the Federal Circuit, illustrate the types of historical and legal sources that are relevant to that determination. If I am fortunate enough to be confirmed, I would apply the Supreme Court's analysis in each case presenting the issue. I would reach a decision only after carefully considering the arguments of the parties, the applicable precedents, and the facts in the record.

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

was dispositive or even conclusively supportive?

Response: I am aware there is some scholarship arguing that the result of *Brown* is justified on originalist grounds, but I have not had occasion to study this issue sufficiently to reach an informed opinion. *Brown* is binding law established by the Supreme Court, and I would apply it faithfully if I am fortunate enough to be confirmed.

- 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-pages/democratic-constitutionalism> (last visited August 1, 2017).

Response: Determining the meaning of terms that “are not precise or self-defining” is the fundamental challenge for any method of interpreting legal texts. In cases where the meaning of a statutory or constitutional text is not fixed by controlling caselaw, I would interpret the text according to the methods established by the Supreme Court and other applicable precedents.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment’s promise of “equal protection” guarantees equality across race and gender, or does it only require racial equality?
- 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?
- 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?
- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?
- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Response to (a)-(d): The Supreme Court has held that the Fourteenth Amendment’s guarantee of equal protection applies to certain categories of discrimination other than racial discrimination, including sex. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996). If I am fortunate enough to be confirmed, I would faithfully apply those and any other applicable precedents. The scope of the Equal Protection Clause 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 further detail.

4. With regard to the right to privacy encompassed in substantive due process:
- a. Do you agree that the right to privacy protects a woman’s right to use contraceptives?

- b. Do you agree that the right to privacy protects a woman’s right to obtain an abortion?
- c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?
- d. 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.

Response to (a)-(d): The Supreme Court has held that the right to privacy entails certain protections for the decision to use contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the decision to obtain an abortion, *see Roe v. Wade*, 410 U.S. 113 (1973), and for intimate relations between consenting adults, including consenting adults of the same sex, *see Lawrence v. Texas*, 539 U.S. 558 (2003). If I am fortunate enough to be confirmed, I would faithfully apply those and any other applicable precedents. The precise scope of those protections 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 further detail.

- 5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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?
 - b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Response to (a)-(b): The Supreme Court’s cases illustrate the circumstances where such inquiries and evidence may be appropriate, as well as the methods a court should use if and when it engages in their application. However, the application of those precedents is a complex question that depends on the facts, controlling decisions in given fields of law, and arguments of the parties addressed to particular circumstances, as well as the applicable rules of evidence. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents.

- 6. The brief you filed in *G.G. v. Gloucester County School Board* argued that Title IX is a “straightforward prohibition intended to erase discrimination against women in classrooms, facilities and athletics.” Do you agree that Title IX prohibits discrimination based on the failure to conform with gender stereotypes?

Response: 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.

7. Do you agree with the Supreme Court's analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding that treating employees differently in the workplace on the basis of whether they conform to stereotypes constitutes sex discrimination under Title VII of the Civil Rights Act of 1964?

Response: The Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is binding law, which I would faithfully apply if I am fortunate enough to be confirmed.

8. You filed a petition for certiorari in *North Carolina v. North Carolina State Conference of the NAACP*, after the U.S. Court of Appeals for the Fourth Circuit held that the provisions of North Carolina's law "targeted African Americans with almost surgical precision. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Do you agree that, even after *Shelby County v. Holder*, 570 U.S. 2 (2013), Section 2 of the Voting Rights Act prohibits voting practices or procedures that have a discriminatory impact on African Americans?

Response: Yes.

9. You filed an amicus brief in *Burwell v. Hobby Lobby Stores, Inc.*, in which you asserted that the First Amendment and Religious Freedom Restoration Act "protect the exercise of religion without regard to corporate form or profit motive." What is the appropriate legal analysis when a business owner's religious rights interfere with the constitutionally protected liberty interests of his/her employees?

Response: The Supreme Court's analysis in *Hobby Lobby Stores, Inc.* illustrates the appropriate analysis under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* A variety of other constitutional, statutory, and factual considerations may apply in other circumstances. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents.

- a. Is it a correct reading of your brief that the arguments set forth therein were not limited to closely held companies, but rather would, in your view, extend to publicly held companies as well?

Response: The arguments I made on behalf of certain clients in the Supreme Court in the referenced *amicus* brief speak for themselves. The applicable law in the area comes not from the *amicus* brief, but from the binding decisions of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents, regardless of the arguments I previously made on behalf of clients.

- b. Do you agree that the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*

was limited to closely held companies like Hobby Lobby?

Response: The Supreme Court stated in that case: “we hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act].” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014). The scope of that holding 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 faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

Senate Judiciary Committee - Questions for the Record
July 25, 2017

Hearing entitled: "Nominations"

Questions for Mr. Stephen S. Schwartz, to be a Judge of the United States Court of Federal Claims

1. Can you please describe the interview process that you went through with the White House and who was involved in any and all interviews?

Response: On April 3, 2017, officials from the White House Counsel's Office approached me about my interest in the Court of Federal Claims. I interviewed for the appointment on April 7, 2017, with officials from the White House Counsel's Office and the Department of Justice Office of Legal Policy.

I remember the names and affiliations of the individuals at my interview whom I knew previously—Mr. Daniel Epstein of the White House Counsel's Office and Mr. Jonathan Berry of the Office of Legal Policy—but not those of individuals I met there for the first time. I have reviewed my files and have been unable to find an accurate record of the others who were present. I was not interviewed on any other occasion.

Following that interview, officials from the White House Counsel's Office informed me that the White House intended to move forward with my nomination. Since April 3, 2017, I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy.

Senator Mazie K. Hirono

Questions for the Record following hearing on July 25, 2017 entitled:

“Nominations”

Stephen S. Schwartz:

- 1) You have not been admitted to the bar of the Court of Federal Claims. Have you ever litigated a case before the Court of Federal Claims? Has any of your work involved the Court of Federal Claims? If not, what qualifies you to serve as a judge on 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, which resolves appeals from the Court of Federal Claims. 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/or the federal trial court procedures that its cases involve.

In particular, 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.

- 2) You are one of only three partners at a boutique litigation firm that has championed a number of conservative causes. Is it fair to hold you accountable for the choice of which clients and cases you take, and the positions you advocate for? If not, why not?

Response: In any law firm, and particularly a small one, the decision to take on a particular representation is a complicated one that involves a variety of factors. Those factors include the nature of the issues the case raises, the firm’s capacity to take on additional work, the kind of work that litigating the matter to a successful conclusion would entail, the consistency of the matter with the firm’s overall business development strategy, the positions taken by the firm’s pre-existing clients, and many other

considerations. New matters come to a firm, furthermore, through a wide variety of channels such as personal and professional connections, news reports of past matters, and the general reputation of the firm's partners. *See also* ABA Model Rules of Professional Responsibility 1.2(b).

- 3) You represented Louisiana in a case challenging a variety of abortion restrictions. The restrictions include a requirement that doctors who perform outpatient abortions have admitting privileges, a three-day waiting period, a prohibition on the most common method of second trimester abortion, and terms of imprisonment for receiving reimbursement for the costs of collecting and storing tissue from abortions for medical research.

- a. Why did you choose to defend these restrictions?

Response: This question appears to address at least two different cases. Both matters were pending with my firm when I joined in 2016, and I was not part of the decision to take on either of the representations.

- b. Is it your understanding that the Constitution provides for a right to abortion free of undue burdens? Would you consider the burdens you defended in this case to be undue after *Hellerstedt*?

Response: This question refers to pending cases in which I currently represent some of the parties. My obligations as an advocate make it inappropriate for me to answer this question in detail.

- 4) You submitted an amicus brief in the *Hobby Lobby* case which argued that the Court should recognize corporations as having the right to free exercise of religion. Are there any limits, and what are the limits, on what a corporation may claim as a religious belief in justifying the denial of health or other benefits to its employees?

Response: The scope of the Supreme Court's holding in *Hobby Lobby* is an issue that is subject to current litigation, potentially 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.

- 5) You have represented the Gloucester County School Board in its defense of a policy requiring children to use bathrooms that correspond to their biological sex. Why did you choose to defend that policy?

Response: That matter was pending with the firm when I joined in 2016, and I was not part of the decision to take on the representation.

- 6) You submitted an amicus brief on behalf of Jeb Bush arguing that DACA, the executive immigration policy that defers action on undocumented immigrants who were brought to the United States as minors, is unconstitutional. Why did you choose to defend this position?

Response: That matter was pending with the firm when I joined in 2016, and I was not part of the decision to take on the representation.

- 7) You represented North Carolina in a case challenging a variety of voting restrictions. The restrictions include a photo ID requirement, a reduction in early-voting days, a ban on out-of-precinct voting, the elimination of same-day voter registration, and the elimination of pre-registration for those under the age of 18. The Fourth Circuit concluded that these restrictions were enacted with discriminatory intent, and that they “targeted African Americans with almost surgical precision.”

- a. Why did you choose to defend these restrictions?

Response: That matter was pending with the firm when I joined in 2016, and I was not part of the decision to take on the representation.

- b. Do you believe that there is a fundamental right to vote?

Response: The Supreme Court has stated that “the political franchise of voting ... is regarded as a fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). I would apply all applicable precedents if I am fortunate enough to be confirmed.

- 1) You are a member of the Federalist Society. It has been reported that President Trump has essentially outsourced the presidential responsibility of nominating judges to the Federalist Society. Almost every judicial nominee to come before the Committee so far in this Congress has been a member or leader of the Federalist Society, as have many Trump Justice Department nominees.

- a. For how long have you been a member of the Federalist Society? Will you maintain your membership during your service as a federal judge if confirmed? Will you attend Federalist Society events? If so, what steps will you take to ensure that they do not have an undue influence on your judging?

Response: To my recollection, I joined the Federalist Society in law school. If I am fortunate enough to be confirmed, I will evaluate all my professional memberships and participation in professional events in light of the applicable Canons of the Code of Conduct for United States Judges.

- b. What does it tell us that nearly every judicial nominee to come before us in this Congress is a member of the Federalist Society?

Response: I cannot speculate as to what motivates others to join the Federalist Society, or as to the President's reasons for each individual exercise of his authority under the Constitution to nominate judges. In my case, I believe that I was nominated because the President believes I have the ability to manage a docket of cases as a judge on the Court of Federal Claims, and that I would apply all precedents fairly and impartially.