

**QUESTIONS FOR THE RECORD  
NOEL J. FRANCISCO  
NOMINEE TO BE SOLICITOR GENERAL**

**SENATOR DIANNE FEINSTEIN, RANKING MEMBER**

1. Earlier this year, while serving as Acting Solicitor General, you led the defense of the President's Executive Order 13769 in the U.S. Court of Appeals for the Ninth Circuit. This Executive Order suspended the admission of refugees and banned entry of individuals from seven majority Muslim countries. It was issued on January 27, just a week after President Trump took office.

Former Acting Attorney General Sally Yates testified before this Committee on May 8. As I know you are well aware, she was fired by the President after she declined to defend the original Executive Order, because she did not believe it was lawful.

- a. When did you first learn about the original Executive Order?

**RESPONSE:** To the best of my recollection, I first learned of Executive Order 13769 after it was publicly issued.

- b. Did you see or review the Order before it was issued by the President?

**RESPONSE:** No.

- c. Former Acting Attorney General Yates testified that while the Office of Legal Counsel reviewed the Executive Order, it was "advised not to tell the [Acting] Attorney General about it until after it was over." If you saw or reviewed the Order before it was issued by the President, were you similarly advised not to tell Acting Attorney General Yates about it?

**RESPONSE:** See Responses 1a-1b.

- d. On December 7, 2015, while he was running for President, Donald Trump issued a statement calling for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Did you consider this statement when you evaluated whether the Executive Order was lawful?

**RESPONSE:** After the Ninth Circuit preliminarily enjoined Executive Order 13769, the President withdrew it and replaced it with a new Executive Order. The new Executive Order is in active litigation. It would therefore be inappropriate for me to comment on the legality of that order outside the context of the ongoing litigation.

- e. Do you believe that as a general matter, the Constitution prohibits discrimination on the basis of religion in enforcing our laws governing immigration and refugees?

**RESPONSE:** See Response 1d.

- f. If the President issued an Executive Order that you did not believe was lawful, would you defend it?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders. If confirmed, I will defend the President's Executive Orders when a reasonable defense is available, but not otherwise.

- 2. According to filings with the Ninth Circuit, you participated in the defense of that Executive Order from the beginning. Notably, in your capacity as Acting Solicitor General, you signed the Government's emergency motion for a stay of the District Court's injunction against enforcement of the Executive Order, which was filed on February 4, 2017. But you did not sign the next brief submitted in that case, even though you were still Acting Solicitor General. That brief—which was submitted on February 6, 2017—includes a footnote indicating that you “refrained from signing this brief, out of an abundance of caution, in light of a last-minute filing of an amicus brief by [your] former law firm,” Jones Day. Your name has since appeared on other filings in that litigation.

Please provide a complete accounting or timeline of your work on this Executive Order and its defense in the lawsuit brought against the Trump Administration, *State of Washington v. Trump*. Specifically, please answer the following questions:

- a. Please describe any and all work that you did, in your capacity as Acting Solicitor General, on the Government's Reply in Support of Emergency Motion for Stay Pending Appeal, submitted to the Ninth Circuit on February 6, 2017.

**RESPONSE:** To the best of my recollection: I participated in the normal process of drafting and revising the brief referenced above until the afternoon of February 6, 2017, when my former law firm, Jones Day, filed an amicus brief in the case. Upon learning of the filing, I promptly consulted the career ethics attorneys within the Department of Justice. They authorized me to participate in the case pending further review, but they advised me that I should refrain from signing the brief or communicating with Jones Day. During the evening of February 6, I discovered that companies in which I have small financial holdings also had filed an amicus brief in the case (separate from the amicus brief filed by Jones Day). Again, I consulted with career ethics officials. In an abundance of caution, I declined to work on the matter until the following morning of February 7, when career ethics officials again authorized me to participate in the case. On February 9, 2017, the career ethics attorneys in the Department completed a more

comprehensive review and continued their authorization to work on the case and related litigation. Throughout this period, I consulted with career attorneys in the Departmental Ethics Office and followed their advice at all times. The Departmental Ethics Office has reviewed this answer and confirmed its accuracy.

- b. After Jones Day filed an amicus brief in the case, why did you think it was necessary to refrain from signing the government's reply brief "out of an abundance of caution"?

**RESPONSE:** See Response 2a.

- c. In addition to refraining from signing the brief, did you recuse yourself from involvement in the case?

**RESPONSE:** See Response 2a.

- d. Did you receive a waiver or an ethics opinion permitting you to continue working on the case?

**RESPONSE:** See Response 2a.

- e. If so, at what point did you receive that waiver or ethics opinion?

**RESPONSE:** See Response 2a.

Assuming that you did in fact receive a waiver or ethics opinion, between the time you became aware that Jones Day had filed its amicus brief in the case and the time when you received the waiver permitting you to continue working on the case, did you participate at all in the case, including, but not limited to:

- i. Drafting, editing, or supervising the drafting of the Reply?
- ii. Participating in any strategy sessions regarding defense of the Executive Order?
- iii. Preparing, mooting, or participating in preparation for the oral argument held telephonically on February 7, 2017?
- iv. Participating in the February 7, 2017 telephonic oral argument itself?

**RESPONSE:** See Response 2a.

- 3. Last year, you argued the case *Zubik v. Burwell* before the Supreme Court on behalf of certain religious nonprofit organizations. These organizations were already exempt from the Affordable Care Act's contraceptive coverage requirement. However, they claimed that the accommodation that the Obama Administration had created for entities like them

violated their religious rights because it still made them “complicit” in allowing their female employees to get contraceptive coverage.

- a. The accommodation merely requires these employers to opt out of providing contraceptive coverage by filling out a one-page form, and then insurance companies provide coverage to their employees without any further involvement by these organizations.

As a general matter, when do you believe an organization’s beliefs should be allowed to infringe on another person’s rights because that organization might feel “complicit” in an action or activity it disagreed with?

**RESPONSE:** As the Supreme Court explained in *Hobby Lobby*, this issue is governed by the Religious Freedom Restoration Act (“RFRA”), which establishes the contours and limits of the rights that an individual or entity has with respect to federal regulations that they believe infringe on their religious liberty. Generally, the threshold question is whether the individual or entity is protected by RFRA. If it is, then under RFRA, the questions are (1) whether the federal regulation substantially burdens the person’s sincere exercise of religion, and (2) if so, whether the regulation is the least restrictive means of furthering a compelling governmental interest.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate for me to comment further on this matter.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead, on the best interests of the United States.

- b. Are there any limits to this argument? For example, would you have argued that an employer who is morally opposed to vaccines on religious grounds could refuse to fill out a form that results in a third party providing vaccinations to that employer’s employees, because the employer believed that doing so would make it complicit in immoral behavior?

**RESPONSE:** See Response 3a.

- c. The Supreme Court in *Zubik* remanded that case—and the other cases that were consolidated with it—to the Courts of Appeals. Will you commit to recuse yourself from any involvement in those cases on behalf of the government given your representation of the *Zubik* plaintiffs?

**RESPONSE:** See Response 3a.

4. On May 4, President Trump issued an Executive Order on “Promoting Free Speech and Religious Liberty.” Section 3 of the Order states that “[t]he Secretary of the Treasury, the

Secretary of Labor, and the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code.” Obviously, certain changes to the contraceptive coverage mandate would stand to benefit your Zubik clients.

- a. Since joining the Department of Justice, have you participated in any meetings or discussions regarding potential amended regulations to the contraceptive coverage mandate?

**RESPONSE:** No.

- b. If such amended regulations are issued, and are subsequently challenged, will you commit to recuse yourself from the defense of those regulations given your representation of the *Zubik* plaintiffs?

**RESPONSE:** As noted above, I have recused myself from the *Zubik* cases. If confirmed, and should this issue arise in other contexts, I will consult with the career ethics attorneys in the Department of Justice’s Ethics Office and will follow their advice.

- c. Will you commit to recuse yourself from any case or matter that involves the contraceptive coverage requirement, given your representation of the *Zubik* plaintiffs?

**RESPONSE:** See Response 4b.

5. In your notes for a talk in 2015 about the *Zubik* case, you argued that the case was not about women’s access to contraception.

According to your notes, you wrote: “Contraception is widely available. It’s cheap. And for those who can’t afford it, there are lots of other ways to get it for free.”

- a. Please state how much the average woman in the United States spent annually on contraception before the Affordable Care Act’s contraceptive coverage requirement took effect.

**RESPONSE:** In the *Zubik* litigation, I represented Catholic Charities and other Catholic organizations that believed that, under RFRA, the contraceptive mandate imposed a substantial burden on their sincerely held religious beliefs, and was not narrowly tailored to a compelling governmental interest. Briefs in that case argued that the contraceptive mandate was not the least restrictive means of furthering the relevant governmental interests because the government could provide contraceptive coverage through other government programs. For example, Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.*, provides federal funding for family-planning clinics. Briefs filed in the *Zubik* litigation also argued that the government could provide contraceptive coverage through other programs, including the insurance exchanges established under the Affordable Care

Act, Medicaid, or other forms of tax subsidies.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate to comment further on this issue.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead on the best interests of the United States.

- b. Would you be surprised to learn that a 2010 study found that one in three female voters struggled to afford prescription birth control at some point?

**RESPONSE:** I am aware that there is a significant amount of literature related to the contraceptive mandate, including the study referenced in the question above. Given my recusal from the *Zubik* litigation, I do not believe it would be appropriate for me to comment further on this matter.

- c. Please state all the places where individuals can obtain contraception “for free.”

**RESPONSE:** See Responses 5a-5b.

6. You served as a Deputy Assistant Attorney General in the Office of Legal Counsel from June 2003 to July 2005. According to materials you provided to the Committee, you signed four opinions.
  - a. Did you work on, edit, or contribute to the Office of Legal Counsel opinion entitled “Definition of Torture Under 18 U.S.C. §§ 2340-2340A,” which was signed by Acting Assistant Attorney General Daniel Levin and issued on December 30, 2004?

**RESPONSE:** Although the referenced opinion was issued many years ago, to the best of my recollection, while I did not draft the referenced opinion, I reviewed it prior to publication.

- b. Did you work on, edit, or contribute to any other opinions related to enhanced interrogation techniques? If the answer is yes, please list the opinions.

**RESPONSE:** Although the referenced events occurred many years ago, to the best of my recollection, I do not recall working on, editing, or contributing to other opinions related to enhanced interrogation techniques.

- c. Did you ever work on, edit, or contribute to the Office of Legal Counsel opinion entitled “Whether the Second Amendment Secures an Individual Right,” which was signed by Principal Deputy Assistant Attorney General Steven Bradbury and issued on August 24, 2004?

**RESPONSE:** Although the referenced opinion was issued many years ago, to the best of my recollection, while I did not draft the referenced opinion, I reviewed it prior to publication.

7. In testimony you delivered before the House Judiciary Committee in May 2011, you argued that courts defer too much to federal agencies, and you criticized the Chevron doctrine. If confirmed as Solicitor General, and you are called upon to defend a federal agency’s rule or regulation where a statute is ambiguous, will you urge the Court to apply Chevron and give deference to the agency’s interpretation?

**RESPONSE:** The applicability of the *Chevron* doctrine turns on the facts and circumstances of a particular case. Any decision whether to argue for application of the *Chevron* doctrine in a particular case would be based not on my personal views, but instead on the best interests of the United States.

8. During your hearing, Chairman Grassley asked whether you would “be able to defend this nation’s statutes regardless of ideology or regardless of whether or not you personally agree with the statute itself.” You responded that you could, noting that “the Solicitor General is obligated to defend whenever a reasonable argument can be made in [a statute’s] defense — save that very narrow category of cases that implicate the President’s own Article II powers.”

- a. What falls within this “narrow category of cases” implicating the President’s Article II powers?

**RESPONSE:** The standard that I articulated is consistent with the longstanding views of the Office of Solicitor General. The referenced “narrow category of cases” arises when statutes encroach on the President’s powers under Article II of the Constitution. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court invalidated the one-house legislative veto under separation of powers principles. More recently, in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), the Supreme Court held unconstitutional a statute specifying that, upon request, the Secretary of State must list “Israel” as the birthplace of a U.S. citizen born in Jerusalem; the Solicitor General had argued that the statute interfered with the President’s exclusive power to recognize foreign nations.

- b. Would this category of cases include the possible defense of executive orders implicating national security, immigration, or other foreign affairs powers of the President?

**RESPONSE:** Although this exception could theoretically apply in the above-referenced contexts—*INS v. Chadha*, for example, arose in the immigration context, and *Zivotofsky* involved foreign affairs—whether it applies to a specific statute or executive order will turn on the details of the statutes and executive orders at issue.

9. In October 2016, a three-judge panel of the D.C. Circuit Court of Appeals held in a split opinion that the Consumer Financial Protection Bureau (CFPB) was unconstitutionally structured. Judge Henderson dissented from that part of the holding. The CFPB petitioned for rehearing en banc, and the D.C. Circuit granted that petition on February 16, 2017, while you were Acting Solicitor General. Two months later, your replacement as Acting Solicitor General, Jeffrey Wall, transmitted a letter to the Committee indicating that the Solicitor General’s Office “ha[d] determined that the for-cause removal provision relating to” the CFPB Director “is unconstitutional,” and noting that the Justice Department had taken that position in an amicus brief filed with the court.

- a. What role did you play in the Justice Department’s decision not to defend the constitutionality of the CFPB’s structure?

**RESPONSE:** None. I am recused from this matter.

- b. When do you believe it is appropriate for the Solicitor General to decline to defend the constitutionality of a statute passed by Congress?

**RESPONSE:** The longstanding view of the Office of the Solicitor General is that the Solicitor General should defend the constitutionality of a statute passed by Congress when there is a reasonable basis for doing so, unless it encroaches on the President’s Article II powers. I agree with this standard.

- c. Do you believe there are no reasonable arguments in favor of the constitutionality of the statute at issue in the CFPB case?

**RESPONSE:** I am recused from this matter and therefore believe it would be inappropriate for me to comment on it.

- d. In Judge Henderson’s partial concurrence and partial dissent, she criticized her colleagues for “unnecessarily reach[ing the plaintiff’s] constitutional challenge, thereby rejecting one of the most fundamental tenets of judicial decisionmaking.” Does Judge Henderson’s separate opinion suggest that the decision by the Solicitor General’s Office to no longer defend the constitutionality of this statute—based on a majority opinion that decided the constitutional issue unnecessarily—was premature?



**RESPONSE:** See Response 9c.

10. What factors would you consider when debating whether to file an amicus brief where the government is not a party?

**RESPONSE:** The overriding factor is the long-term interests of the United States. In assessing those interests, if confirmed, I would consider, among other things, the views of the agencies that have a stake in the matter, the views of the relevant components of the Department of Justice, and any applicable regulations, statutes, and constitutional provisions.

11. If the Attorney General or the President requested that you file such a brief and you objected, how would you resolve that conflict?

**RESPONSE:** I would file such a brief if I ascertained that it was in the best long-term interests of the United States. In conducting that assessment, I would consider, among other things, the views of the agencies that have a stake in the matter, the views of the relevant components of the Department of Justice, and any applicable regulations, statutes, and constitutional provisions. If I ascertained that the brief was not in the long-term interests of the United States, I would attempt to persuade the Attorney General or the President to my point of view or to defer to my judgment. In the vast majority of cases, I would hope and expect that that would resolve the issue.

12. If the Attorney General or the President directed you not to file such a brief, how would you resolve that conflict?

**RESPONSE:** See Response 11.

13. You currently serve in the Associate Attorney General's Office at the Department of Justice. On May 9, President Trump fired the Director of the FBI, James Comey.

- a. When did you first hear that Director Comey might not stay in his position for the duration of his term?

**RESPONSE:** I played no role in the decision to dismiss Director Comey. To the best of my recollection, I learned of this possibility on the afternoon of May 9 from a staff member of the Deputy Attorney General's Office. I was not informed of the reasons for the decision.

- b. How did you find out?

**RESPONSE:** See Response 13a.

- c. Who told you, and what reasons did that person give for Director Comey's removal?

**RESPONSE:** See Response 13a.

- d. Did you discuss it with anyone else?

**RESPONSE:** No.

- e. Did you see any documents or emails about Director Comey's possible or actual removal beforehand?

**RESPONSE:** No.

- f. When did you become aware that Director Comey would be removed from his position as FBI Director?

**RESPONSE:** See Response 13a.

- g. How did you find out?

**RESPONSE:** See Response 13a.

- h. Who told you and what reasons did that person describe for his removal?

**RESPONSE:** See Response 13a.

- i. Did anyone solicit your opinion as to whether Director Comey should be removed? If so, who?

**RESPONSE:** No.

14. On May 9, the President fired FBI Director James Comey. On January 30, the President fired Acting Attorney General Sally Yates. The President has made very clear that he will fire individuals who disagree with him or who pursue investigations against his wishes. Kellyanne Conway, one of the President's advisors, stated on May 11 that President Trump "expects people who are serving in this Administration to be loyal to the country and to be loyal to the Administration." Yet if confirmed, you will be called upon to exercise independence and to serve the American people, not the President.

- a. How can this Committee have confidence that you will be independent from the President and the White House?

**RESPONSE:** I strongly believe that the only way to properly serve the country is to provide the President, the White House, federal agencies, and any other entity that I am called upon to represent with sound, independent legal advice. In my experience, that is the only way for an attorney to properly perform his or her job. Anything less is a disservice to the attorney's clients, and for government attorneys, a disservice to the Nation. I firmly commit that, if confirmed, I will provide candid, honest, and independent legal advice.

- b. What specific examples from your background offer evidence that you will not reflexively do what the White House wants you to do?

**RESPONSE:** Throughout my career, I have been called upon to advise clients on many sensitive matters. Although it would not be proper to reveal the details of those communications, I believe that I have developed a strong reputation for providing clients with sound, independent legal advice.

- c. Do you believe it is important for the Solicitor General to be, first and foremost, "loyal to the Administration"?

**RESPONSE:** The Solicitor General owes responsibilities to all three branches of government. He or she is, of course, an attorney for the President and Executive Branch, and in that respect, has ethical responsibilities to both. But the Solicitor General also defends the laws of Congress whenever they can reasonably be defended, save for that narrow category of cases that encroach on the President's Article II powers. And the Solicitor General also owes a special duty of independence and candor to the courts. I believe that all of these aspects of the Solicitor General's job are vital to the proper functioning of the office.

15. Do you believe the Office of the Solicitor General should be insulated from outside political pressure, especially from the White House?

**RESPONSE:** The Office of Solicitor General should make its decisions based on the law and the facts, not partisan political considerations.

16. If confirmed, how will you maintain your independence from the President and the White House?

**RESPONSE:** If confirmed, I will provide the President, the White House, and any other entity that I am called upon to advise with candid and independent legal advice.

17. What will you do when you are confronted with a legal question where the outcome implicates the President's business or other financial interests?

**RESPONSE:** The resolution of issues such as those referenced in the question above will

turn on the facts and circumstances of the particular matter. Should such a matter arise, I would consult with the relevant officials within the Department of Justice to determine how it should be appropriately handled.

18. The Department of Justice is currently defending President Trump in a lawsuit filed by Citizens for Responsibility and Ethics in Washington (CREW), which alleges that President Trump is violating the Constitution—specifically, the Emoluments Clause—by allowing his hotels and other business interests to accept payments from foreign governments. In other words, taxpayers are funding the President’s legal defense in a lawsuit that stems entirely from his private business interests.

a. If the district court ruled against President Trump, how would you approach the decision of whether to authorize an appeal?

**RESPONSE:** Because this issue is in active litigation, it would not be appropriate for me to comment on it specifically. As a general matter, the decision whether to authorize an appeal turns on an assessment of the long-term interests of the United States, which is determined, among other things, in consultation with the relevant components of the Department of Justice, the relevant agencies with a stake in the matter, as well as any applicable federal statutes, regulations, and constitutional provisions.

b. How would you ensure that your decision was free from outside political influence, given the President’s clear financial interest in your decision?

**RESPONSE:** See Response 18a.

19. Please describe with particularity the process by which these questions were answered.

**RESPONSE:** The answers are my own and reflect my views. I discussed my answers and consulted with representatives of the Department of Justice as I deemed helpful and appropriate.

**QUESTIONS FOR THE RECORD**  
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**SENATOR PATRICK LEAHY**

1. If the President seeks to do something unlawful or unconstitutional, should the Solicitor General refuse to defend the action or policy? If so, are you prepared to say “no” to this White House?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches upon the President’s Article II powers. I believe that a similar standard applies to Executive Orders and other executive action. If confirmed, I will defend laws passed by Congress, the President’s Executive Orders, and other executive action when a reasonable defense is available, but not otherwise. I am fully prepared to say “no” to the White House or any other entity that I am charged with advising if they seek to advance positions for which no reasonable defense is available.

2. As Acting Solicitor General, you defended President Trump’s Muslim ban executive order. What troubles me is not only that you defended it, but also how you defended it. As lawyers, we have an ethical obligation to affirmatively acknowledge and disclose adverse precedent to the court.

On February 4, 2017, you signed the administration’s brief submitted to the Ninth Circuit that argued “Judicial second-guessing of the President’s national security determination in itself imposes substantial harm on the federal government and the nation at large.” The Circuit’s decision rejected that argument, citing *Boumediene* and noting that “There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.”

Why did your brief fail to cite *Hamdi*, *Hamdan*, or *Boumediene* when making that argument? Please also explain why you are not in violation of your ethical obligations for failing to cite to those critical Supreme Court precedents.

**RESPONSE:** After the Ninth Circuit preliminarily enjoined Executive Order 13769, the President withdrew it and replaced it with a new Executive Order. The new Executive Order is in active litigation. It would therefore be inappropriate for me to comment on the legality of, or the legal arguments made in support of, that order outside the context of the ongoing litigation.

3. When crafting the litigation strategy to defend President Trump’s Muslim ban executive orders, did anyone outside the Justice Department direct or provide guidance on the types of arguments the Justice Department should or should not make?

**RESPONSE:** As a general matter, the Department of Justice often solicits the views of other entities within the Executive Branch that have an interest in a particular case. As to the handling of any specific case, I believe it would be inappropriate to comment on internal Executive Branch deliberations.

4. Last week, President Trump cited the FBI's investigation into Russian interference in the 2016 election as a basis for dismissing Director Comey. The Deputy White House Press Secretary said, "We want this to come to its conclusion . . . And we think that we've actually by removing Director Comey, taken steps to make that happen." President Trump himself admitted that "I was gonna fire [Comey] regardless of [Mr. Rosenstein's] recommendation. . . . And in fact when I decided to just do it, I said to myself, I said you know, this Russia thing with Trump and Russia is a made up story." Should those statements and justifications for FBI Director Comey's dismissal raise concerns?

**RESPONSE:** I have no knowledge of the facts and circumstances surrounding these issues beyond what I have seen reported in the news media and, therefore, am not in a position to comment on this matter.

5. Is it proper for the President to pressure a law enforcement official to terminate an ongoing investigation into one of the President's associates?

**RESPONSE:** See Response 4.

6. Have you ever been asked by the President, or any other individual associated with the White House, to express loyalty to President Trump? If so, please describe that conversation in detail, including the participants of that conversation.

**RESPONSE:** No.

7. If confirmed, will you be loyal to the Constitution or to President Trump? Do you believe there is a difference? If so, will you put your obligation to uphold the Constitution above any personal loyalty to President Trump?

**RESPONSE:** If confirmed, my oath will be to protect and defend the Constitution of the United States. That obligation transcends any personal loyalty to any individual. If confirmed, I will honor that oath.

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**SENATOR DICK DURBIN**

1. In your questionnaire you say you have been a member of the Federalist Society from 1996 to the present.

- a. Why did you join the Federalist Society?

**RESPONSE:** I joined the Federalist Society because it hosts interesting and informative events that debate legal issues of interest to me. I have also participated in events hosted by the American Constitution Society, which I have also found interesting and informative.

- b. Do you agree with the views espoused by this organization?

**RESPONSE:** I am not in a position to speak to any specific views espoused by the Federalist Society.

- c. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree or disagree with this statement?

**RESPONSE:** In my experience, law schools and other legal institutions differ in multiple respects, including in the legal and political views of their students, professors, and members.

- d. Please list all years in which you attended the Federalist Society's national convention.

**RESPONSE:** To the best of my recollection: I began attending the Federalist Society's national conventions in 1996. Since then, I have generally attended some portion of the convention each year, though I suspect that there are some years where I had scheduling conflicts.

2. President Trump publicly thanked the Federalist Society and the Heritage Foundation for assembling his list of 21 Supreme Court candidates. He said he would only choose from that list in naming nominees for the Supreme Court.

- a. Was it appropriate for President Trump to involve the Federalist Society and the Heritage Foundation in the selection of candidates for the Supreme Court?

**RESPONSE:** I do not know what factors the President considered in selecting Supreme Court candidates.

- b. Are you concerned that this creates an incentive for judges and attorneys not to take positions that contravene the views of these two organizations, if those judges want to someday have a chance at being nominated by President Trump for a Supreme Court seat?

**RESPONSE:** See Response 2b.

3. Will you commit that, if you are confirmed, you will recuse yourself from tobacco-related litigation matters, given your and your law firm's extensive past advocacy for tobacco companies?

**RESPONSE:** If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials in the Department of Justice's Ethics Office and recuse myself whenever appropriate.

4. On p. 31 of your attachments to Question 12(d) of your committee questionnaire, you supply the text of a speech you gave to the annual conference of the Community Financial Services Association, better known as the trade association for the payday lending industry, you described your role in representing and advocating for this industry. You said:

The payday lending industry is facing the challenge of a lifetime. It is essential that, as an industry, you be prepared to respond on all fronts, and it has been my privilege to assist you in doing this over the last few years. This includes the legislative front, the regulatory front, and – my favorite – the legal front. This conference has been a showcase in how the industry...is fully engaged in meeting this challenge, and I'm honored to be a part of it.

Will you commit that, if you are confirmed, you will recuse yourself from litigation matters involving the payday lending industry, given your extensive advocacy on behalf of that industry and your assistance to them on the legislative, regulatory and legal fronts?



**RESPONSE:** If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials in the Department of Justice’s Ethics Office and recuse myself whenever appropriate.

5. On May 19, 2016, you delivered a keynote address at the Heritage Foundation on the legacy of Justice Scalia. At that address, you said:

We lost the single best and most articulate defender of our view of the world that most of us in this room have known and may ever know. We live in an era where our views, traditional views, are under constant attack. Our adversaries have not even really tried to beat us through the democratic processes, but instead go straight to the courts, where they often win not by asserting that our views are legally wrong, but that they are so fundamentally illegitimate that the Constitution prohibits them. And they now have an increasingly compliant Judiciary that agrees with their policy views and that is unconstrained by legal principle. This is where Justice Scalia’s contributions and leadership were so critical and why he will be so dearly missed. For in defending his view of the Constitution, Justice Scalia defended our view of the world.

- a. In this speech, when you talk about “our adversaries,” who were you talking about?

**RESPONSE:** I gave this speech shortly after Justice Scalia’s tragic death. Justice Scalia was not just my mentor, but my friend. This speech was meant to be a tribute to his life and legacy. In the referenced excerpt above, I was acknowledging that people of good faith have different views on certain issues. However, if confirmed, my personal policy and political views would be irrelevant; the decisions of the Solicitor General must reflect the long-term interests of the United States.

- b. Do you believe that judges that rule for your “adversaries” are doing so because they agree with your adversaries’ policy views?

**RESPONSE:** I believe that judges generally do their best to decide cases based on the rule of law, not on their personal policy views.

- c. What did you mean by “our view of the world”?

**RESPONSE:** See Response 5a.

6. Last year you served as counsel of record for the petitioners in *Zubik v. Burwell*, a Supreme Court case involving the implementation of the Affordable Care Act's contraceptive coverage mandate.

You argued that the Obama Administration's accommodation for non-profit religious employers with religious objections to contraception, which merely required them to file a two-page form, burdened their right to freely exercise their religion.

In speeches about the litigation, you suggested that the Obama Administration intentionally discriminated against religious employers in implementing the contraceptive coverage mandate. For example, in a speech to the Cato Institute, you said that you believed a "case can be made that these regulations were adopted to discriminate against religious organizations [with] certain views on abortion and contraception."

Do you believe that by ensuring that women had access to preventive health care recommended by medical professionals, the Obama Administration was intentionally discriminating against religious employers?

**RESPONSE:** In the *Zubik* litigation, I represented clients that believed that the contraceptive mandate violated their rights under the Religious Freedom Restoration Act ("RFRA"). In that litigation, I served as an attorney advancing my client's views, not my own views.

In view of my prior representation, I have recused myself from the *Zubik* litigation and therefore it would be inappropriate for me to comment further on this matter.

7. You discussed *Zubik* and its predecessor, *Hobby Lobby*, in a speech to the Lumen Christi Institute. In *Hobby Lobby*, a divided Supreme Court interpreted the Religious Freedom Restoration Act to permit a for-profit corporation to assert free exercise rights and impose its religious beliefs on its more than 13,000 employees.

In this speech, you stated that these cases were not, in your view, about contraception. You said "[c]ontraception is widely available. It's cheap. And for those who can't afford it, there are lots of other ways to get it for free."

Medical professionals do not agree with your assessment. In a 2015 opinion, the American College of Obstetricians and Gynecologists' Committee on Health Care for Underserved Women noted its support for full implementation of the ACA's contraceptive coverage mandate, noting: "multiple barriers prevent women from obtaining contraceptives or using them effectively and consistently. All women should have unhindered and affordable access to all U.S. Food and Drug Administration-approved contraceptives."

- a. Do you agree or disagree with the opinion of the medical professionals at the American College of Obstetricians and Gynecologists?

**RESPONSE:** See Response 6.

- b. How would you defend your position to the thousands of employees affected by the Hobby Lobby case, whose ability to access affordable preventive care has been burdened by the religious beliefs of their corporate employer?

**RESPONSE:** See Response 6.

8. In a speech to the Heritage Foundation, you discussed litigation that involved discrimination against same-sex married couples. You said:

[W]e need to build powerful cases—both legally powerful, and sympathetic. [The] HHS Contraceptive Mandate cases are again a great example—we, Beckett, [and] others have worked hard to put together sympathetic plaintiffs with powerful arguments—Little Sisters, Catholic Charities, inner city Catholic schools, diocese and archdiocese. On marriage, [we] need to do the same. Focus on the Florist, on the Baker, the sincere small businessman under attack.

I find it interesting that you use the words “under attack” here. Many would argue that when a business refuses to serve a customer on the basis of that customer’s sexual orientation—an immutable characteristic—it is the customer who is subject to illegal discrimination who is “under attack.”

- a. Do you stand by your comments?

**RESPONSE:** In those remarks, I was advising organizations on building cases that would be persuasive to courts. I continue to believe that, in litigating matters, attorneys should attempt to present both legally and factually persuasive cases.

- b. Discrimination against LGBT individuals goes far beyond just the “sympathetic” cases you sought to build. The Human Rights Campaign (HRC) recently found that 42% of LGBT youth say they live in communities that are not accepting of LGBT people. In a 2015 HRC poll of LGBT Americans, 63% reported experiencing discrimination in their personal lives. And according to a New York Times analysis of FBI hate crimes data, “[e]ven before the shooting rampage at a gay nightclub in Orlando, Fla., lesbian, gay, bisexual and transgender people were already the most likely targets of hate crimes in America.”

These statistics suggest that anti-discrimination protections for LGBT Americans are very much needed, despite your efforts to encourage litigation against them.

Do you disagree with these statistics?

**RESPONSE:** I have no basis to disagree or agree with these statistics.

- c. Do you think that anti-discrimination protections for LGBT individuals are unnecessary?

**RESPONSE:** I believe that all individuals should be treated with dignity and respect, including LGBT individuals.

- 9. As Acting Solicitor General, you led the Administration's legal defense of President Trump's Muslim-ban Executive Order.

Both the January 27 order and the subsequent revised March 6 order sought to fulfill President Trump's repeated promises as a candidate to ban Muslims from entering the country. The orders' effects are not limited to those seeking to enter our country without any ties here: they also prevent U.S. citizens and lawful permanent residents from reuniting with family who are nationals of the targeted countries.

Despite the unequivocal discriminatory intent of the Executive Orders, you argued that the courts should not consider President Trump's repeated statements as a candidate vowing to ban Muslims in an assessment of the legality of the Orders. You even argued that judicial review of the President's decisions on immigration policy on the basis of his national security assessment should be unreviewable by the judiciary.

- a. Do you disagree with the 9th Circuit's finding in *State of Washington v. Trump* that "There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy."

**RESPONSE:** After the Ninth Circuit preliminarily enjoined Executive Order 13769, the President withdrew it and replaced it with a new Executive Order. The new Executive Order is in active litigation. It would therefore be inappropriate for me to comment on the legality of that order outside the context of the ongoing litigation.

- b. If so, what precedent is there for this claim?

**RESPONSE:** See Response 9a.

- c. Your brief also argued that both the Temporary Restraining Order and judicial review of the Executive Order threatened considerable harm to the public and to national security. "The injunction," you stated, "immediately harms the public by thwarting enforcement of an Executive Order issued by the President, based on his national security judgment." Do you stand by your position that the injunction and judicial review of the President's executive order has harmed the public?

**RESPONSE:** See Response 9a.

- d. How and on what basis can you make this determination?

**RESPONSE:** See Response 9a.

10.

- a. Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election? If you are unfamiliar with this claim, please review <http://www.factcheck.org/2017/01/trumps-bogus-voter-fraud-claims-revisited/>.

**RESPONSE:** I have no basis to agree or disagree with this issue.

- b. Are you aware of any evidence that supports the President’s claim?

**RESPONSE:** See Response 10a.

11. In 1886, the Supreme Court noted that the right to vote “is regarded as a fundamental political right, because [it is] preservative of all rights,” a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

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

**RESPONSE:** The Supreme Court has repeatedly made clear that the right to vote is a fundamental right. See, e.g., *Wisconsin v. City of New York*, 517 U.S. 1, 12 (1996); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

- b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized closely by the courts?

**RESPONSE:** I believe that courts should assess voting rights cases under the legal standards provided by the Constitution, Acts of Congress, and judicial precedent.

- c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing an American citizen from exercising his or her fundamental right to vote?

**RESPONSE:** See Response 11b.

12. In 2013, a divided Supreme Court voted 5-4 in *Shelby County v. Holder* to invalidate part of the Voting Rights Act. The Court struck down a provision of the Act that required certain jurisdictions to “preclear” any changes to their voting laws with the Department of Justice.

Since the decision, several states have put in place restrictive state voting laws which have a disproportionate impact on lower-income and minority voters. For example, hours

after the Shelby County decision, Texas state officials announced that they would immediately implement a strict photo ID requirement for in-person voting, which Texas first tried to put in place in 2011. This burdensome voter-ID law had previously been blocked by both the Department of Justice and a federal appeals court, due to the law's harmful impact on poor and minority voters.

Last summer, the Fifth Circuit held that the law has a discriminatory effect on voters and violates the Voting Rights Act. The Fifth Circuit also remanded the case for a new hearing on the question of whether the law was passed with racially discriminatory intent. But this year under a new Administration, before the new hearing began, the Justice Department asked the district court to dismiss its claim that the Texas law was enacted with discriminatory intent. Despite the Justice Department's changed position, the district court ruled that the law was passed with discriminatory intent.

- a. Do you agree with the Justice Department's decision to switch positions in this case?

**RESPONSE:** My understanding is this case is in active litigation and therefore that it would be inappropriate for me to comment further.

- b. Were you involved with the decision in any way?

**RESPONSE:** During the time that I served as Acting Solicitor General, I was advised of the Department of Justice's position in this matter.

13. Do you believe that systemic racial discrimination still exists in America today?

**RESPONSE:** I believe that racial discrimination is abhorrent. Although I believe that the country has made great strides in eliminating racial discrimination, I do believe that, unfortunately, it still exists in America today.

14. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuetz v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor’s statement, or are your views closer to Chief Justice Roberts’ statement in *Parents Involved*?

**RESPONSE:** I do not believe it would be appropriate to state whether I agree or disagree with any particular Supreme Court decision. If confirmed, the positions that I advance on behalf of the United States would not be based on my personal views, but instead on the best interests of the United States.

15. You have some experience with the Emoluments Clause. In 2005, when you were in the Office of Legal Counsel at the Justice Department, you wrote an opinion about whether the Clause applied to an advisor on the President’s Council on Bioethics.

As you know, the Foreign Emoluments Clause in Article I, Section 9, Clause 8 of the Constitution provides that:

...no Person holding any Office of Profit or Trust under [the United States], 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.

- a. What do you believe the Founding Fathers intended this clause to mean?

**RESPONSE:** In 2005, while serving in the Office of Legal Counsel, I authored an opinion on the meaning of the phrase “Office of Profit or Trust under [the United States].” To the best of my recollection, the opinion concluded that service on the President’s advisory Council on Bioethics did not constitute such an “Office.” Beyond that, I do not have any well-formed views on the scope of the Emoluments Clause.

- b. The historical record is clear that the Framers believed that corruption from foreign interests was a grave threat to the nation and that it had to be resisted aggressively. They were worried that great powers like Britain and France would give gifts to U.S. officeholders to manipulate them. As George Mason said at the Constitutional Convention, “if we do not provide against corruption, our government will soon be at an end.” Alexander Hamilton said in *Federalist No. 68* that “nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.”

Do you believe that this original public meaning of the Foreign Emoluments Clause should be applied in interpreting it today?

**RESPONSE:** See Response 15a.

16. According to news reports, in a January 27th dinner, President Trump asked then-FBI Director James Comey if Comey would pledge his loyalty to President Trump. Do you

believe it is appropriate for a President to ask a Director of the FBI to pledge loyalty to the President?

**RESPONSE:** I have no knowledge of the facts and circumstances surrounding this event beyond what I have seen reported in the news media and, therefore, am not in a position to comment on this matter.

17.

- a. Do you think the Solicitor General has the responsibility to say no to the President if he asks for something that's improper?

**RESPONSE:** Yes.

- b. If the views that the President wants to execute are unlawful, should the Solicitor General say no?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders and other executive actions. If confirmed, I will defend Acts of Congress, the President's Executive Orders, and other executive actions when a reasonable defense is available, but not otherwise.



**QUESTIONS FOR THE RECORD  
NOEL J. FRANCISCO  
NOMINEE TO BE SOLICITOR GENERAL**

**SENATOR SHELDON WHITEHOUSE**

1. While in private practice, you worked extensively on behalf of the tobacco company R.J. Reynolds, including in federal racketeering proceedings under RICO.
  - a. Was the Department of Justice wrong when it brought and won the civil RICO cases against the tobacco industry?

**RESPONSE:** In the above-referenced litigation, I was an attorney advancing the views of my client, R.J. Reynolds Tobacco Co. My client disagreed with the Department of Justice's claim, but the district court found my client liable and the D.C. Circuit largely affirmed. *United States v. Philip Morris USA Inc., et al.*, 566 F.3d 1095 (D.C. Cir. 2009).

- b. Was the United States District Court for the District of Columbia wrong when it held that the tobacco industry, including your client R.J. Reynolds, constituted a RICO enterprise?

**RESPONSE:** See Response 1b. As noted, the district court's opinion was largely affirmed by the D.C. Circuit.

- c. You have argued that an association-in-fact cannot include corporations. Was the United States Court of Appeals for the D.C. Circuit wrong when it held that a RICO enterprise "may consist of "a group of individual[s], partnerships, and corporations associated in fact"?

**RESPONSE:** See Responses 1a-1b.

- i. In speech notes you produced through your questionnaire, you indicated that you were "on a crusade to get this issue back before the Supreme Court." Would you continue that crusade as Solicitor General – reversing course on a position the Department of Justice has consistently held?

**RESPONSE:** If confirmed, the positions that I would advance as Solicitor General would be based on the long-term interests of the United States, not the interests of my former clients. The long-term interests of the United States would be determined through, among other things, consultation with the relevant individuals and agencies within the federal government, including within the Department of Justice.

2. As you know, one of the chief functions of the Solicitor General is to file amicus briefs before the Supreme Court when the United States is not a party. The support of the

United States carries enormous weight, and indeed, empirical studies have demonstrated the dramatic historical success rate of parties to whom the SG lends its support.

- a. When considering amicus participation on a given case, is it the practice of the Office of the Solicitor General to meet with both sides before deciding which, if any, to support?

**RESPONSE:** To my knowledge, that is the general practice of the Office of the Solicitor General. I do not know how that practice is implemented in the full range of facts and circumstances in which it arises, or whether it is subject to exceptions based on those facts and circumstances.

- b. Will you commit that, as Solicitor General, it will be the practice of your office not to confer with only one side in litigation before intervening?

**RESPONSE:** If confirmed, I intend to adhere to the Office's longstanding practice on this issue.

3. Please list every case you worked on, in any capacity whatsoever, during your 2017 tenure as Acting Solicitor General. For each case, please note the relevant Department of Justice operating component (e.g., Civil Division, Antitrust Division, Civil Rights Division, etc.)

**RESPONSE:** To the best of my knowledge, and based on a review of Office of Solicitor General files conducted by individuals on my behalf, set forth below are cases on which I worked during my tenure as Acting Solicitor General from January 23-March 10, 2017. Given the scope of the Office's work, it is possible that there could be some matters inadvertently omitted from this list.

| Case Name   | Division  | Court     | Number  |
|---|-----------|-----------|---------|
| Akel v. United States   | Criminal  | SCOTUS    | 16-6032 |
| Allied Industrial Development Corp. v. Surface Transportation Board | Antitrust | SCOTUS    | 16-875  |
| Althage v. United States  | Criminal  | SCOTUS    | 16-6436 |
| Ameren Services Co. v. FERC   | FERC      | SCOTUS    | 16-531  |
| American Hospital Ass'n v. Burwell                                  | Civil     | DC        | 14-851  |
| Ariosa Diagnostics v. Illumina, Inc.                                | Civil     | Fed. Cir. | 16-2388 |
| ATI Technologies ULC v. LG Electronics, Inc.                        | Civil     | Fed. Cir. | 16-2222 |
| Baginski v. Sessions  | Civil     | D.D.C.    | 15-1225 |
| Bandimere v. SEC  | Civil     | CA10      | 15-9586 |
| Banks v. United States  | Lands     | Fed. Cir. | 16-2326 |
| Bello v. United States  | Criminal  | SCOTUS    | 16-7667 |
| Belmora LLC v. Bayer Consumer Care                                  | Civil     | SCOTUS    | 16-548  |
| Berger & Moore v. Burwell   | Civil     | E.D.N.C.  | 17-25   |
| Big Cats of Serenity Springs, Inc. v. Vilsack                       | Civil     | CA10      | 15-1174 |
| Binderup v. Sessions  | Civil     | SCOTUS    | 16-983  |

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| Blaine v. United States  | Criminal | SCOTUS     | 16-6574  |
| Blue Belt Techs. v. Mako Surgical Corp.                          | Civil    | Fed. Cir.  | 16-2470  |
| BNSF Railway Co. v. Tyrrell                                      | Civil    | SCOTUS     | 16-405   |
| Boente v. Baptiste   | Civil    | CA3        | 14-4476  |
| Bonin v. CBS Radio, Inc.   | Civil    | E.D. Wis.  | 16-674   |
| Bostic v. DC Housing Authority                                   | Civil    | D.C.       | 15-386   |
| Bristol Myers Squibb Co. v. Superior Court of California         | Civil    | SCOTUS     | 16-466   |
| Brown v. United States   | Criminal | SCOTUS     | 16-7796  |
| Bruce v. United States   | Criminal | SCOTUS     | 16-7084  |
| Caira v. United States   | Criminal | SCOTUS     | 16-6761  |
| California Public Employees' Retirement System v. ANZ Securities | Civil    | SCOTUS     | 16-373   |
| Carpenter v. United States                                       | Criminal | SCOTUS     | 16-402   |
| Carrasquillo-Penalosa v. United States                           | Criminal | SCOTUS     | 16-6076  |
| Center for the Study of Services v. HHS                          | Civil    | CADC       | 14-498   |
| Citizens Against Reservation Shopping v. Haugrud                 | Lands    | SCOTUS     | 16-572   |
| Clarian Health West, LLC v. Burwell                              | Civil    | CADC       | 14-339   |
| Conrad v. United States  | Criminal | SCOTUS     | 16-603   |
| Cooper v. O'Brien  | Criminal | SCOTUS     | 16-6280  |
| County of Los Angeles v. Mendez                                  | Criminal | SCOTUS     | 16-369   |
| Coventry Health Care v. Nevils                                   | Civil    | SCOTUS     | 16-0149  |
| Craig v. Princeton Enters, LLC                                   | Civil    | E.D. Mich. | 16-10027 |
| Cruickshank v. United States                                     | Criminal | SCOTUS     | 16-7337  |
| Daniels v. Merit Systems Protection Board                        | Civil    | SCOTUS     | 16-709   |
| Darin v. United States   | Criminal | SCOTUS     | 16-564   |
| Davila v. Davis  | Criminal | SCOTUS     | 16-6219  |
| Dean v. United States  | Criminal | SCOTUS     | 15-9260  |
| Edwards v. United States   | Criminal | SCOTUS     | 16-5760  |
| Esquivel-Quintana v. Sessions                                    | Civil    | SCOTUS     | 16-0054  |
| Federal Education Ass'n and Karen Graviss v. Dep't of Defense    | Civil    | Fed. Cir.  | 15-3173  |
| Flores v. Lynch  | Civil    | CA9        | 17-55208 |
| Ford v. United States  | Criminal | SCOTUS     | 16-6107  |
| Fox v. United States   | Criminal | SCOTUS     | 16-6989  |
| Golicov v. Lynch   | Civil    | CA10       | 16-9530  |
| Graf v. United States  | Criminal | SCOTUS     | 16-6743  |
| Graham v. United States  | Criminal | SCOTUS     | 16-6308  |
| Habeas Corpus Resource Center v. DOJ                             | Civil    | SCOTUS     | 16-880   |
| Hernandez v. Mesa  | Civil    | SCOTUS     | 15-0118  |
| Hawaii v. Trump (and related litigation)                         | Civil    | CA9        | 17-15589 |
| Honeycutt v. United States                                       | Criminal | SCOTUS     | 16-142   |
| Howell v. Howell   | Civil    | SCOTUS     | 15-1031  |
| Howell v. United States  | Marines  | SCOTUS     | 16-536   |

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| Impression Products, Inc. v. Lexmark International, Inc.                   | Civil        | SCOTUS    | 15-1189              |
| In re Andrew Silver  | Civil        | Texas     | 16-682               |
| In re Reald Inc.   | Civil        | Fed. Cir. | 17-1156              |
| In re Sherman Lamont Fields  | Criminal     | SCOTUS    | 16-293<br>and 16-294 |
| Internal Revenue Service v. Murphy   | Tax          | D. Me.    | 16-08                |
| International Refugee Assistance Project v. Trump (and related litigation) | Civil        | CA4       | 17-1351              |
| Jennings v. Rodriguez  | Civil        | SCOTUS    | 15-1204              |
| Jordan v. United States  | Criminal     | SCOTUS    | 16-6694              |
| Judicial Watch, Inc. v. Kerry  | Civil        | CADC      | 16-6015              |
| Juliana v. United States   | Lands        | D. Or.    | 15-1517              |
| Justice v. IRS   | Tax          | SCOTUS    | 16-786               |
| Kerr v. Haugrud  | Civil        | SCOTUS    | 16-742               |
| King v. Marion County Circuit Court  | Civil Rights | CA7       | 16-3726              |
| Kumar v. Republic of Sudan   | Civil        | CA4       | 16-2267              |
| Langbord v. Department of the Treasury                                     | Civil        | SCOTUS    | 16-612               |
| Langston v. United States  | Criminal     | SCOTUS    | 16-7737              |
| Lauriano-Esteban v. United States  | Criminal     | SCOTUS    | 16-7553              |
| Lee v. United States   | Criminal     | SCOTUS    | 16-0327              |
| Leija-Sanchez v. United States   | Criminal     | SCOTUS    | 16-5910              |
| Liff v. OIG  | Civil        | DC        | 14-1662              |
| Los Angeles County v. Mendez   | Civil        | SCOTUS    | 16-369               |
| Lovett v. United States  | Criminal     | SCOTUS    | 16-6569              |
| Manning v. United States   | Civil        | D. Md.    | 13-1852              |
| Matchett v. United States  | Criminal     | SCOTUS    | 16-7598              |
| McFadden v. United States  | Criminal     | SCOTUS    | 16-679               |
| McIntosh v. United States  | Criminal     | SCOTUS    | 16-7234              |
| McLane Company, Inc. v. EEOC   | EEOC         | SCOTUS    | 15-1248              |
| McWilliams v. Jefferson  | Criminal     | SCOTUS    | 16-5294              |
| Medina v. Lynch  | Civil        | D.D.C.    | 16-1718              |
| Mejia v. Time Warner Cable Inc.; Johnson v. Time Warner Cable Inc.         | Civil        | S.D.N.Y.  | 15-6445              |
| Menendez v. United States  | Criminal     | SCOTUS    | 16-755               |
| MetLife v. Financial Stability Oversight Council                           | Civil        | CADC      | 16-5086              |
| Miller v. DOJ  | Civil        | Fed. Cir. | 15-3149              |
| Millhouse v. Heath   | Civil        | CA3       | 15-2278              |
| Moses v. Dodaro  | Civil        | CADC      | 12-5199              |
| Murray Energy Corp. v. McCabe  | Lands        | N.D.W.V.  | 14-39                |
| Nesbitt v. U.S. Army Corp. of Engineers                                    | Civil        | CA9       | 16-3249              |
| Noble Energy, Inc. v. Haugrud  | Lands        | SCOTUS    | 16-368               |
| OCA-Greater Houston v. Texas   | Civil Rights | CA5       | 16-51126             |

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|---|----------|-----------------|------------------------|
| Payne v. United States                                    | Criminal | SCOTUS          | 16-7273                |
| Penaloza-Carlon v. United States                          | Criminal | SCOTUS          | 16-7585                |
| Planned Parenthood of Kansas and Mid-Missouri v. Mosier   | Civil    | CA10            | 16-3249                |
| Public Citizen v. Trump                                   | Civil    | D.D.C.          | 17-253                 |
| Raymond J. Lucia Cos., Inc. v. SEC                        | Civil    | CADC            | 15-1345                |
| Republican Party of Louisiana v. FEC                      | N/A      | SCOTUS          | 16-865                 |
| Robinson v. United States                                 | Criminal | SCOTUS          | 16-6550                |
| Russell v. United States                                  | Criminal | SCOTUS          | 16-6780                |
| Sandoz Inc. v. Amgen Inc. and Amgen Inc. v. Sandoz Inc.   | Civil    | SCOTUS          | 15-1039<br>and 15-1195 |
| Sessions v. Baptiste                                      | Civil    | SCOTUS          | 16-0976                |
| Sessions v. Golicov                                       | Civil    | SCOTUS          | 16-0966                |
| Sessions v. Shuti   | Civil    | SCOTUS          | 16-0991                |
| Shuti v. Lynch  | Civil    | CA6             | 15-3835                |
| Slone Revocable Trust v. Commissioner of Internal Revenue | Tax      | CA9             | 16-73356               |
| Snipes v. United States                                   | Criminal | SCOTUS          | 16-7818                |
| Staab v. McDonald   | Civil    | Veterans Claims | 14-957                 |
| Stanley v. BOP  | Civil    | CA9             | 15-35926               |
| State of Washington v. Trump (and related litigation)     | Civil    | CA9             | 17-35105               |
| Stephens v. United States                                 | Criminal | SCOTUS          | 16-7448                |
| Strong v. United States                                   | Criminal | SCOTUS          | 16-6861                |
| Takeda Pharmaceutical Co. v. Array Biopharma Inc.         | Civil    | Fed. Cir.       | 17-1079                |
| TC Heartland LLC v. Kraft Foods Group Brands LLC          | Civil    | SCOTUS          | 16-341                 |
| Turner v. United States; Overton v. United States         | Criminal | SCOTUS          | 15-1503;<br>15-1504    |
| Tyree v. Chao   | Civil    | SCOTUS          | 16-7080                |
| U.S. Bank N.A. v. The Village of Lakeridge, LLC           | Civil    | SCOTUS          | 15-1509                |
| United States v. Alta Wind I Owner Lessor C               | Tax      | Fed. Cir.       | 17-1410                |
| United States v. Atkins                                   | Criminal | CA6             | 16-5531                |
| United States v. Broadbent                                | Civil    | D. Utah         | 12-313                 |
| United States v. Cordes                                   | Criminal | E.D. Tenn.      | 14-124                 |
| United States v. Dinkins                                  | Criminal | D.S.C.          | 11-2061                |
| United States v. Gardner                                  | Criminal | N.D. Cal.       | 09-203-1               |
| United States v. Gilbert                                  | Criminal | N.D. Ala.       | 16-130                 |
| United States v. Goldsberry                               | Criminal | E.D. Mo.        | 14-91                  |
| United States v. Haak                                     | Criminal | W.D.N.Y.        | 15-220                 |
| United States v. Hampton                                  | Criminal | D.S.C.          | 07-1517                |

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| United States v. Hampton   | Criminal     | CA8        | 16-3971  |
| United States v. Hoffman   | Criminal     | E.D. La.   | 14-22    |
| United States v. Lafon   | Criminal     | CA9        | 16-10044 |
| United States v. Lambis  | Criminal     | S.D.N.Y.   | 15-734   |
| United States v. Lewis   | Criminal     | SCOTUS     | 16-7535  |
| United States v. Maldonado-Burgos  | Criminal     | CA1        | 15-2145  |
| United States v. Mar-Jac Poultry, Inc.                                     | Civil        | CA11       | 16-17745 |
| United States v. New Mexico Supreme Court                                  | Civil        | CA10       | 14-2037  |
| United States v. Pennick   | Criminal     | W.D.N.Y.   | 10-191-2 |
| United States v. Powers  | Criminal     | CA2        | 15-3867  |
| United States v. Reinhart  | Criminal     | N.D. Cal.  | 15-330   |
| United States v. Robinson  | Criminal     | SCOTUS     | 16-6550  |
| United States v. Santiago  | Criminal     | D.N.J.     | 15-418   |
| United States v. Sparkman  | Criminal     | CA7        | 12-3683  |
| United States v. Tanksley  | Criminal     | CA5        | 15-11078 |
| United States v. Taylor  | Criminal     | W.D. Mich. | 15-106   |
| United States v. Walton  | Criminal     | N.D. Tex.  | 15-364-1 |
| United States v. Weaver  | Civil        | CA2        | 16-3861  |
| United States v. West  | Criminal     | E.D. Wash. | 14-66    |
| United States v. Wise  | Criminal     | CA5        | 16-20808 |
| United States v. Zuk   | Criminal     | CA4        | 16-4727  |
| USA ex rel. Able v. U.A. Bank, NA  | Civil        | SCOTUS     | 16-130   |
| Valdez v. United States  | Criminal     | SCOTUS     | 16-6872  |
| Veasy v. Abbott  | Civil Rights | S.D. Tex.  | 13-193   |
| Vennes v. United States  | Criminal     | SCOTUS     | 16-6224  |
| Verdin-Garcia v. United States   | Criminal     | SCOTUS     | 16-6786  |
| Viloski v. United States   | Criminal     | SCOTUS     | 16-508   |
| Vitreo Retinal Consultants of the Palm Beaches v. DHS                      | Civil        | SCOTUS     | 16-808   |
| Walker v. City of Calhoun County   | Civil Rights | CA11       | 16-10521 |
| Water Splash, Inc. v. Menon  | Civil        | SCOTUS     | 16-254   |
| West Virginia ex rel. Morrissey v. Department of Health and Human Services | Civil        | SCOTUS     | 16-721   |

4. During your hearing, you stated that as Acting Solicitor General, when considering whether to authorize appeals, you “had a chance to see how the [appeal authorization process] actually functions.” You noted that the Solicitor General has “an enormous amount of assistance,” and that “in any case where the government is considering taking an appeal, taking a position, the first thing that happens is the views of all of the affected agencies are solicited. They then send those views over to the Department of Justice where they’re further reviewed by attorneys in the relevant operating components, whether it’s the Antitrust Division, the Civil Division, the Tax Division, the Criminal Division. Those views then get forwarded to the Solicitor General’s Office where they’re reviewed by one of our fine career assistants to the [Solicitor] General, and then one of the four deputies to the Solicitor General. It’s only at that point, with the benefit of all of

these views, does the issue then actually land on the Solicitor's desk, and even then, often the Solicitor General will convene meetings of all of the relevant entities, agencies, and individuals to ensure that whatever position is taken is the position that reflects the interest of the United States as determined by the government as a whole." You described this process as "absolutely essential" given that the Department is representing the views of the United States as a whole.

- a. With respect to any case you listed in response to Question 3 above, did you ever make an appeal or amicus participation determination without the case going through each step of the procedure you described above? If yes, please describe in detail how the procedure was different with respect to each applicable case.

**RESPONSE:** In my response to Senator Lee's question, I intended to describe the general process that I observed during my brief tenure as Acting Solicitor General that applied to appeal recommendations in most cases. During my roughly six weeks serving as Acting Solicitor General, I did not have an opportunity to observe all of the various facts and circumstances in which appeal recommendations are made. I suspect that the application of that process may vary from case to case depending on the nature of the case. In addition, there may be some cases that require emergency and/or expedited treatment or for which, given the nature of the case, the need for an appeal is clear. As to the handling of any specific case, I believe it would be inappropriate to comment on internal Executive Branch deliberations.

- b. With respect to any case you listed in response to Question 3 above, did you ever make an appeal or amicus participation determination without having first reviewed a memorandum by a career attorney in the relevant operating component? If yes, please describe the circumstances in detail with respect to each applicable case.

**RESPONSE:** See Response 4a.

- c. With respect to any case you listed in response to Question 3 above, did you ever make an appeal or amicus participation determination without having first reviewed a memorandum drafted by either an Assistant to the Solicitor General or a Deputy United States Solicitor General? If yes, please describe the circumstances in detail with respect to each applicable case.

**RESPONSE:** See Response 4a.

- d. With respect to any case you listed in response to Question 3 above, did you ever make an appeal or amicus participation determination based on conversations with political appointees or acting political appointees in the relevant operating division?

**RESPONSE:** See Response 4a. It should be noted that, to my knowledge, memoranda provided by the operating components are often signed by the head or the acting head of that component.

- e. Is it appropriate for the Solicitor General to discuss a case with political appointees in the front office of a DOJ operating component before the operating component's formal views on that case have been presented to OSG through the process you described at your hearing?

**RESPONSE:** See Responses 4a-4d.

- f. As Acting Solicitor General, were you ever consulted by any political appointee in the front office of any DOJ operating component about a case that did not ultimately reach OSG through the process you described in your hearing? If yes, please identify any applicable case and explain why the process you described was not completed.

**RESPONSE:** See Responses 4a-4e. In addition, I should note that the Office of Solicitor General is frequently asked to advise on matters that do not involve appeal or amicus recommendations.

- g. As Solicitor General, will you commit to following the procedure you described in your hearing with respect to every appeal or amicus participation determination? If no, why not?

**RESPONSE:** See Responses 4a-4d. If confirmed, I intend to adhere to the Office of Solicitor General's past practices for handling appeal and amicus recommendations.

- 5. The Trump Administration's Department of Justice has reversed course from previously held positions on a number of high profile cases and policies. For example: the DOJ backtracked on its argument that Texas acted with discriminatory intent in passing its voter ID laws; changed course to argue that the Consumer Financial Protection Bureau should be stripped of its independence; withdrew its "Dear Colleague" letter on protections for transgender students under Title IX of the Education Amendments of 1972; reversed its previous stance on the federal use of private prisons; and signaled to courts its intention to reverse course in cases concerning the Clean Power Plan and the Fair Labor Standards.

- a. In your view, when, if ever, is it appropriate for the United States to change or reverse litigating positions during pending litigation?

**RESPONSE:** Although there are times when it is appropriate for the United States to change litigating positions, as a general matter, it should be done infrequently in order to foster continuity. It is, for example, appropriate to change litigating positions when the underlying policy at issue has changed. For example, if an agency regulation is subject to



litigation, and the agency at issue changes the regulation, it may be both appropriate and necessary to change litigating positions.

- b. Is it appropriate for the United States to change litigating position on policy grounds? Or only when a determination is made that a previous position was incorrect as a matter of law?

**RESPONSE:** See Response 5a.

- c. Is it appropriate for the United States to change litigating position based on a President's campaign promises?

**RESPONSE:** See Responses 5a-5b.

- d. Is there a risk that the United States will lose credibility with a court if it switches positions during litigation?

**RESPONSE:** Although there are times when it is appropriate for the United States to change litigating positions, I believe that, if the United States changes positions too often and without a sound basis for doing so, then there is a risk of undermining credibility with the courts.

- 6. As acting Solicitor General, you were involved in the defense of President Trump's Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States," Exec. Order 13769 (Jan. 27, 2017).

- a. In your personal view, was that Executive Order constitutional?
  - i. Had you determined that the travel ban was unconstitutional, how would you have handled that?

**RESPONSE:** After the Ninth Circuit preliminarily enjoined Executive Order 13769, the President withdrew it and replaced it with a new Executive Order. The new Executive Order is in active litigation. It would therefore be inappropriate for me to comment on the legality of that order outside the context of the ongoing litigation.

- b. What may a court consider in attempting to determine the purpose of a particular government action? For example, may a court look to legislative history to determine the purpose of an Act of Congress?
  - i. Is it appropriate for the Solicitor General to rely on legislative history in defending an Act of Congress during litigation?

**RESPONSE:** The Supreme Court has held that if the text of a statute is ambiguous, it is appropriate to look to a statute's legislative history in order to ascertain legislative intent.

*See, e.g., Milner v. Department of Navy*, 562 U.S. 562, 572 (2011); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 567-568 (2005).

- c. May courts consider the President's statements as evidence of his motivation in signing an executive order? For example, should a court be able to consider that Trump promised "a total and complete shutdown of Muslims entering the United States"?

**RESPONSE:** See Response 6a.

- d. During your tenure in the Associate Attorney General's office, have you had any involvement in the DOJ's defense of President Trump's revised "Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States," Exec. Order 13780 (Mar. 6, 2017). If yes, please describe your involvement in detail.

**RESPONSE:** During my time in the Associate Attorney General's Office, I have reviewed and commented on briefs involving challenges to Executive Order 13780 and have participated in preparations for oral arguments in the matter.

- e. In recent Fourth Circuit proceedings in the challenge to President Trump's revised travel ban (*International Refugee Assistance Project v. Trump*), the DOJ argued that "searching for governmental purpose outside the operative terms of governmental action and official pronouncements is fraught with practical 'pitfalls' and 'hazards that would make courts' task "extremely difficult."
- i. Do you agree with that proposition?

**RESPONSE:** See Response 6a.

- ii. In making that argument, the government quoted *Palmer v. Thompson*, 403 U.S. 217 (1971), a case in which the Supreme Court permitted the city of Jackson, MS, to close down its swimming pools after being ordered to integrate them. This case has been widely discredited. Was that citation appropriate? Is *Palmer* still good law?

**RESPONSE:** See Response 6a.

- 7. What is your understanding of the DOJ's policies with respect to the hiring and firing of career attorneys?
  - a. Is it appropriate to use an ideological litmus test when hiring career line lawyers?

**RESPONSE:** I believe it is important that all Justice Department officials understand and comply with the laws that govern their conduct, including the civil service protection laws. If confirmed, I am committed to ensuring that those with hiring authority in the Office of Solicitor General understand and comply with their obligations with respect to hiring.

- b. Are you familiar with the joint report of the DOJ Inspector General and Office of Professional Responsibility on politicized hiring and other personnel actions in the Civil Rights Division under the Bush administration?

**RESPONSE:** Although I have not studied the report in detail, I am generally familiar with it.

- c. Will you commit to following the recommendations made by OIG and OPR in that report? What other steps would you take to ensure similar misconduct is not repeated in your hiring and firing practices?

**RESPONSE:** See Response 7a-7b.

- d. Will you commit to hiring career attorneys regardless of ideology?

**RESPONSE:** See Response 7a-7b.

- 8. What is your understanding of the policy governing contacts between the White House and the Office of the Solicitor General? In what circumstances would it be appropriate for the White House to contact OSG about a pending or potential case?

**RESPONSE:** The Department of Justice is governed by procedures issued by the Attorney General limiting communications between the White House and the Justice Department concerning criminal prosecutions and civil litigation. The purpose of these procedures is to prevent inappropriate political influence or the appearance of inappropriate influence on Department of Justice matters.

- 9. Please describe your views on the Solicitor General's legal ethical duty of loyalty, including to whom such a duty is owed.

- a. Is the Solicitor General's duty of loyalty to the President, or to the American people?

**RESPONSE:** The Solicitor General owes responsibilities to all three branches of government and, ultimately, to the American people as a whole. He or she is, of course, an attorney for the President and Executive Branch, and in that respect, has ethical responsibilities to both. But the Solicitor General also defends the laws of Congress whenever they can reasonably be defended, save that narrow category of cases that encroach on the President's Article II powers. And the Solicitor General also owes a

special duty of independence and candor to the courts. I believe that all of these aspects of the Solicitor General's job are vital to the proper functioning of the office.

- b. Is it possible that the President's agenda and the Solicitor General's obligation to the United States could conflict? As Solicitor General, how would you handle a situation in which you felt those interests were at odds?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders and other executive actions.

If the President were to ask me to advance positions that conflicted with the Solicitor General's obligation to the United States, I would, to the best of my ability, ascertain the long-term interests of the United States. In conducting that assessment, I would consider, among other things, the views of the agencies that have a stake in the matter, the views of the relevant components of the Department of Justice, and any applicable regulations, statutes, and constitutional provisions. Based on this judgment, I would attempt to persuade the President to agree with me or to defer to my judgment.

If I were nonetheless directed to advance positions for which there was no reasonable basis, I would resign.

- c. As Solicitor General, how would you handle a case that implicated President Trump's business interests?

**RESPONSE:** The resolution of issues such as that referenced in the question above will turn on the facts and circumstances of the particular matter. Should such matter arise, I would consult with the relevant officials within the Department of Justice to determine how best it should be handled.

- d. Do you believe it is the duty of the Solicitor General to advance to political agenda of the President?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders and other executive actions. If confirmed, I will defend laws passed by Congress, the President's Executive Orders, and other executive actions when a reasonable defense is available, but not otherwise.

10. Do you agree that the Solicitor General has an obligation to enforce and defend laws of Congress?

- a. Does the Solicitor General have discretion to choose which laws of Congress he or she defends in court?

**RESPONSE:** The longstanding view of the Office of the Solicitor General is that the Solicitor General should defend the constitutionality of a statute passed by Congress when there is a reasonable basis for defending it, unless it encroaches on the President's Article II powers. I agree with this standard.

- b. Can the Solicitor General choose not to enforce or defend certain laws based on policy preferences?

**RESPONSE:** See Response 10a. The Solicitor General's personal policy preferences should play no role in his or her decision to enforce or defend certain laws.

- c. Is it appropriate for the Solicitor General to advance a legal position based on the President's campaign promises?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders and other executive actions. If confirmed, I will defend Acts of Congress, the President's Executive Orders, and other executive actions when a reasonable defense is available, but not otherwise.

**QUESTIONS FOR THE RECORD**  
**NOEL J. FRANCISCO**  
**NOMINEE TO BE SOLICITOR GENERAL**

**SENATOR AMY KLOBUCHAR**

1. The Solicitor General occupies a unique role in American government. Some have called the Solicitor General the “tenth Justice.” That is because the job does not just involve advocating for the government like any lawyer would for their client; it also means deciding when the government will appeal cases to the Supreme Court.

- a. When making these decisions, to whom does the Solicitor General answer?

**RESPONSE:** The Solicitor General owes responsibilities to all three branches of government. He or she is, of course, an attorney for the President and Executive Branch, and in that respect, has ethical responsibilities to both. But the Solicitor General also defends the laws of Congress whenever they can reasonably be defended, save that narrow category of cases that encroach on the President’s Article II powers. And the Solicitor General also owes a special duty of independence and candor to the courts. I believe that all of these aspects of the Solicitor General’s job are vital to the proper functioning of the office.

- b. Do you think your political beliefs would, or should, influence decisions regarding whether to appeal certain cases?

**RESPONSE:** No, I think that decisions on whether to appeal certain cases should be based on the long-term interests of the United States, not on my own personal political beliefs.

- c. What would you do if asked to represent a legal position that, from a professional opinion, you do not find legally defensible?

**RESPONSE:** If asked to advance a position that was not legally defensible, I would attempt to persuade the relevant client that it was not a legally defensible position, and attempt to determine a course of action that was both legally defensible and consistent with the client’s interests.

2. I understand that you commented on the Supreme Court’s decision in *McCutcheon v. Federal Election Commission* in 2014. Specifically, you said, “I’ve always thought these were relatively simple cases,” and that the regulation of political speech during an election is the “federal government directly influenc[ing] the political process through restrictions on free speech.”

- a. If confirmed, you would be responsible for defending the federal campaign finance laws that are still in place. Will you commit to upholding the campaign finance laws still on the books?

**RESPONSE:** If confirmed, I will apply the same standard to campaign finance laws that I would apply to any other Act of Congress. That is, I would defend campaign finance laws whenever a reasonable basis exists for defending them.

- b. Do you still agree with your previous assessment that *McCutcheon* was a “relatively simple case,” despite the fact that it was a 5-4 decision?

**RESPONSE:** I do not believe that it would be appropriate for me to comment on whether I agree or disagree with any particular Supreme Court case. If confirmed, the positions that I advance on behalf of the United States would not be based on my personal views, but instead on the best interests of the United States.

3. You were Acting Solicitor General when the President issued both of his executive orders targeting the refugee admissions program, and you were responsible for defending those orders against successful challenges in federal court.
  - a. What is your reaction to the federal court decisions that have blocked implementation of both of these executive orders?

**RESPONSE:** After the Ninth Circuit preliminarily enjoined Executive Order 13769, the President withdrew it and replaced it with a new Executive Order. The new Executive Order is in active litigation. It would therefore be inappropriate for me to comment on the legality of that order outside the context of the ongoing litigation.

**QUESTIONS FOR THE RECORD**  
**NOEL J. FRANCISCO**  
**NOMINEE TO BE SOLICITOR GENERAL**

**SENATOR CHRISTOPHER COONS**

1. In private practice, you represented religious organizations in *Zubik v. Burwell* and argued that signing a form that notified the government or an insurer of a religious objection to providing contraceptives was overly burdensome, even though the form freed them from further involvement in the provision of contraceptives. Given this previous representation, if you are confirmed, will you recuse yourself from any case that involves the Affordable Care Act’s contraceptive mandate?

**RESPONSE:** I have recused myself from the *Zubik* litigation. If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials in the Department of Justice’s Ethics Office and recuse myself whenever appropriate.

2. The President recently issued an Executive Order in which he called for agencies to consider “amended regulations . . . to address conscience-based objections to the preventive-care mandate promulgated under” the Affordable Care Act. Given your previous representation in *Zubik v. Burwell*, if you are confirmed, will you recuse yourself from providing any legal guidance on those regulations?

**RESPONSE:** See Response 1.

3. If you are confirmed, under what circumstances would you recuse yourself from involvement in cases involving Jones Day?

**RESPONSE:** If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials in the Department of Justice’s Ethics Office and recuse myself whenever appropriate.

4. In a 2015 *National Review* article discussing the Affordable Care Act’s mandate to provide access to contraception, you asserted your client’s belief that filling out a one-page exemption form would make them “complicit in sin to offer their employees a health plan that comes with contraceptive” coverage. I am concerned there is no limiting principle to this complicity argument. If any attenuated role in supporting a third party’s conduct can be claimed as a violation of the Religious Freedom Restoration Act, many neutral laws and personal freedoms are at risk. What limiting principle should be applied?

**RESPONSE:** As the Supreme Court explained in *Hobby Lobby*, this issue is governed by the Religious Freedom Restoration Act (“RFRA”), which establishes the contours and limits of the rights that an individual or entity has with respect to federal regulations that they believe infringe on their religious liberty. Generally, the threshold question is



whether the individual or entity is protected by RFRA. If it is, then under RFRA, the questions are (1) whether the federal regulation substantially burdens the person's sincere exercise of religion, and (2) if so, whether the regulation is the least restrictive means of furthering a compelling governmental interest.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate for me to comment further on this matter.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead on the best interests of the United States.

5. During the period when you served as Acting Solicitor General, you appeared on some of the administration's briefs challenging the travel ban executive orders.
  - a. What was your role in these cases?

**RESPONSE:** During my tenure as Acting Solicitor General, I was involved in the drafting of briefs and formulation of the Government's legal arguments in these cases.

- b. Why is your name on some of the briefs and not others?

**RESPONSE:** To the best of my recollection: I participated in the normal process of drafting and revising the brief referenced above until the afternoon of February 6, 2017, when my former law firm, Jones Day, filed an amicus brief in the case. Upon learning of the filing, I promptly consulted the career ethics attorneys within the Department of Justice. They authorized me to participate in the case pending further review, but they advised me that I should refrain from signing the brief or communicating with Jones Day. During the evening of February 6, I discovered that companies in which I have small financial holdings also had filed an amicus brief in the case (separate from the amicus brief filed by Jones Day). Again, I consulted with career ethics officials. In an abundance of caution, I declined to work on the matter until the following morning of February 7, when career ethics officials again authorized me to participate in the case. On February 9, 2017, the career ethics attorneys in the Department completed a more comprehensive review and continued their authorization to work on the case and related litigation. Throughout this period, I consulted with career attorneys in the Departmental Ethics Office and followed their advice at all times. The Departmental Ethics Office has reviewed this answer and confirmed its accuracy.

**QUESTIONS FOR THE RECORD**  
**NOEL J. FRANCISCO**  
**NOMINEE TO BE SOLICITOR GENERAL**

**SENATOR MAZIE K. HIRONO**

1. As Solicitor General, you would be responsible for supervising and conducting government litigation before the Supreme Court, as well as determining which cases the government will appeal, and which strategies to use and arguments to present. If confirmed, you will often face situations where the government has lost its case before a district or appeals court, in cases where the lower court's opinion calls into serious question the validity of the government's opinion.
  - a. If you believe a case is fruitless or that you don't have a sound legal or constitutional argument, yet the President is pushing for an appeal, will you be able to tell him no?

**RESPONSE:** Yes.

- b. Would you defend a law or policy before the Supreme Court that you felt to be unconstitutional? Would you resign if put in the position of having to do so? What if you believe the law or policy would be otherwise constitutional, but for statements or actions by the President or executive branch that reveal an unconstitutional motive?

**RESPONSE:** Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders and other executive actions. If confirmed, I will defend laws passed by Congress, the President's Executive Orders, and other executive actions when a reasonable defense is available, but not otherwise. If I were nonetheless directed to advance positions for which there was no reasonable basis, I would resign.

- c. Over the course of the presidential campaign and in the early months of his administration, the President has lashed out at judges and the federal judiciary in general when things do not go his way. Most recently, federal judges have halted his executive orders concerning the Muslim ban and so-called "sanctuary cities." The President belittled Judge Derrick Watson of the US District Court for Hawaii for ruling on the second travel ban, and he has threatened to break up the Ninth Circuit over their opinions, even though he lacks the power to do so. What is your view of the President's attacks on judges and the courts? As Solicitor General, would these kind of personal attacks on judges concern you as you consider the government's strategy in court?

**RESPONSE:** I have the utmost respect for the federal judiciary. If confirmed, I would do my best to ensure that cases are handled on behalf of the United States with the highest level of integrity.

- d. Do you believe the rulings of the Ninth Circuit, which the President attacked in a series of tweets on April 26, are less valid than other circuit courts'?

**RESPONSE:** I believe that the Ninth Circuit's rulings are as binding as the rulings of other circuit courts.

- e. How will you handle a matter that affects the President's business interests?

**RESPONSE:** The resolution of issues such as that referenced in the question above will turn on the facts and circumstances of the particular matter. Should such a matter arise, I would consult with the relevant officials within the Department of Justice to determine how it should be appropriately handled.

- 2. You served as counsel for the petitioners in *Zubik v. Burwell*, in which religiously-affiliated non-profits challenged the accommodation offered to them as part of the Affordable Care Act's requirement that employers provide coverage for contraception in employee-sponsored health plans.

- a. In a 2013 speech delivered at the Cato Institute, you argued that the contraceptive mandate "was adopted to discriminate against religious organization [with] certain views on abortion and contraception." Do you stand by those comments? How would your clearly expressed personal view impact the decisions you would make as Solicitor General as to whether and how to defend the contraception mandate, which remains the law of the land?

**RESPONSE:** In the *Zubik* litigation, I represented clients that believed that the contraceptive mandate violated their rights under the Religious Freedom Restoration Act ("RFRA"). In that litigation, I served as an attorney advancing my client's views, not my own views.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate to comment further on this matter.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead on the best interests of the United States.

- b. In *Burwell v. Hobby Lobby Stores*, the Supreme Court held that the government had a compelling interest in providing women with access to contraception. Do you agree or disagree with that holding?

**RESPONSE:** I do not believe it would be appropriate to state whether I agree or disagree with any particular Supreme Court decision.

- c. In a 2014 speech, you said “[c]ontraception is widely available. It’s cheap. And for those who can’t afford it, there are lots of other ways to get it for free.” According to Planned Parenthood, the out of pocket costs for a year of oral contraception is over \$600, plus the cost of going to a doctor. That may seem cheap for a partner at a law firm that bills several hundred dollars an hour. But is that cheap for an average American woman or family? If a woman does not qualify for Medicaid, and her employer does not cover contraception, how can she get contraception for free?

**RESPONSE:** In the *Zubik* litigation, I represented Catholic Charities and other Catholic organizations that believed that, under RFRA, the contraceptive mandate imposed a substantial burden on their sincerely held religious beliefs and it was not narrowly tailored to a compelling governmental interest. Briefs in that case argued that the contraceptive mandate was not the least restrictive means of furthering the relevant governmental interests because the government could provide contraceptive coverage through other government programs. For example, Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.*, provides federal funding for family-planning clinics. Briefs filed in the *Zubik* litigation also argued that the government could provide contraceptive coverage through other programs, including the insurance exchanges established under the Affordable Care Act, Medicaid, or other forms of tax subsidies.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate to comment further on this issue.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead on the best interests of the United States.

- d. The Supreme Court vacated *Zubik* for further consideration by the lower courts in light of supplemental briefings from the parties, but the issue may return to the Supreme Court in the future. If confirmed, would you recuse yourself from further litigation in this case? Would you defend the ACA from future challenges? Or would your advocacy in *Zubik* create a conflict of interest?

**RESPONSE:** See Response 2c. More generally, if confirmed, in any case where potential recusal issues arise, I will consult with the career ethics officials in the Department of Justice’s Ethics Office and recuse myself when appropriate.

- e. If you were recused from defending the ACA because of a conflict of interest—or from any other case or controversy that you have already litigated—would your office defend those policies?

**RESPONSE:** If I am confirmed, then on any matter in which I am recused, the Office of Solicitor General would make its determination on the matter without my participation.

- 3. After the Supreme Court struck down limits on individuals' aggregated political contributions in *McCutcheon v. FEC*, you said that you agreed with the decision and commented: "I've always thought these were relatively simple cases. We're talking about core political speech made at the single point in time when it's most important—in the midst of an election—and if you can restrict core political speech at the most important time that it is to make it, that is during an election . . . then you really are having the federal government directly influence the political process through restrictions on free speech and the basic principle, in my view, has always been [that] we're always better off with more speech."

- a. Prior to *Citizens United*, the Court recognized, as Congress and numerous state legislatures have, that there is a connection between limits on political giving and preventing corruption in our political system. Is that connection a concern for you? Is there a point at which donations become so large that they present a corruption concern?

**RESPONSE:** I do not believe it would be appropriate for me to comment on issues that may come before the courts. If confirmed, the positions that I advance on behalf of the United States would not be based on my personal views, but instead on the best interests of the United States.

- b. Doesn't the ability to give hundreds of thousands or even millions of dollars raise a risk of undue influence in a way that small donations do not?

**RESPONSE:** See Response 3a.

- c. In all the years you've donated to Republican campaigns, were you ever concerned with the flood of unfettered money into campaigns?

**RESPONSE:** See Response 3a.

- d. What level of scrutiny should apply to laws that limit campaign contributions?

**RESPONSE:** See Response 3a.

- 4. On May 4, the President signed an executive order instructing the Attorney General to provide guidance to all agencies on "interpreting religious liberty protections in Federal law." This sweeping approach could result in an unprecedented expansion of religious

exemptions affecting LGBTQ people in housing and homelessness programs, healthcare nondiscrimination regulations, and child welfare regulations.

- a. Were you involved in drafting this order?

**RESPONSE:** No.

- b. Should religiously-affiliated institutions that receive federal funds be permitted to deny services to same-sex couples or the children of same-sex couples? Is that not state-sponsored discrimination? What is the constitutional basis for such discrimination?

**RESPONSE:** I do not believe it would be appropriate for me to comment on issues that may come before the courts. If confirmed, the positions that I advance on behalf of the United States would not be based on my personal views, but instead on the best interests of the United States.

- c. Would the Solicitor General's office, as a general matter, be expected to review or advise federal agencies on the content of these regulations? If so, would you be obligated to recuse yourself from participation in any discussions related to amending the contraceptive coverage mandate, given your role in the *Zubik* case?

**RESPONSE:** As far as I am aware, the Solicitor General's Office generally does not advise on the content of regulations unless they affect cases that the Solicitor General's Office is handling. As noted above, I have recused myself from the *Zubik v. Burwell* litigation and so have not been involved in the Government's handling of that litigation on remand from the Supreme Court's *Zubik* decision.

5. In *Hobby Lobby*, the Supreme Court accepted the corporation's claims based on religious beliefs about contraception that directly contravened scientific research. In your involvement with *Hobby Lobby* and *Zubik*, you have argued that the government cannot question whether a religious belief is valid, but that courts must instead accept plaintiffs' description of their beliefs without question, including beliefs about when a person is complicit in the action of another. In your words, "[t]he question of whether one action (paying wages that may then be used to purchase abortion-inducing drugs and devices) is morally indistinguishable from another (providing coverage for abortion-inducing drugs and devices) is one for religious authorities and individuals, not the courts." Are there any limits—and what are the limits—on what a corporation may claim as a belief in justifying its denial of healthcare for its employees?

**RESPONSE:** As the Supreme Court explained in *Hobby Lobby*, this issue is governed by the Religious Freedom Restoration Act ("RFRA"), which establishes the contours and limits of the rights that an individual or entity has with respect to federal regulations that they believe infringe on their religious liberty. Generally, the threshold question is whether the individual or entity is protected by RFRA. If it is, then under RFRA, the

questions are (1) whether the federal regulation substantially burdens the person's sincere exercise of religion, and (2) if so, whether the regulation is the least restrictive means of furthering a compelling governmental interest.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate for me to comment further on this matter.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead on the best interests of the United States.