Nomination of Matthew H. Solomson to the U.S. Court of Federal Claims
Questions for the Record
Submitted May 7, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. 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 question raises policy issues that are within the authority and discretion of the President to decide, subject, of course, to the advice and consent of the Senate. Accordingly, and given the policy nature of the question, it would be inappropriate for me, as a judicial nominee, to comment specifically on the court's need for additional judges. That said, it is worth noting a few salient facts:

1) currently, there are only five active judges serving on the court;
2) since 2014, the number of judicial vacancies on the court has ballooned from five to 11;
3) according to the Administrative Office ("AO") of the U.S. Courts, filings in 2018 were 79% higher than in 2014;
4) as of September 30, 2018, there were 3,655 pending cases before the court, an increase of approximately 23.6% over the prior year;
5) during that same period, filings increased 16% (with contract/injunction cases growing 30%, takings cases rising 223%, and general jurisdiction cases increasing 46%); and
6) the AO described the new general jurisdiction cases as being "of increased complexity and national significance."

See https://www.uscourts.gov/statistics-reports/us-court-federal-claims-judicial-business-2018. Echoing those data points, an August 25, 2018 *Houston Chronicle* article reported on a burgeoning class of cases, as follows:

> [L]awsuits from those whose homes flooded in Harvey pile up, meaning litigation about who was responsible and what should be done, could continue for years. The chief judge for the federal claims court continues to hold packed proceedings in an oversized courtroom in downtown Houston, addressing the so-called takings claims by home and business owners who say the Army Corps deliberately flooded their properties. As of July, 42 law firms have filed 220 cases on behalf of more than 1,600 individuals, collectively seeking roughly a billion dollars. . . .Lawyers anticipate thousands more cases might be filed before the six-year statute of limitations expires.

Finally, I note that Patricia McCarthy – one of the referenced, previous nominees – is among the approximately 80 distinguished members of the federal procurement and Court of Federal Claims bars who supported my confirmation in the April 23, 2019 letter that was transmitted to the Judiciary Committee.

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"?

I do not know the facts, circumstances, or context surrounding Senator Cotton's statement. In addition, the question raises policy issues that are within the authority of the President, subject to the advice and consent of the Senate. As such, it would be inappropriate for me, as a judicial nominee, to comment specifically on the court's need for judges. That said, the data speaks for itself.

2. 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?

If a Supreme Court or Federal Circuit decision applies to the particular facts and legal issues presented in a case before the Court of Federal Claims, a trial judge of that court must follow the higher courts' decisions.

b. Do you believe it is proper for a district court judge or a Court of Federal Claims judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

Judges serving on the Court of Federal Claims do not sit on panels, and thus do not author concurring or dissenting opinions. A trial judge ordinarily should not have occasion to question or otherwise critique Supreme Court precedent.

c. When, in your view, is it appropriate for a district court or the Court of Federal Claims, to overturn its own precedent?

The Court of Federal Claims is a trial court, and, thus, decisions of an individual judge are not binding on the other members of the court. Where a particular judge decides a novel question, she or he should ordinarily adhere to that precedent in future cases, absent new law or facts that would justify a departure from the holding in the earlier matter.

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

Although not a question I have considered in any depth, some brief research demonstrates that the nature and role of *stare decisis* is complex, in terms of when the Supreme Court itself has said that it is appropriate to overturn its own precedent. Justice Stevens, for example, writing for the Court, explained that there is a "strong presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424, 106 S. Ct. 1922, 1930–31, 90 L. Ed. 2d 413 (1986). In commenting on the presumption of stability in statutory interpretation, Justice Brandeis similarly observed that "[s]tare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right.... This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 447, 76 L. Ed. 815 (1932) (dissenting). In contrast, the Court has also said that "when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 765, 88 L. Ed. 987 (1944).

In any event, and without expressing a view as to the correctness (or not) of any of the aforementioned statements from the Court or its justices, I would be bound – as a trial judge of the Court of Federal Claims – to follow all Supreme Court precedent that has not been overturned by the Court itself.

3. 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"?

It is almost impossible to conceive of a case in which *Roe* would be at issue before the Court of Federal Claims. That said, and while I am not familiar with the term "super-precedent," I agree that *Roe* is binding law.

b. Is it settled law?

Yes, *Roe* is settled law, just as all Supreme Court decisions constitute settled law. It is not the role of a trial court judge to question or otherwise critique binding Supreme Court decisions such as *Roe.*

4. 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* is settled law, just as all Supreme Court decisions constitute settled law. It is not the role of a trial court judge to question or otherwise critique binding Supreme Court decisions such as *Obergefell.*

5. 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?

It is almost impossible to conceive of a case before the Court of Federal Claims where *Heller* would be at issue. That said, I would apply the holding of the *Heller* majority in any case in which *Heller* is at issue, regardless of my personal views on whether the majority or dissenting opinions is correct.

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

The majority in *Heller* explained its holding as follows:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . .Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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.

D.C. v. Heller, 554 U.S. 570, 626–27, 128 S. Ct. 2783, 2816–17, 171 L. Ed. 2d 637 (2008) (citations omitted).

As a pending judicial nominee, and in light of the Code of Conduct for United States Judges, it would be inappropriate for me to comment further, or to otherwise speculate, regarding what types of restrictions might pass constitutional muster under *Heller*, or to opine on what might constitute "common-sense" regulations.

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

The majority in *Heller* answered that question in the negative, concluding that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved." *D.C. v. Heller*, 554 U.S. 570, 625, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). I have never studied this issue in any detail, and, in any event, it would not be appropriate for me to critique a binding Supreme Court decision, for the reasons explained above.

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

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

The scope of the First Amendment as applied to corporate speech, particularly in the political context, appears to be a subject of ongoing litigation and judicial consideration. Accordingly, it would be inappropriate under the Code of Conduct for United States Judges, applicable to judicial nominees, for me to express a view on the subject. As with the other cases discussed above, I will faithfully adhere to, and apply, all binding Supreme Court precedent.

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

Whether and how to regulate corporate speech is a matter, in the first instance, for Congress (or state legislatures) to decide, subject, of course, to review for compliance with the First Amendment, as interpreted and applied by the Supreme Court in *Citizens United* (and by inferior courts in relevant progeny). Accordingly, this question either calls for a political or policy answer, or concerns a matter that likely is, or will be, the subject of pending litigation before the Federal courts, and thus it would be inappropriate for me to comment further.

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

The Supreme Court answered that question in the affirmative in *Burwell v. Hobby Lobby Stores, Inc.*, noting both that the Court has "entertained [Religious Freedom Restoration Act (RFRA)] and free-exercise claims brought by nonprofit corporations" and also that the government "concede[d] that a nonprofit corporation can be a 'person' within the meaning of RFRA." *See* 573 U.S. 682, 708, 134 S. Ct. 2751, 2768–69, 189 L. Ed. 2d 675 (2014) (citing cases). As a trial court judge on the Court of Federal Claims, I would faithfully apply all binding Supreme Court precedent, including *Hobby Lobby*.

7. 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?**

My interview with the Administration was over two years ago. I do not recall whether or not anyone asked me about my personal views on administrative law.

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

I was not asked to speak with, interview with, or otherwise discuss my potential nomination with anyone outside of the Administration. To the best of my recollection, no one from either referenced organization has ever asked me about my views on administrative law.

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

The Supreme Court has held that "[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law,'" and that "[t]his doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295–96, 99 S. Ct. 1705, 1714, 60 L. Ed. 2d 208 (1979). I am aware that there may be some controversy about the degree to which federal agency regulations are owed, or should be accorded, deference – *e.g.*, for the purpose of interpreting a statute. Given that such issues are

frequently litigated in the federal courts, generally – and the Court of Federal Claims, in particular – it would inappropriate to comment on that issue as a judicial nominee. Suffice it to say, I will follow all Supreme Court and Federal Circuit precedent regarding administrative law (and any other subject, for that matter).

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

Pursuant to Supreme Court precedent, considering legislative history may be appropriate where the plain meaning of a statutory provision is insufficient to resolve the question at issue, or where the statutory provision is otherwise ambiguous. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658-1661, 198 L. Ed. 2d 96 (2017) (Kagan, J.) (explaining that the Court "[s]tart[s], as we always do, with the statutory language," and critiquing particular legislative materials as consisting "almost wholly of excerpts from committee hearings and scattered floor statements by individual lawmakers—the sort of stuff we have called 'among the least illuminating forms of legislative history'").

9. 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.

I had no such discussions whatsoever of that nature.

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

I reviewed the answers of other nominees, performed some basic legal research, and drafted my responses.

Nomination of Matthew H. Solomson
United States Court of Federal Claims
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QUESTIONS FROM SENATOR BOOKER

1. In 2016, you testified before a House Judiciary subcommittee at a hearing on "Oversight of the False Claims Act."[1] You argued in support of amending the False Claims Act "to require proof of a specific intent to defraud."[2] This amendment would enhance the scienter requirement beyond its current definition, which includes "deliberate ignorance of the truth or reckless disregard of the truth"[3] such that "no specific intent to defraud is required"[4] — making it much harder for the government or *qui tam* plaintiffs to prevail.

    a. As a judge on the Court of Federal Claims, you may hear, for example, False Claims Act counterclaims by the government. What will you do to assure those who appear before you that you will fairly consider their claims and apply the appropriate standard?

The referenced testimony was submitted on behalf of my client, Anthem, Inc. (and its Federal Government Solutions business unit) – and not in my personal capacity – and did not critique the False Claims Act (FCA) generally, but rather specifically addressed the implied-certification theory of liability, including those "based on mere technical regulatory or simple contractual breaches where there has been no direct financial harm to the government or for which the government already has adequate remedies at law (aside from the FCA)." Indeed, Anthem recognized "that the FCA provides the Federal government – and would-be *qui tam* whistleblowers – with a powerful weapon that has been used to great positive effect to fight fraud." Although at the time of the testimony's submission the U.S. Supreme Court had not yet decided the *Escobar* case, the Court since has done so, recognizing and addressing the very problem Anthem identified, holding as follows:

> ***The materiality standard is demanding***. The False Claims Act is ***not*** "an all-purpose antifraud statute," or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.

Universal Health Servs., Inc. v. United States and Massachusetts, ex rel. Julio Escobar and Carmen Correa, 136 S. Ct. 1989, 2003, 195 L. Ed. 2d 348 (2016) (emphasis added) (citing *Allison Engine*, 553 U.S., at 672).

In any event, as a trial court judge serving on the Court of Federal Claims, I would be bound by, and

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[1] Prepared Statement, *Oversight of the False Claims Act: Hearing before the Subcomm. On the Const. and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (April 28, 2016) (SJQ Attachment 12(c) at pp. 720-25).
[2] *Id.*
[3] Daewoo Eng'g & Constr. Co., Ltd. v. U.S., 73 Fed. Cl. 547, 585 (Fed. Cl. 2006).
[4] *Id.*

unequivocally would follow, the FCA statutory language enacted by Congress – and as interpreted and applied by the Supreme Court and the U.S. Court of Appeals for the Federal Circuit – including the law regarding materiality, burden of proof, and scienter requirements. In that regard, my referenced testimony specifically noted that "I am proud of my anti-fraud work at the Justice Department, where I experienced firsthand the important role that FCA cases play in protecting the financial integrity of federal programs, and ultimately, the prudent expenditure of taxpayer dollars." As a Trial Attorney with the DOJ's Commercial Litigation Branch, I frequently worked with my Civil Fraud Section colleagues – whether as counsel of record or in a supporting role – to assert FCA counterclaims to protect the government's interests. *See, e.g.*, *Multiservice Joint Venture, LLC v. United States*, 85 Fed. Cl. 106 (2008) (sanctioning plaintiff and its counsel in case involving counterclaims pursuant to the False Claims Act, 31 U.S.C. § 3729 et seq., the Forfeiture of Claims Statute, 28 U.S.C. § 2514, and the fraud provisions of the Contract Disputes Act, 28 U.S.C. § 604), *aff'd*, 374 F. App'x 963 (Fed. Cir. 2010); *Hernandez, Kroone & Assocs., Inc. v. United States*, 95 Fed. Cl. 395 (2010) (noting that court granted government leave to file counterclaims under the special plea in fraud, 28 U.S.C. § 2514; the anti-fraud provision of the Contract Disputes Act, 41 U.S.C. § 604; and the False Claims Act, 31 U.S.C. § 3729). I also assisted with the discovery phase of *Veridyne Corp. v. United States*, 758 F.3d 1371 (Fed. Cir. 2014) (noting that "the Claims Court also awarded penalties to the government under the False Claims Act, 31 U.S.C. § 3729, and the antifraud provision of the Contract Disputes Act, 41 U.S.C. § 604 (2006) (recodified at 41 U.S.C. § 7103)."). On behalf of the United States, I also prevailed at trial in asserting (non-fraud) government contract counterclaims in *Distribution Postal Consultants, Inc. v. United States*, 90 Fed. Cl. 569 (2009).

Accordingly, and having spent nearly five years representing the United States government, in addition to my time in private practice and as in-house counsel, I have no doubt about my ability to fairly consider either a plaintiff's claims against the government or any government counterclaims.

2. 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.[5] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[6] 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.[7] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[8]

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

With but a few exceptions, my litigation practice has consisted, almost entirely, of civil matters, primarily concentrated in the U.S. Government Accountability Office, the Armed Services Board of Contract Appeals, and the National Courts (*i.e.*, the U.S. Court of Federal Claims, the U.S. Court of International Trade, and the U.S. Court of Appeals for the Federal Circuit). As such, I do not have an opinion regarding to what extent there is implicit racial bias in our criminal justice system. My personal experience, however, has been informative. In that regard, as part of a law school clinic, I represented an African American man, who was arrested and charged with theft of an item from a government building. Prior to the defendant's trial, I argued that he had been subject to an unlawful *Terry* stop. I served as co-counsel with an Assistant Federal Public Defender for the jury trial, and the defendant was acquitted.

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[5] 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.
[6] *Id.*
[7] 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.
[8] *Id.*

There were a number of issues in that case that provided me with a heightened sense of awareness of bias and injustice that litigants may face. To the extent such bias exists, all members of the bench and bar should seek to eradicate it, whether in the criminal justice system or in civil matters.

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

Yes.

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 – I have not studied the issue, except that I likely have read articles on the subject in the popular press (*e.g.*, the *Wall Street Journal*, the *Washington Post*, etc.). I have taken extensive, multi-session, implicit bias training sponsored by my current employer, but it was not focused on the 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.[9] Why do you think that is the case?

I have not studied the issue and do not know why that is the case, although racial bias may be a factor.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men are to be charged with federal offenses that carry harsh mandatory minimum sentences.[10] Why do you think that is the case?

I have not studied the issue and do not know why that is the case, although racial bias may be a factor.

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?

My criminal litigation experience is limited, as noted above. I think federal judges can best address racial bias in our justice system by following the law, and by striving to ensure that such bias – or any other bias – plays no role in their decision making. The Court of Federal Claims, however, has no criminal docket.

3. 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.[11] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[12]

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[9] 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.
[10] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)
[11] 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.
[12] *Id.*

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 neither studied this issue, nor, to the best of my recollection, read anything on the subject of the relationship between rates of incarceration and crime. Accordingly, I have no opinion on the matter, and leave to criminal justice experts, statisticians, and policy makers to explain the cited statistics.

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

I have neither studied this issue, nor, to the best of my recollection, read anything on the subject of the relationship between rates of incarceration and crime. Accordingly, I have no opinion on the matter, and leave to criminal justice experts, statisticians, and policy makers to explain the cited statistics.

4. 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. Given that we live in a democratic republic, I believe it is important for all branches of government to represent and reflect the makeup of our nation's citizenry.

5. Would you honor the request of a plaintiff, defendant, or witness in your courtroom, who is transgender, to be referred in accordance with their gender identity?

Yes.

6. Do you believe that *Brown v. Board of Education*[13] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As indicated during the confirmation hearing, I believe that *Brown v. Board of Education* remedied a great injustice, stands as one of the most significant and historic decisions of the last century, and is binding precedent on inferior courts, including the Court of Federal Claims. I am committed to following it without hesitation or reservation, however unlikely the case is to be at issue in the Court of Federal Claims.

7. Do you believe that *Plessy v. Ferguson*[14] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

I do not believe that *Plessy* was correctly decided, a view since adopted by the U.S. Supreme Court.

8. 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?

My answers are my own, and to the extent I have declined to directly comment on binding precedent, that is consistent with both my understanding of the applicable Code of Conduct, as well as with now-Justice Ginsburg's explanation before the U.S. Senate Judiciary Committee that "Judges in our system are bound to decide concrete cases, not abstract issues; each case is

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[13] 347 U.S. 483 (1954).
[14] 163 U.S. 537 (1896).

based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives choose to present." Justice Ginsburg thus appropriately explained that she could "offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process." I commit, however, to faithfully applying all binding precedents, should the Senate confirm my nomination to the Court of Federal Claims.

9. 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."[15] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

With the caveat that I am unfamiliar with immigration law, and assuming that the President is proposing a change from current statutory or regulatory procedures for processing asylum claims, it would be inappropriate for me under the Code of Conduct for United States Judges, equally applicable to judicial nominees, to respond to the question. That said, I believe that judges, at every level in our country, have a duty to fairly and impartially adjudicate all claims, and that all claimants should be provided with whatever due process the law requires under the facts and circumstances of a particular case.

[15] 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 May 7, 2019
For the Nomination of

Matthew H. Solomson, to the U.S. 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?**

A judge's duty – particularly that of a trial judge – is to follow the law as established by Congress, the U.S. Supreme Court, and the applicable circuit court of appeals, regardless of whether the ultimate result is consistent with the judge's preferred outcome or policy views. Certainly, all litigants and their counsel must be treated fairly and equitably.

2. If confirmed, 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. I believe that a diversity of viewpoints and backgrounds is valuable, generally, and also is more likely to produce the type of robust analysis, discussion, and debate that should exist within a judge's chambers.

    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?**

I do not believe there are any supervisory positions within the chambers of an individual judge of the Court of Federal Claims. That said, I am committed to ensuring that professional opportunities are advertised widely to attract a diverse pool of applicants. I will give serious consideration to all qualified applicants, and will endeavor to select the most qualified applicant, without regard to race, religion, gender, sexual orientation, etc.