

Questions for the Record
Senator Mazie Hirono
September 27, 2017

Allison Eid, Nominee to the U.S. Court of Appeals for the Tenth Circuit

1. You have spent years involved with the Federalist Society. You listed your time as a faculty advisor on your Senate Judiciary Committee questionnaire, and you are listed on the Federalist Society website as one of their “experts.” According to the Federalist Society’s website:

“The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

I want to ask you about the influence of the Federalist Society on your thinking about the law and the Constitution.

a. What priorities within the legal system do you believe need reordering?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

b. Are there parts of the current “ordering” of priorities in the legal system with which you disagree? If so, what parts?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

c. How will that reordering of priorities operate to place a premium on individual liberty, traditional values, and the rule of law? Give an example.

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

d. How do define “traditional values”?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

e. How have you applied “traditional values” to the cases you’ve heard and decided? Give an example.

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

f. How will an application of “traditional values” apply to your work as a federal judge if you are confirmed?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

g. As a Justice on the Colorado Supreme Court, how has this desire to reorder priorities applied to the cases you’ve heard and decided? Give an example.

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

h. How has that reordering of priorities affected the litigants who argue before you?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

i. How will that reordering of priorities apply to your work as a federal judge if you are confirmed?

Response: I did not author the statement you recite above. As far as I am aware, there is no requirement for membership in the Federalist Society that a member adhere to that statement.

2. In addition to being active with the Federalist Society, you have also written extensively about the so-called “New Federalism.” The way you describe it, New Federalism endorses the judiciary’s questioning, even usurping, of Congress’s role as fact-finder.

For example, I see the Supreme Court's decision in *Shelby County v. Holder*, gutting key parts of the Voting Rights Act, to be an imposition of the justices' policy preferences, in direct contradiction to the considered decision of the Congress, which held hearing after hearing and compiled a record of thousands of pages.

a. What is your view on federalism?

Response: In *Bond v. United States*, Justice Kennedy writing for the Court stated that:

Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

564 U.S. 211, 221-22 (2011) (internal citation omitted).

b. Are you an adherent of states' rights, as exemplified in the New Federalism?

Response: While serving as a full-time academic, I studied and published scholarly articles describing (at that time) recent decisions of the Supreme Court that dealt with what was at the time considered "New Federalism." I do not believe that "adherent" is an accurate description of my academic work. If I am confirmed I would faithfully apply Supreme Court and Tenth Circuit precedent in the area of federalism.

c. Does the *Shelby County* decision raise concerns about judicial activism?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to whether *Shelby County* was correctly decided or what, if any, concerns it may raise. If I am confirmed I will faithfully apply *Shelby County* and all other precedent of the Supreme Court.

d. Did the Court in *Shelby County* step outside of its judicial role and act as a legislative body?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to whether *Shelby County* was correctly decided. If I am confirmed I will faithfully apply *Shelby County* and all other precedent of the Supreme Court.

e. Would New Federalism be applied to Acts of Congress legislating on issues of national importance, such as the right to vote?

Response: In determining whether a decision of the Supreme Court (including a case involving “New Federalism”) is applicable to a case before me, I would review the arguments of the parties, consult with my colleagues, and conduct independent legal research.

f. How will you incorporate the New Federalism into your work on the federal appellate bench?

Response: In determining whether a decision of the Supreme Court (including a case involving “New Federalism”) is applicable to a case before me, I would review the arguments of the parties, consult with my colleagues, and conduct independent legal research.

g. What criteria will you use to analyze Congressional legislation challenged in your court?

Response: All analysis of legislation, including legislation enacted by Congress, involves a close reading of the text of the statute and prior cases interpreting that statute.

3. At his confirmation hearing, Chief Justice Roberts testified that:

“... one of the warning flags that should suggest to you as a judge that you may be beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings, because that doesn’t look like a judicial function. It’s not an application of analysis under the Constitution. It’s just another look at findings.”

a. Is Chief Justice Roberts’s description of the role of a judge consistent with your understanding of “New Federalism” as you described it in your writings?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to Supreme Court precedent. If I am confirmed I will faithfully apply the Supreme Court’s cases concerning federalism all other precedent of the Supreme Court.

b. Was the Supreme Court decision in *Shelby County* an example of “just another look at findings”?

Response: As a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, I do not believe it is appropriate for me to offer my personal opinion as to

whether *Shelby County* was correctly decided. If I am confirmed I will faithfully apply *Shelby County* and all other precedent of the Supreme Court.

c. Do you still believe that the New Federalism is not activist, as you wrote in your William and Mary law journal article?

Response: I have not revisited the conclusions in my article in William & Mary Bill of Rights Journal. I do not believe in my present capacity as a nominee for federal judicial office and as a sitting member of the Colorado Supreme Court, that I should offer any commentary on decisions of the Supreme Court.

4. Would you describe any of the opinions you have written or participated in to be New Federalist in nature? Give examples of which ones and why.

Response: As a member of a state court I have not had the opportunity to consider the issues raised in “New Federalism” cases.

5. In his memorandum opinion in response to a request for recusal in *Laird v Tatum*, Justice Rehnquist famously wrote the following about judges and their preconceived notions that will influence their legal interpretations on the Court:

“ [s]ince most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa would be evidence of lack of qualification, not lack of bias.”

You have been a Justice on the Colorado Supreme Court for over a decade, handing down numerous opinions, which set forth your interpretation of the law and constitution as it applied in those cases. And as a professor, you have published significant writing about the role of “New Federalism,” your understanding on the limits of the federal government’s powers in relationship to the states.

a. If all judges come to the bench, as Justice Rehnquist observed, with notions and opinions on constitutional issues that will influence how they would interpret the constitution, what does it mean when nominees tell the Committee that their personal views don’t matter because they will merely apply the law, as you did in your hearing?

Response: The fact that I have chosen not to offer my personal opinions with regard to issues of law does not mean that I am a “complete tabula rasa.” As a member of the Colorado Supreme Court I took an oath to support the Constitution of the United States and of the State of Colorado, and to faithfully perform the duties of a justice of the Colorado Supreme Court. These duties include an obligation on my part to set aside my personal views and decide cases on the law even if I disagree with the law or am

disappointed by the outcome. Litigants who come before the Colorado Supreme Court are entitled to know that the justices hearing their case will do no less.

b. What does Justice Rehnquist's observation suggest about reassurances from nominees that they will simply apply precedent, particularly in areas where many have strong convictions, such as abortion, or in circumstances where the facts of a case don't line up precisely with a precedent and a judge has discretion in what precedent to apply and how it would apply?

Response: I do not believe Justice Rehnquist's observation is applicable here. As I noted above, I have not suggested to this Committee that I have no personal opinions. As I stated above, I am not the "tabula rasa" Justice Rehnquist describes.

c. Would you agree that application of precedent is not always straightforward?

Response: The application of precedent to a case always involves reviewing the arguments of parties, consulting with colleagues (on a multi-judge court), and conducting independent legal research.

d. Don't the legal inclinations and interpretations you have set forth so clearly in your academic writing and as a Colorado Supreme Court Justice have a bearing on what they would do as a circuit court judge, and how you would apply the law?

Response: In my former capacity as a full-time academic, I was not bound by precedent. As a sitting member of the Colorado Supreme Court, I took an oath to follow the law, including following precedent. I would take a similar oath, and abide by it, if I were confirmed to the Tenth Circuit.

6. You testified at your confirmation hearing that in considering cases on your current bench you just "follow the law where it takes me." But not every case is unanimously decided.

a. So, are the judges who disagree with you not following the law?

Response: No.

b. If the law takes you one place and then another, why is that?

Response: Judges can disagree without being unfaithful to their obligation to uphold the law. The process of deciding a case involves reviewing the parties' arguments, consulting with colleagues, and conducting independent legal research. Judges can, and do, assess the strength of arguments differently and reach different conclusions based on their research.

c. If judges just have to "follow the law where it takes them", then why have people as judges at all and not just computers to apply the law to the facts at hand? Put another way, what do human beings add to judging?

Response: The process of deciding a case is not reducible to a computer exercise.

7. At your hearing, you testified that there “are no cases of first impression.” Can you clarify that answer?

Response: Senator Kennedy asked me a question in which he defined a case of first impression as one in which there was no precedent bearing on the question before the court. I responded that in my experience on the Colorado Supreme Court, parties always direct our attention to precedents that bear on the question before the court.

8. The person who nominated you does not have much respect for judges or courts. As a candidate for President and even now while in office, President Trump has belittled and berated judges who do not rubberstamp his views. He attacked Judge Curiel, his family’s heritage and his fairness while he was presiding over the Trump University fraud case. He sought to bully Judge Robart, who decided the first case challenging the constitutionality of his anti-Muslim travel ban. He sought to intimidate the Ninth Circuit, and more recently has belittled Judge Watson in Hawaii for ruling in the second round of travel ban cases. His pardon of Joe Arpaio shows he has little regard for the rule of law or the role of courts as a co-equal and independent branch.

What is your view of President Trump’s comments on judges?

Response: Federal judges are afforded life tenure in part to insulate them from popular sentiment. I have no opinion with respect President Trump’s comments.

9. You have not only been nominated by President Trump to the Tenth Circuit, but you were on his list of potential selections for the Supreme Court he set forth during his election campaign. President Trump has also made clear his litmus test for nominees in the context of the Supreme Court, stating that he would select nominees who would, for example, adhere to a broad view of the 2nd Amendment and who would overturn *Roe v Wade* “automatically.”

a. Are such litmus tests appropriate?

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion.

b. Were you selected based on Donald Trump’s litmus tests?

Response: I do not know why I was included on then-candidate Trump’s lists. At no time has anyone asked me to explain my view of the Second Amendment and no one has asked me to make any commitments with respect to how I would rule on any case that were to come before me.

10. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe* that the right to an abortion is constitutionally protected. The Court held that these decisions are protected because they are among “the most intimate and personal choices a

person makes in a lifetime.” Does the Constitution protects the right to make “intimate and personal” decisions?

Response: As the question indicates, the Supreme Court has held in *Planned Parenthood v. Casey*, that the Constitution offers such protection. If I am confirmed, I would apply all precedent of the Supreme Court including *Planned Parenthood v. Casey*.