

**Nomination of Zachary Somers to the United States Court of Federal Claims
Questions for the Record
Submitted November 25, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1) According to your Questionnaire, you have been admitted to the Court of Federal Claims since 2005. However, you also note that you were only in private practice for two years from 2005 to 2007 before spending the last thirteen years working as a counsel for the House and the Senate.

a) Have you argued or appeared before the U.S. Court of Federal Claims—the court to which you have been nominated?

I have not argued before the Court of Federal Claims; however, I have appeared in several cases before the court and began my legal career clerking on that court.

b) If not, why do you think the President nominated you for this position?

Please see my answer to Question 1(a).

2) The Judiciary Committee’s Questionnaire asks nominees a number of questions about their litigation experience. On your Questionnaire, you wrote that “I have not tried a case.”

a) According to the most recent data available, the Court of Federal Claims currently has almost 1,500 pending cases. Given that you have never litigated a case, what makes you qualified to serve on the bench and consider any of these 1,500 matters?

My legal experience is extensive, both in the Court of Federal Claims and as a committee counsel in the House and the Senate. My legal career began as a law clerk on the Court of Federal Claims, during which time I participated in all manner of proceedings before the court. After clerking, I spent nearly two years as an associate at a law firm that largely specialized in Court of Federal Claims litigation. While at that firm, I was involved in nearly all stages of litigation in cases before the Court of Federal Claims and other federal courts. This work included drafting complaints, initial discovery requests, reviewing discovery, depositions, responding to motions to dismiss, drafting motions for summary judgment and supporting briefs, drafting pre- and post-trial motions and briefs, trial preparation, and drafting briefs appealing Court of Federal Claims rulings to the Federal Circuit and the Supreme Court in complex breach of contract and Fifth Amendment takings cases.

In addition to practice before the court, while I was a counsel on the House Judiciary Committee, I worked on resolutions to authorize congressional reference cases before the Court of Federal Claims and legislation to amend 28 U.S.C. § 1500 and the court’s contract dispute, bid protest, and military pay case jurisdiction. Beyond Court of Federal Claims issues directly, my legislative portfolio at House Judiciary predominantly

consisted of matters related to federal court litigation. While I have extensive experience in complex congressional investigations, including dozens of staff depositions, my legislative work has concentrated on legislation impacting litigation in federal court, such as legislation to: create or amend federal causes of action, amend federal court procedure and evidentiary rules, create or limit waivers of sovereign immunity against the United States, the states, and foreign governments, expand federal statutes of limitation and preempt state statutes of limitation, and enhance enforcement of congressional subpoenas. In working on legislation in these areas, I have regularly read judicial opinions, court rules, and secondary sources, and interpreted how existing statutes and proposed statutory changes apply.

I believe the experience I have gained on Capitol Hill will be invaluable if I am lucky enough to be confirmed, especially to this court in which trials are rare and without juries or a criminal docket. I also believe I would bring an increasingly unique perspective to the bench having served in the legislative branch as studies indicate that prior legislative experience has been decreasing on the federal bench in recent years.

- 3) 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?

The decision to appoint judges up to the court’s statutory maximum is given to the President with the advice and consent of the Senate. As a judicial nominee, it would be inappropriate for me to offer an opinion on the need for additional judges on the court.

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”?

Please see my answer to Question 3(a).

- 4) Please respond with your views on the proper application of precedent by judges.

a) When, if ever, is it appropriate for the Court of Federal Claims to depart from

Supreme Court or relevant circuit court precedent?

It is never appropriate for a judge on the Court of Federal Claims to depart from precedent.

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

As a judicial nominee, it would be inappropriate for me to give my view on when it is appropriate for the Supreme Court to overturn its own precedent. The Supreme Court has, however, articulated the factors it considers in deciding whether to overturn its own precedent to include “the quality of [the precedent’s] reasoning, the workability of the rule it establishes, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.” *Janus v. American Federation of State, County, and Municipal Employees*, 138 S.Ct. 2448, 2478-2479 (2018).

- 5) 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”?

If confirmed, as a federal trial judge, I will follow all Supreme Court precedent, including *Roe v. Wade* and its progeny.

b) Is it settled law?

Please see my answer to Question 5(a).

- 6) 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?**

If confirmed, as a federal trial judge, I will consider all precedent, including *Obergefell v. Hodges*, to be settled law.

- 7) 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?

As a judicial nominee, it would be inappropriate for me to comment on whether a case was correctly decided. If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and the Federal Circuit, including *District of Columbia v. Heller*.

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

As the Supreme Court observed in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. . . . [A]s we have explained, that the sorts of weapons protected were those 'in common use at the time.'" *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008).

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

The opinions in *Heller* disagreed on whether the majority opinion was a departure from precedent. See *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) ("We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.").

8) 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?

In *Citizens United v. FEC*, 558 U.S. 310, 342 (2010), the Supreme Court held that "First Amendment protection extends to corporations." If confirmed, I will fully and faithfully apply this precedent.

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

Please see my answer to Question 8(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that the Religious Freedom Restoration Act applies to closely-held corporations. It did not reach the further question of whether corporations have a right to freedom of religion under the First Amendment. As a judicial nominee, it would be inappropriate for me to comment further on an issue that could be the subject of pending or impending litigation.

- 9) On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former 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?

Not that I recall.

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?

Not that I recall.

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

As a judicial nominee, it is inappropriate for me to give my personal views on any area of the law. If confirmed, I will fully and faithfully apply all Supreme Court and Federal Circuit precedent, including administrative law precedent.

- 10) Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No.

- 11) Do you believe that human activity is contributing to or causing climate change?

As a judicial nominee, it is inappropriate for me to comment on a political issue, especially one like climate change that may be the subject of pending or impending litigation.

- 12) Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

As a judicial nominee, it is inappropriate for me to comment on this question as it is the subject of pending and impending litigation in the federal courts.

- 13) Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

In *Loving v. Virginia*, the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause. As a judicial nominee, it would be inappropriate for me to comment any further on this issue, which could be the subject of pending and impending litigation in the federal courts.

- 14) Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please see my answer to Question 13.

- 15) When is it appropriate for judges to consider legislative history in construing a statute?

Statutory construction begins with the text of the statute itself. If the statute is clear on its face, there is no need to look any further. In cases in which ambiguity exists, a judge may consider a number of methods of statutory construction. In some cases, precedent may require a judge to examine legislative history in construing an ambiguous statute.

- 16) 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.

- 17) Please describe with particularity the process by which you answered these questions.

I received these questions from the Office of Legal Policy and then began reviewing the questions and drafting responses. After I prepared draft responses, I sent them to the Office of Legal Policy, which offered some recommended edits. I reviewed the comments that I received, prepared a final draft of my answers, and authorized the Office of Legal Policy to submit my responses to the Committee.

Senator Dick Durbin
Written Questions for Somers
November 25, 2020

For questions with subparts, please answer each subpart separately.

Questions for Zachary Somers

- 1. You say in your questionnaire that you have not tried a case. Don't you think that actual trial experience is helpful for a person to serve as a judge?**

My legal experience is extensive, both in the Court of Federal Claims and as a committee counsel in the House and the Senate. My legal career began as a law clerk on the Court of Federal Claims, during which time I participated in all manner of proceedings before the court. After clerking, I spent nearly two years as an associate at a law firm that largely specialized in Court of Federal Claims litigation. While at that firm, I was involved in nearly all stages of litigation in cases before the Court of Federal Claims and other federal courts. This work included drafting complaints, initial discovery requests, reviewing discovery, depositions, responding to motions to dismiss, drafting motions for summary judgment and supporting briefs, drafting pre- and post-trial motions and briefs, trial preparation, and drafting briefs appealing Court of Federal Claims rulings to the Federal Circuit and the Supreme Court in complex breach of contract and Fifth Amendment takings cases.

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I believe the experience I have gained on Capitol Hill will be invaluable if I am lucky enough to be confirmed, especially to this court in which trials are rare and without juries or a criminal docket. I also believe I would bring an increasingly unique perspective to the bench having served in the legislative branch as studies indicate that prior legislative experience has been decreasing on the federal bench in recent years.

- 2. When was the last time you filed a brief in court?**

Most recently, I have consulted on amicus briefs filed by members of Congress who I worked for and consulted on, including reviewing filings and negotiating a settlement of, litigation involving the enforcement of a House Judiciary Committee subpoena in 2018. In addition, I have filed many briefs in court, most recently in 2008.

3. When was the last time you appeared in court?

The last time I appeared in court was in 2007.

Nomination of Zachary N. Somers, to be Judge for the United States Court of Federal Claims

**Questions for the Record
Submitted November 25, 2020**

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?

If confirmed, to the extent this issue were to arise in the Court of Federal Claims, I would fully and faithfully apply Supreme Court precedent that addresses this question, including *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes.

- 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?

Yes, according to Supreme Court precedent, the "Due Process Clause 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, 720-721 (1997). In *Glucksberg*, the Supreme Court further instructed that, in terms of sources, "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking.'" *Id.* at 721.

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

Yes, if a right has been previously recognized by the Supreme Court or the Federal Circuit, I would be bound to follow that precedent. In the absence of binding precedent, I would consider decisions of circuits other than the Federal Circuit.

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

Yes.

- 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*).

I would fully and faithfully apply *Casey* and *Lawrence*.

- f. What other factors would you consider?

I would consider the factors articulated in *Glucksberg* and any additional factors the Supreme Court or Federal Circuit have set forth in other cases.

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

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment applies to gender equality. If confirmed, I would fully and faithfully apply this precedent.

- 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 answer to Question 2.

- 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?

I do not know why this question was not decided until 1996.

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

In *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment protects the right of same sex couples to marry "on the same terms and conditions as opposite-sex couples." 576 U.S. 644, 675-676 (2015). If confirmed, I would fully and faithfully apply this and all other binding precedents.

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

I do not believe that the Supreme Court has decided this issue; accordingly, it would be inappropriate for me to comment on an issue that may be pending or impending in litigation. If confirmed, I will fully and faithfully apply all Supreme Court and Federal

Circuit precedent concerning how transgender people are treated under the Constitution and federal law.

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

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that there is a constitutional right to privacy that protects a woman's right to use contraceptives. If confirmed, I will fully and faithfully apply this precedent and all precedents of the Supreme Court and the Federal Circuit.

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

The Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to obtain an abortion. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I will fully and faithfully apply these precedents and all precedents of the Supreme Court and the Federal Circuit.

- 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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders. See also *Obergefell v. Hodges*, 576 U.S. 644 (2015). If confirmed, I will fully and faithfully apply these precedents and all precedents of the Supreme Court and the Federal Circuit.

- 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 3, 3(a), and 3(b).

4. 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*, 576 U.S. 644, 668 (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 trial judges may appropriately consider such evidence when directed to by Supreme Court or circuit precedent. If confirmed, I will fully and faithfully apply *United States v. Virginia*, *Obergefell v. Hodges*, and all other Supreme Court and Federal Circuit precedent on this issue.

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

The admission of scientific and other expert testimony is governed by Federal Rule of Evidence 702 and the factors set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and its progeny. If confirmed, I will fully and faithfully follow all Supreme Court and Federal Circuit precedent on the role of sociology, scientific evidence, and data in judicial analysis.

5. 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?

The Supreme Court has observed that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply *Obergefell* and other precedent on this issue and all other precedents of the Supreme Court and Federal Circuit.

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

Please see my response to Question 5(a).

6. 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.

- a. 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?

While I believe that *Brown* was correctly decided, I have not studied the original public meaning of the Fourteenth Amendment sufficiently enough to know whether *Brown* is consistent with it. I am aware, however, that some scholars have argued that *Brown* is consistent with the original meaning of the Fourteenth Amendment. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘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 Nov. 25, 2020).

If confirmed, I will fully and faithfully apply Supreme Court and Federal Circuit precedent, including precedent on the meaning of terms such as “freedom of speech,” “equal protection,” and “due process of law.”

- 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?

Yes, in cases involving the interpretation of constitutional provisions, the Supreme Court has examined the text, structure, and history of the provision, including the provision’s public meaning at the time of its adoption, in its interpretation. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will fully and faithfully follow all precedents from the Supreme Court and the Federal Circuit, including those on constitutional interpretation.

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

Please see my answer to Question 6(c).

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

Please see my answer to Question 6(c).

7. Please describe any experience you have practicing in the Court of Federal Claims.

From 2004 to 2005, I served as a law clerk on the Court of Federal Claims. After clerking, from 2005 to 2007, I was an associate attorney at a law firm that largely specialized in Court of Federal Claims litigation, although I also worked on several cases in other federal courts. While at that firm, I worked on approximately 10 cases filed in the Court of Federal Claims. This work included drafting complaints, initial discovery requests, reviewing discovery,

responding to motions to dismiss, drafting motions for summary judgment and supporting briefs, drafting pre-trial motions and pre-trial briefs, drafting post-trial motions, trial preparation, and drafting briefs appealing Court of Federal Claims rulings to the Federal Circuit and the Supreme Court in complex breach of contract and Fifth Amendment takings cases seeking hundreds of millions of dollars in damages and just compensation. In addition to practice before the court, while I was a counsel on the House Judiciary Committee, I worked on resolutions to authorize congressional reference cases before the Court of Federal Claims, and legislation to amend 28 U.S.C. § 1500 and the court's contract dispute, bid protest, and military pay case jurisdiction.

**Questions for the Record for Zachary Noah Somers
From Senator Mazie Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I ask each nominee to answer the following two questions:

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Because judges are required to preside over and decide cases impartially and without regard to any biases, prejudices, or preferences, any training that helps judges understand and fulfill their duty to be impartial is important.

b. Have you ever taken such training?

No.

c. If confirmed, do you commit to taking training on implicit bias?

If confirmed, I will participate in training opportunities that will assist me in performing my job to the best of my ability, including with regard to implicit bias.

3. As a law student at Georgetown University, you were the Editor-in-Chief of the Georgetown Journal of Law and Public Policy. In the notes section, you wrote a piece entitled “The Mythical Wall of Separation: How the Supreme Court has Amended the Constitution.” You wrote about the Establishment Clause and how it was not intended to erect “a wall of separation between Church and State.”

a. Does this statement still reflect your views on the Establishment Clause? Can you discuss what actions are prohibited by the Establishment Clause?

In my note, I observed that the “Establishment Clause, as it was originally understood by its framers and ratifiers, had a very limited dual purpose: to prohibit Congress from establishing a national church and to clarify that each state had a free hand in defining the meaning of establishment in its own laws and constitution.” 2 Geo. J. L. & Pub. Pol’y 265, 266 (2004). The references made to “a wall of separation” in my note were intended to convey that the phrase comes from a metaphor used in a letter written by Thomas Jefferson more than ten years after the First Amendment was ratified, that the phrase is not in the First Amendment itself, and that the phrase and letter are of little utility in determining the original meaning of the Establishment Clause. As a judicial nominee, it would be inappropriate for me to comment on what actions are prohibited by the Establishment Clause, as cases involving the clause are pending and impending in the federal courts.

b. Can you discuss your views on whether the Establishment Clause should be applied to the States?

The Supreme Court has clearly applied the Establishment Clause to the states. To the extent such a question could arise in the Court of Federal Claims, I would fully and faithfully apply Supreme Court and Federal Circuit precedent.

4. Since 2007, you have been a congressional employee focused on policy and oversight investigations. You have very little litigation experience and have never tried a case.

a. Given your lack of experience in a courtroom, how can you ensure that you will be able to serve as a judge and correctly follow the relevant rules and procedure in a courtroom?

My legal experience is extensive, both in the Court of Federal Claims and as a committee counsel in the House and the Senate. My legal career began as a law clerk on the Court of Federal Claims, during which time I participated in all manner of proceedings before the court. After clerking, I spent nearly two years as an associate at a law firm that largely specialized in Court of Federal Claims litigation. While at that firm, I was involved in nearly all stages of litigation in cases before the Court of Federal Claims and other federal courts. This work included drafting complaints, initial discovery requests, reviewing discovery, depositions, responding to motions to dismiss, drafting motions for summary judgment and supporting briefs, drafting pre- and post-trial motions and briefs, trial preparation, and drafting briefs appealing Court of Federal Claims rulings to the Federal Circuit and the Supreme Court in complex breach of contract and Fifth Amendment takings cases.

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in complex congressional investigations, including dozens of staff depositions, my legislative work has concentrated on legislation impacting litigation in federal court, such as legislation to: create or amend federal causes of action, amend federal court procedure and evidentiary rules, create or limit waivers of sovereign immunity against the United States, the states, and foreign governments, expand federal statutes of limitation and preempt state statutes of limitation, and enhance enforcement of congressional subpoenas. In working on legislation in these areas, I have regularly read judicial opinions, court rules, and secondary sources, and interpreted how existing statutes and proposed statutory changes apply.

I believe the experience I have gained on Capitol Hill will be invaluable if I am lucky enough to be confirmed, especially to this court in which trials are rare and without juries or a criminal docket. I also believe I would bring an increasingly unique perspective to the bench having served in the legislative branch as studies indicate that prior legislative experience has been decreasing on the federal bench in recent years.

b. What measures are you taking to compensate for your lack of experience?

I believe that my experience as a law clerk, an attorney in private practice, and as a counsel on both the House and Senate Judiciary Committees has prepared me to serve as a judge on the Court of Federal Claims. I will of course, as I have throughout my legal career, carefully study case law, treatises and other secondary sources, and federal and Court of Federal Claims rules as applicable in the cases that come before me if I am confirmed.

**Nomination of Zachary Noah Somers
United States Court of Federal Claims
Questions for the Record
Submitted November 25, 2020**

QUESTIONS FROM SENATOR BOOKER

1. In 2004, you penned a note titled, “The Mythical Wall of Separation: How the Supreme Court has Amended the Constitution.”¹ In it, you argued that the First Amendment’s separation of church and state should not apply to states. You wrote, “The Establishment Clause, as it was originally understood by its framers and ratifiers, had a very limited dual purpose: to prohibit Congress from establishing a national church and to clarify that each state had a free hand in defining the meaning of establishment in its own laws and constitution.”²

- a. Do you stand by the position that the separation of church and state should not apply to states?

I stand by the position that as originally understood by the public at the time of its ratification, and prior to the adoption of the Fourteenth Amendment, the Establishment Clause was not intended to apply to the states.

- b. In the same note, you wrote that the Bill of Rights was not intended to be applied to the states. Do you stand by that position?

When the Bill of Rights was originally adopted it was not intended to apply to the states. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833); *Lessee of Livingston v. Moore*, 7 Pet. 469, 551–552 (1833) (“[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states.”). It was only after the adoption of the Fourteenth Amendment that the Supreme Court has held that most of the guarantees in the Bill of Rights apply to the states.

- i. If so, do you believe it is constitutional for states to enact laws that would limit the Second Amendment rights of its citizens?

Please see my answer to Question 1(b).

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

To the extent that the term “originalist” refers to a method of constitutional interpretation by which clauses in the Constitution and its amendments are interpreted according to their public meaning at the time they were adopted, I consider myself an originalist. However, if confirmed, I will fully and faithfully apply all Supreme Court and Federal Circuit precedent regardless of the method of constitutional interpretation that was applied.

¹ Zachary N. Somers, *The Mythical Wall of Separation: How the Supreme Court has Amended the Constitution*, 2 GEO. J.L. & PUB. POL’Y 265 (2004) (SJQ Attachments at p. 2).

² *Id.* at 266.

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

To the extent that the term “textualist” means a method of statutory interpretation through which statutes are interpreted by their plain meaning at the time of their adoption, I consider myself a textualist. However, if confirmed, as a federal trial judge, I will fully and faithfully apply all precedent, regardless of the method of interpretation employed in the precedent.

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

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

Statutory construction begins with the text of the statute itself. If the statute is clear on its face, there is no need to look any further. In cases in which ambiguity exists, a judge may consider a number of methods of statutory construction. In some cases, precedent may require a judge to examine legislative history in construing an ambiguous statute. If confirmed, I will follow all Supreme Court and Federal Circuit precedent on the use of legislative history.

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

Please see my answer to Question 4(a).

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

As I understand the term judicial restraint—that a judge decides only the case or controversy presented by applying the law to the facts and not reasoning to a pre-ordained result—I believe it is important.

- a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.³ Was that decision guided by the principle of judicial restraint?

The opinions in *Heller* disagreed on whether the majority opinion was a departure from precedent. See *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (“We conclude that nothing in our precedents forecloses our adoption of the original

³ 554 U.S. 570 (2008).

understanding of the Second Amendment.”). As a judicial nominee, it is inappropriate for me to comment any further on whether judicial restraint guided the Supreme Court’s decision in *Heller*.

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁴ Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it is inappropriate for me to comment on whether judicial restraint guided a Supreme Court decision.

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

As a judicial nominee, it is inappropriate for me to comment on whether judicial restraint guided a Supreme Court decision.

- 6. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁶ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁷

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

The right to vote is a fundamental right that must be protected. The issue of voter fraud is the subject of pending or impending litigation in federal courts and, therefore, as a judicial nominee, it would be improper for me to comment further.

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

Please see my answer to question 6(a).

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

Please see my answer to question 6(a).

- 7. According to a Brookings Institution study, African Americans and whites use drugs at

⁴ 558 U.S. 310 (2010).

⁵ 570 U.S. 529 (2013).

⁶ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁷ *Id.*

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.⁸ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁹ 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.¹⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹¹

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

I understand that there are studies and other evidence that indicate that there is implicit racial bias in our criminal justice system. I have not, however, read these studies or examined the evidence.

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

I am aware that there are statistics showing that racial minorities constitute a larger percentage of individuals incarcerated when compared to their representation in the population at large.

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

I have not studied the issue of implicit racial bias in our criminal justice system.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹² Why do you think that is the case?

The disparities that you reference with regard to the sentencing of similarly situated defendants who commit the same crimes is a problem and an injustice. As a judicial nominee, however, it would be inappropriate for me to speculate on the possible causes for the disparities that you reference. I can only commit that if I am confirmed that bias, including racial bias, will have no place in my courtroom.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory

⁸ 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>.

⁹ *Id.*

¹⁰ 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>.

¹¹ *Id.*

¹² U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

minimum sentences.¹³ Why do you think that is the case?

Please see my answer to Question 7(d).

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

I believe that federal judges can be aware of the potential for implicit racial bias and work to ensure that no biases affect the fairness and impartiality that criminal defendants are entitled to.

8. 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.¹⁴ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁵

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

I have not studied this issue and, therefore, have not formed an opinion on it.

- 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.

Please see my answer to Question 8(a).

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

Yes.

10. Do you believe that *Brown v. Board of Education*¹⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

11. Do you believe that *Plessy v. Ferguson*¹⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

¹³ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹⁴ 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>.

¹⁵ *Id.*

¹⁶ 347 U.S. 483 (1954).

¹⁷ 163 U.S. 537 (1896).

No.

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

No.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”¹⁸ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

As a judicial nominee, it is inappropriate for me to comment on the political statements of any elected official.

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.”¹⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Please see my answer to Question 13. With regard to the due process rights of immigrants, in *Zadvydas v. Davis*, the Supreme Court held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” 533 U.S. 678, 693 (2001).

¹⁸ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.