

**Nomination of Thompson Michael Dietz to the United States Court of Federal Claims**  
**Questions for the Record**  
**Submitted September 16, 2020**

**QUESTIONS FROM RANKING MEMBER FEINSTEIN**

1. Are you currently admitted to practice law before the Court of Federal Claims? If so, please provide the dates of your admission and describe the nature of your practice before the Court of Federal Claims.

During the course of my 15-year legal career, I have developed a depth of knowledge regarding substantive matters that are directly relevant to the types of matters filed before the Court of Federal Claims. I have gained significant practical experience with all aspects of federal government contracting, including evaluating solicitations, developing proposals, negotiating and administering contracts, and resolving contract disputes. In addition, my legal practice as in-house counsel has required that I have the ability and versatility to develop expertise in new areas of the law in a high-pressure, fast-paced environment, apply the law to complex factual scenarios involving adverse parties, and efficiently solve legal and business problems. While my legal practice has not involved appearing before the Court of Federal Claims, my practice has provided me with first-hand experience handling the types of litigants who will appear before me if I am confirmed as a judge on the Court of Federal Claims.

2. In your Senate Judiciary Questionnaire, you wrote, "I have not tried a case during my law practice." You also wrote, "My legal practice has not been in litigation or required appearances in court." The Questionnaire specifically asks nominees to list their top ten most significant litigated matters. To that question, you responded, "I have not personally litigated matters."

**Given that you have never litigated a case or appeared in any court, what makes you qualified to serve on the Court of Federal Claims?**

My 15 years of legal experience in federal government contracts qualifies me to serve on the Court of Federal Claims. As I describe in my response to the previous question, my legal practice has also provided me with first-hand experience handling the types of litigants who will appear before me if I am confirmed as a Judge on the Court of Federal Claims, and I will apply that same skill-set to my handling of the cases presented on my docket, including through trial, in accordance with the relevant rules and procedures. I would handle all matters before me in accordance with the Rules of the Court of Federal Claims, Federal Rules of Evidence, Code of Conduct for United States Judges, and binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit. In addition to my relevant legal experience, throughout my career, I have consistently demonstrated through my interactions with colleagues, counterparties and others with whom I have dealt that I have the integrity and even-handed temperament to serve as a fair and impartial judge on the Court of Federal Claims.

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?**

I have reviewed the statistical reports made available by the Court of Federal Claims on the Court’s website. The decision to appoint judges is subject to the discretion and authority of the President with the advice and consent of the Senate. As a judicial nominee, it would not be appropriate for me to comment on the need for new judges or the decision-making process for judicial nominations.

**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 response 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 the Court of Federal Claims to depart from precedent established by the Supreme Court or Court of Appeals for the Federal Circuit.

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

The Supreme Court alone determines when it is appropriate to overturn its own precedent. As a judicial nominee, it would not be appropriate for me to comment on Supreme Court decisions. If confirmed, I will fully and faithfully apply all precedent established by the Supreme Court.

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”?**

All Supreme Court decisions, including *Roe v. Wade*, are binding on the Court of Federal Claims. If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

**b. Is it settled law?**

Yes. *Roe v. Wade* is settled law.

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?**

Yes, *Obergefell v. Hodges* is 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 not be appropriate for me to comment on whether a Supreme Court decision was rightly or wrongly decided. If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Heller*.

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

In *Heller*, the Supreme Court stated that “nothing 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.” 554 U.S. 570, 626–27 (2008). If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Heller*.

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

Issues relating to the Second Amendment and application of *Heller* are subject to pending or impending litigation. As a judicial nominee, it would not be appropriate for me to provide a comment on this question.

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*, the Supreme Court held that First Amendment protection extends to corporations. 558 U.S. 310, 342 (2010). The scope of First Amendment protection as applicable to corporations is subject to pending or impending litigation. It would not be appropriate for me under the Code of Conduct of United States Judges to comment further on this question. If confirmed, I will fully and faithfully apply all precedent as established by the Supreme Court and Court of Appeals for the Federal Circuit.

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

I believe that individuals have a legitimate interest in protecting their First Amendment free speech rights. As noted in my response to Question 8.a, the scope of First Amendment protection as applicable to corporations is a subject to pending or impending litigation. It would not be appropriate for me under the Code of Conduct of United States Judges to comment further on this question.

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

As noted in my response to Question 8.a, the scope of First Amendment protection as applicable to corporations is subject to pending or impending litigation. Accordingly, under the Code of Conduct of United States Judges, it would not be appropriate for me as a judicial nominee to comment further on this question.

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?**

No.

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

No.

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

Administrative law is the body of law that governs the administration and regulation of government agencies. Administrative law encompasses legal issues that are frequently subject to litigation before the Court of Federal Claims. Accordingly, under the Code of Conduct for United States Judges, it would not be appropriate for me to comment further or express a view on administrative law. If confirmed, I would fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including precedent related to administrative law.

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?

I think climate change is an important policy issue for our country, as well as the international community. However, as a judicial nominee, it is not appropriate for me to comment or express my views on policy matters, such as climate change and whether human activity is contributing to or causing climate change.

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

This issue is subject to pending or impending litigation. Accordingly, under the Code of Conduct of United States Judges, it would not be appropriate for me as a judicial nominee to comment or express a view on this issue. If confirmed, I would fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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?

The Supreme Court has held that "the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). If confirmed, I would fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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

This issue is subject to pending or impending litigation. Accordingly, under the Code of Conduct of United States Judges, it would not be appropriate for me as a judicial nominee to comment or express a view on this issue. If confirmed, I would fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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

It is not appropriate for judges to consider legislative history in construing a statute where the text of the statute is clear and unambiguous. If the text of the statute is ambiguous, the Supreme Court has stated that legislative history may be considered. If confirmed, I would fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit precedent, including those related to use of legislative history.

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 on Wednesday, September 16, 2020. After reading the questions, I prepared draft responses based on my knowledge and research. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy. I finalized my responses after consideration of those comments. I submitted my final responses on Monday, September 21, 2020. Each answer is my own.

**Written Questions for Thompson Michael Dietz**  
**Submitted by Senator Patrick Leahy**  
**September 16, 2020**

1. On your Senate Questionnaire you stated during the course of your career, your “legal practice has not been in litigation or required appearances in court” and you “have not tried a case during my law practice.”

**(a) What specific assurances can you give this Committee that you are prepared to handle the unique matters you will oversee?**

During my 15-year legal career, I have developed a depth of knowledge regarding substantive matters that are directly relevant to the types of matters filed before the Court of Federal Claims. I have also gained significant practical experience with all aspects of federal government contracting, including evaluating solicitations, developing proposals, negotiating and administering contracts, and resolving contract disputes. My legal practice has provided me with first-hand experience handling the types of litigants who will appear before me if I am confirmed as a judge on the Court of Federal Claims. In addition to my relevant legal experience, throughout my career, I have consistently demonstrated through my interactions with colleagues, counterparties and others with whom I have dealt that I have the integrity and even-handed temperament to serve as a fair and impartial judge on the Court of Federal Claims.

If confirmed, I will handle all matters before me in accordance with the Rules of the Court of Federal Claims, Federal Rules of Evidence, Code of Conduct for United States Judges and binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit. Over the course of my 15-year legal career, I have regularly been called upon to handle complex matters involving adverse parties. I have demonstrated throughout my career that I have the ability and versatility to quickly develop expertise in new areas of the law and apply the law to complex factual scenarios in accordance with the relevant rules and procedures. Additionally, if confirmed, I will actively participate in training opportunities made available to me as a judge and will seek other continuing education opportunities that are relevant to my role as a judge.

2. Chief Justice Roberts wrote in *King v. Burwell* that

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’”

- (a) **Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

If confirmed, I will adhere to the rules of statutory interpretation recognized by the Supreme Court and interpret the meaning of statutory terms in accordance with binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit. I agree that both the text and structure of a statute are relevant considerations for statutory interpretation purposes.

3. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

- (b) **Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?**

As a judicial nominee, it would not be appropriate for me to comment on political statements. I think that an independent judiciary is indispensable to our justice system, and, if confirmed, I will conduct myself with integrity and independence and will not be swayed by political interests.

- (c) **While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

Please see my response to Question 3.b.

4. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

- (a) **Do you agree with that view? Does the Constitution permit discrimination against women?**

As a judicial nominee, it would not be appropriate for me to comment on statements made by Justice Scalia. The Supreme Court has extended the Equal Protection Clause to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I will fully and faithfully apply the precedent on this issue as established by the Supreme Court and Court of Appeals for the Federal Circuit.

5. **Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”**

As a judicial nominee, it would not be appropriate for me to comment on what Justice Scalia meant by his statement. However, I do not agree with this characterization of the Voting Rights Act.

6. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The foreign emolument clause is contained in Article I, section 9, clause 8 of the Constitution. It states that “No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.” As a judicial nominee and because there is pending or impending litigation on this issue, it would not be appropriate for me to provide further comment.

7. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

(a) **When is it appropriate for a court to substitute its own factual findings for those made by Congress or the lower courts?**

As a judicial nominee, it would not be appropriate for me to comment on whether a specific case was rightly or wrongly decided. However, as a general rule, fact-finding is performed and the factual record is developed at the trial court level. Appellate courts evaluate the trial court record on appeal. If confirmed, I will fully and faithfully all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit on this issue.

8. **How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?**

The Thirteenth, Fourteenth, and Fifteenth Amendments each contain a clause that provides Congress with the authority to enforce the articles “by appropriate legislation.” This provides Congress with the authority to enact laws to enforce these articles.

9. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

**(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?**

If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Lawrence v. Texas*.

10. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

**(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.**

If confirmed as a judge on the Court of Federal Claims, I will perform my duties in accordance with the Code of Conduct for United States Judges and conduct myself in a manner that promotes public confidence in the integrity and impartiality of the judicial system. The Code of Conduct for United States Judges provides that a judge must avoid all impropriety and appearance of impropriety and must disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. I would adhere to this standard. For example, I would recuse myself in a proceeding concerning a former employer or where I have a financial interest in a party to the proceeding.

11. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

**(b) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

Footnote 4 in *Carolene Products* addressed judicial standards of review for economic and non-economic legislation. Under the *Carolene Products* footnote, courts apply a heightened level of scrutiny to certain non-economic legislation, such as legislation that restricts political process. If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Carolene*.

12. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

**(a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Yes.

13. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

The president's pardon power is set forth in Article II, section 2 of the Constitution. It states that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The scope of the president's pardon power is subject to ongoing public and political debate. As a judicial nominee, it would not be appropriate for me to comment on this issue.

14. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Under Article I of the Constitution, Congress is vested with legislative powers as contained therein, including the powers granted under Article I, section 8 to "regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Under Section 5 of the Fourteenth Amendment, Congress has the power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. The Supreme Court has addressed the scope of congressional power under these provisions in prior cases. If confirmed, I will fully and faithfully apply precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

15. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason

for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

- (a) **What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

As a judicial nominee, it would not be appropriate for me to comment on Chief Justice Roberts' opinion in *Trump v. Hawaii*. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

16. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

*Planned Parenthood v. Casey* provided that a "finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Litigation on the issue of state regulation of abortion and application of the "undue burden" standard is pending or impending. As a judicial nominee, under the Code of Conduct for United States Judges, it would not be appropriate for me to provide specific examples of what I believe would constitute an "undue burden" or otherwise further comment on this issue.

17. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

- (a) **Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?**

The doctrine of qualified immunity has been the subject of multiple Supreme Court decisions under which the Supreme Court has analyzed and refined the scope and limitations of qualified immunity. If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

18. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology,” such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

**(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

The individual right to privacy is an important topic, especially as we experience rapid advancements in technology. The right to privacy under the Fourth Amendment is subject to pending or impending litigation. As a judicial nominee, it would not be appropriate for me to comment on this issue. If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

**19. Can you discuss the importance of judges being free from political influence or the appearance thereof?**

It is essential to maintaining public confidence in the integrity and impartiality of the judicial system that judges are free from political influence or the appearance thereof. A judge must not allow political or other relationships to influence judicial conduct or decision making. An independent judiciary is an indispensable component of our system of government.

**Nomination of Thompson M. Dietz  
to the United States Court of Federal Claims  
Questions for the Record  
Submitted September 16, 2020**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Yes, I have read the Washington Post story and listened to the associated recordings of Mr. Leo.

b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

I believe that an independent federal judiciary is an essential component of our society and system of government. As a judicial nominee, it would not be appropriate for me to otherwise comment on policy related to the judicial nomination process.

c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my response to question 1.b.

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

As a judicial nominee, it would not be appropriate for me to comment on political matters, including those relating to the judicial nomination process.

2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Without commenting on exactly what Chief Justice Roberts meant by his statement, I agree with the theme of his comment, which I understand to relate to the independence of the judiciary. I strongly believe that an independent judiciary is an integral component of our system of government.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

A judge should faithfully and impartially apply the law in rendering decisions regardless of personal feelings towards the practical consequences of such decisions.

3. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

Whether to grant summary judgment is an objective decision based on an analysis of the applicable law and facts. The court must view all facts and inferences in the light most favorable to the non-moving party and state on the record the reasons for granting or denying the motion. If confirmed, I will adhere to the Rules of the Court of Federal Claims and binding precedent as established by the Supreme Court and Court of Appeals for the Federal Circuit when deciding whether to grant summary judgment.

4. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

- a. What role, if any, should empathy play in a judge’s decision-making process?

A judge should be respectful and courteous to all individuals with whom the judge deals. However, a judge’s decision-making process should be guided by fairness and impartiality in application of the law and should not be swayed by empathy.

- b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?

A judge’s decision-making process should be guided by fairness and impartiality in application of the law and should not be affected by personal life experiences.

5. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

6. The Seventh Amendment ensures the right to a jury “in suits at common law.”

- a. What role does the jury play in our constitutional system?

The right to a trial by jury plays a central role in our judicial system. A jury introduces impartial viewpoints of ordinary citizens into our judicial system and provides an opportunity for citizens to participate in the judicial system.

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

The enforceability of arbitration clauses is subject to pending or impending litigation. Accordingly, under the Code of Conduct of United States Judges, it would not be appropriate for me as a judicial nominee to comment or express a view on this issue. If confirmed, I would adhere to binding precedent established by the Supreme Court and Court of Appeals for the Federal Circuit regarding the Seventh Amendment and arbitration clauses.

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 6.b.

7. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has reviewed congressional factfinding under a deferential standard while retaining an independent duty to review factual findings. *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). If confirmed, I would adhere to binding precedent established by the Supreme Court and Court of Appeals for the Federal Circuit regarding deference to congressional fact-finding.

8. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes, I have read Advisory Opinion #116.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

If confirmed, prior to participating in any educational seminar or conference, I would consult the Code of Conduct for United States Judges and ensure that my

participation adheres to the Canons of the Code of Conduct and relevant advisory opinions, including Advisory Opinion #116. I commit to maintaining high standards of conduct so that the integrity and independence of the judiciary is preserved and the prestige of the judicial office is not used to advance private or political interests.

- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to question 8.b.i.

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to question 8.b.i.

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to question 8.b.i.

- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to question 8.b.i.

- c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to question 8.b.i.

**Nomination of Thompson M. Dietz, to be  
Judge of the United States Court of Federal Claims  
Questions for the Record  
Submitted September 16, 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?

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

Yes. If confirmed, I would consider whether the right is expressly enumerated in the Constitution consistent with precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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. If confirmed, I would consider whether the right is deeply rooted in this nation's history and tradition consistent with precedent of the Supreme Court and Court of Appeals for the Federal Circuit. I would consult the types of sources utilized by the Supreme Court and Court of Appeals for the Federal Circuit.

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 confirmed, I would consider whether the right has been previously recognized by the Supreme Court and Court of Appeals for the Federal Circuit and apply all binding precedent. I would consider the precedent of other courts of appeals if there was no binding precedent.

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. If confirmed, I would consider whether a similar right has been previously recognized by the Supreme Court and Court of Appeals for the Federal Circuit and apply all binding precedent. I would consider the precedent of other courts of appeals if there was no binding 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*).

Yes. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit. *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding precedent of the Supreme Court.

- f. What other factors would you consider?

If confirmed, I would consider other factors as recognized by the Supreme Court and Court of Appeals for the Federal Circuit.

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

The Supreme Court has extended the Equal Protection Clause to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I would fully and faithfully apply the precedent on this issue as established by the Supreme Court and Court of Appeals for the Federal Circuit.

- 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?

The Supreme Court has held that the Fourteenth Amendment applies to gender-based classifications, as well as race-based classifications. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court.

- 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 issue did not reach the Supreme Court until 1996; but, if confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court, including *Virginia*.

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

The Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment requires that states recognize same-sex marriage on the same terms as opposite-sex marriage. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Obergefell*.

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

This issue may be the subject of pending or impending litigation. Accordingly, under the Code of Conduct for United States Judges, it would not be appropriate for me to comment on this issue.

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

The Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to use contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Griswold* and *Eisenstadt*.

- 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 an abortion. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Roe* and *Casey*.

- 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?

The Supreme Court has held that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders. *See Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Lawrence*.

- 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 through 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*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right

to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

If confirmed, I would consider evidence that sheds light on our changing understanding of society to the extent appropriate based on binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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

Sociology, scientific evidence and data may play a role in judicial analysis if relevant to the particular matter and only as permitted by the Federal Rules of Evidence and binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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’s decision in *Obergefell* is binding precedent. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Obergefell*.

- 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?

This question is a topic of debate among legal scholars. As expressed during my hearing, I think *Brown* was correctly decided. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Brown*.

- 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 Sept. 13, 2020).

If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit on matters involving free speech, equal protection and due process regardless of any debate on these topics.

- 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?

If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit regardless of the method of constitutional interpretation used in the precedent.

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

Please see my response to question 6.c.

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

I would employ sources recognized by the Supreme Court and Court of Appeals for the Federal Circuit to discern the contours of a constitutional provision.

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

During the course of my 15-year legal career, I have developed a depth of knowledge regarding substantive matters that are directly relevant to the types of matters filed before the Court of Federal Claims. I have gained significant practical experience with all aspects of federal government contracting, including evaluating solicitations, developing proposals, negotiating and administering contracts, and resolving contract disputes. In addition, my legal practice as in-house counsel has required that I have the ability and versatility to develop expertise in new areas of the law in a high-pressure, fast-paced environment, apply the law to complex factual scenarios involving adverse parties, and efficiently solve legal and

business problems. While my legal practice has not involved appearing before the Court of Federal Claims, my practice has provided me with first-hand experience handling the types of litigants who will appear before me if I am confirmed as a judge on the Court of Federal Claims.

**Nominations**  
**Hearing before the Senate Committee on the Judiciary**  
**Questions for the Record**  
**September 9, 2020**

**QUESTIONS FROM SENATOR BLUMENTHAL**

**Questions for Mr. Thompson M. Dietz**

- 1. Please describe whether you believe *Brown v. Board of Education* was correctly decided.**

Yes, I believe that *Brown v. Board of Education* was correctly decided.

**Questions for the Record for Thompson Michael Dietz  
From Senator Mazie K. 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?**

Yes.

**b. Have you ever taken such training?**

No.

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

Yes, if confirmed, I commit to taking training to assist me in performing my duties in a fair and impartial manner, including training on implicit bias.

3. When reviewing nominees for a judgeship, an individual's experience is important. Your background is notable because you have no litigation experience, you have not made court appearances, and you have not served as a mediator or arbitrator. It also appears you are not admitted to practice in any court.

**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?**

If confirmed, I would handle all matters before me in accordance with the Rules of the Court of Federal Claims, Federal Rules of Evidence, Code of Conduct for United States

Judges and binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit. Over the course of my 15-year legal career, I have regularly been called upon to apply rules and procedures to matters involving adverse parties. I have applied rules and procedures set forth in the Federal Acquisition Regulations and agency supplements to matters and disputes relating to federal government contracting. I have also applied rules and procedures applicable to licensed accounting firms to matters and disputes relating to the performance of financial auditing and accounting services. I have demonstrated throughout my legal career that I have the ability and versatility to quickly develop expertise in new areas of the law and apply the law to complex factual scenarios in accordance with the relevant rules and procedures. In addition, I have real-world experience in effectively mediating disputes, as my in-house counsel role frequently requires that I engage in dispute resolution, internally and externally. While this may not be traditional mediation, this skill set is nonetheless of immense value and will fairly apply to the matters and types of litigants before me if I am confirmed as a judge on the Court of Federal Claims.

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

Over the past several months, I have continued to educate myself on the Rules of the Court of Federal Claims, Federal Rules of Evidence and Code of Conduct for United States Judges to enhance my knowledge and understanding in the event I am fortunate enough to be confirmed. I have also continued to review cases and materials relating to the Tucker Act to increase my understanding of the jurisdiction of the Court of Federal Claims. I am staying abreast of developments at the Court of Federal Claims through publicly available resources and reading opinions and orders posted to the Court of Federal Claims website. Additionally, if confirmed, I will actively participate in training opportunities made available to me as a judge, as well as other continuing education opportunities that are relevant to my role as a judge.

**Nomination of Thompson M. Dietz  
United States Court of Federal  
Claims Questions for the Record  
Submitted September 16, 2020**

**QUESTIONS FROM SENATOR**

**BOOKER**

1. According to your Senate Judiciary Committee Questionnaire, your “legal practice has not been in litigation or required appearances in court.”<sup>1</sup> Additionally, you have not been admitted to any federal or state court, including the Court of Federal Claims.

- a. Based on your lack of experience in the courtroom, why do you think you are qualified to be a judge on the Court of Federal Claims?

While my path has arguably not been a traditional one, I believe my 15 years of legal experience in federal government contracts makes me uniquely qualified to serve on the Court of Federal Claims. I have a depth of knowledge regarding substantive matters that are directly relevant to the types of matters filed before the Court of Federal Claims. Over the course of my legal career, I have gained significant practical experience with all aspects of federal government contracting, including evaluating solicitations, developing proposals, negotiating and administering contracts, and resolving contract disputes. In addition, my legal practice as in-house counsel has required that I have the ability and versatility to develop expertise in new areas of the law in a high-pressure, fast-paced environment, apply the law to complex factual scenarios involving adverse parties, and efficiently solve legal and business issues. My legal practice has provided me with first-hand experience handling the types of litigants who will appear before me if I am confirmed as a judge on the Court of Federal Claims, and I will apply that same skill-set to my handling of the cases presented on my docket, including through trial, in accordance with the relevant rules and procedures. In addition to my relevant legal experience, throughout my career, I have consistently demonstrated through my interactions with colleagues, counterparties and others with whom I have dealt that I have the integrity and even-handed temperament to serve as a fair and impartial judge on the Court of Federal Claims.

- b. You have not practiced before the Court of Federal Claims, why do you think you are qualified to sit on a court you have never practiced before?

Please see my response to question 1.a. In addition, if confirmed, I would handle all matters before me in accordance with the Rules of the Court of Federal Claims, Federal Rules of Evidence, Code of Conduct for United States Judges and binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit.

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<sup>1</sup> SJQ at p. 10.

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

I prefer to not label myself as an originalist. If confirmed, I will interpret the law fairly and impartially based on constitutional and statutory interpretation methods recognized by the Supreme Court and Court of Appeals for the Federal Circuit.

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

I prefer to not label myself as a textualist. If confirmed, I will interpret the law fairly and impartially based on constitutional and statutory interpretation methods recognized by the Supreme Court and Court of Appeals for the Federal Circuit.

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?

If confirmed, I would consider legislative history when interpreting a statute if the statute is ambiguous and there is clear evidence of Congressional intent. However, the text of the statute is primary. If the statute is clear, the interpretation of the statute begins and ends with its text.

- 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 response 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?

Yes, I believe judicial restraint is an important value for a judge to consider in deciding a case. Judicial restraint reinforces the limited role of the judiciary in our system of government. I understand judicial restraint to mean that judges should issue decisions based on application of the law to the facts of the particular case and not reach legal issues that are premature, unnecessary to the outcome of the case, or beyond what is needed to resolve the case.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed

the Court's longstanding interpretation of the Second Amendment.<sup>2</sup> Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it would not be appropriate for me to comment on whether the decision in *Heller* was rightly or wrongly decided. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Heller*.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>3</sup> Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it would not be appropriate for me to comment on whether the decision in *Citizens United* was rightly or wrongly decided. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Citizens United*.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>4</sup> Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it would not be appropriate for me to comment on whether the decision in *Shelby County* was rightly or wrongly decided. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Shelby County*.

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.<sup>5</sup> 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.<sup>6</sup>

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

I am aware of the ongoing debate on this issue, but I have not studied this issue in sufficient detail to address the question. If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including precedent regarding the right to

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<sup>2</sup> 554 U.S. 570 (2008).

<sup>3</sup> 558 U.S. 310 (2010).

<sup>4</sup> 570 U.S. 529 (2013).

<sup>5</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>6</sup> *Id.*

vote.

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

Please see my response 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 response to question 6.a.

7. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>7</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>8</sup> 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.<sup>9</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>10</sup>

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

My legal practice has not involved criminal justice matters, and I have not studied this issue in sufficient detail to directly address the question. However, I believe that racism exists within our society. If confirmed, I will impartially perform my duties with respect for others, and I will require similar conduct by other individuals with whom I deal.

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

Yes, available data suggests that people of color are disproportionately represented in our nation's jails and prisons.

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

No, my legal practice has not involved criminal justice matters, and I have not studied the issue of implicit racial bias.

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<sup>7</sup> 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>.

<sup>8</sup> *Id.*

<sup>9</sup> 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>.

<sup>10</sup> *Id.*

- 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.<sup>11</sup> Why do you think that is the case?

Please see my response in question 7.a.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.<sup>12</sup> Why do you think that is the case?

Please see my response in question 7.a.

- 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 federal judges in criminal matters, as well as civil matters, may help address implicit racial bias by participating in training on implicit racial bias, increasing awareness of implicit racial bias with colleagues and other individuals with whom federal judges deal, remaining cognizant of the potential for implicit racial bias when performing judicial duties, and requiring that others conduct themselves in an impartial and respectful manner.

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.<sup>13</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>14</sup>

- 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.

My legal practice has not involved criminal justice matters, and I have not studied this issue in sufficient detail to address the question.

- 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.

My legal practice has not involved criminal justice matters, and I have not

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<sup>11</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>12</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>13</sup> 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>.

<sup>14</sup> *Id.*

studied this issue in sufficient detail to address the question.

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

Yes.

10. 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.

11. Do you believe that *Brown v. Board of Education*<sup>15</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

12. Do you believe that *Plessy v. Ferguson*<sup>16</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

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

No.

14. 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."<sup>17</sup> 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 would not be appropriate for me to comment on a statement made by the President or any other political leaders. If confirmed, I would adhere to Canon 3 of the Code of Conduct for United States Judges and other applicable laws, rules and practices governing conflicts of interest when deciding whether disqualification is appropriate in a particular proceeding. Under Canon 3, a judge is primarily responsible for making the decision to disqualify himself or herself.

15. 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,

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<sup>15</sup> 347 U.S. 483 (1954).

<sup>16</sup> 163 U.S. 537 (1896).

<sup>17</sup> 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>.

bring them back from where they came.”<sup>18</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

As a judicial nominee, it would not be appropriate for me to comment on a statement made by the President or any other political leaders. The Supreme Court has held that “the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678 (2001). If confirmed, I would fully and faithfully apply all binding precedent of the Supreme Court and Court of Appeals for the Federal Circuit, including *Zadvydas*.

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<sup>18</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted September 16, 2020**  
**For the Nomination of:**

**Thompson M. Dietz, to be a Judge of the United States Court of Federal Claims**

1. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes, I believe there are racial disparities in our criminal justice system. I have not studied this issue, but I am aware of studies and statistics that demonstrate racial disparities in specific areas of our criminal justice system, such as arrest rates and sentence length.

2. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes. If confirmed, I will commit to ensuring that qualified minorities and women are given serious consideration when making hiring decisions.