

Senator Dick Durbin
Written Questions for Noel Francisco, Steven Engel, and Makan Delrahim
May 17, 2017

For questions with subparts, please answer each subpart.

Questions for Steven Engel

1. In your questionnaire you say you've been a member of the Federalist Society since 2002.

a. **Why did you join the Federalist Society?**

Response: To the best of my recollection, I joined the Federalist Society shortly after entering private practice in Washington, DC in order to participate in the Federalist Society's speaking events and social gatherings.

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

Response: According to the website, the Federalist Society "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." I believe in those principles, which I understand to be consistent with the American constitutional tradition.

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 the legal profession differ in multiple respects, including in the legal and political views of their members.

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

Response: To the best of my recollection, I have attended the annual dinner for the Federalist Society's national convention for each year since 2001.

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?**

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: I am not familiar with the process by which President Trump selected candidates for the Supreme Court.

3. You were a member of the Trump transition team. **What reassurance can you provide us that if you are confirmed, the Office of Legal Counsel will operate independently from President Trump when reviewing matters involving the President and his business interests?**

Response: I am deeply committed to the independence of the Office of Legal Counsel. The Office's role in providing candid and principled legal advice is critical to ensuring that ours remains a nation governed by laws. I demonstrated that commitment in my prior service in the Office, as well as in my activities in private practice and my volunteer work for the Trump transition team. I believe that demonstrated commitment is one reason why former heads of the Office, from both Democratic and Republican administrations, have supported my nomination.

4. The Office of Legal Counsel reviews proposed presidential executive orders to ensure they are lawful and properly drafted. Since President Trump took office, OLC has cleared controversial immigration executive orders, including the January 27 Muslim ban executive order and the January 25 executive order targeting so-called "sanctuary cities" that have subsequently been blocked by federal courts.

Did you play any role in providing advice or opinions on President Trump's immigration executive orders?

Response: I am currently an attorney in private practice. I have not provided any advice to the White House or to the Department of Justice with respect to the immigration executive orders. While I provided legal advice to the presidential transition, my ethical obligations as an attorney preclude me from discussing the subjects of that work.

5. On Monday, former Acting Attorney General Sally Yates testified before the Judiciary Crime and Terrorism Subcommittee. As Acting Attorney General, Ms. Yates had directed the Department of Justice not to defend the January 27 Muslim ban Executive Order. Explaining her decision, she said that she was not convinced that the Executive Order was lawful, and she also believed it was inconsistent with the principles of the Department.

In response to questioning by Senator Cruz, Ms. Yates stated that she is not aware of a situation in DOJ history where the Office of Legal Counsel was advised not to tell the Attorney General about OLC's review and approval of a policy.

- a. **Did OLC act correctly by not informing the Acting Attorney General in a timely manner of the review and approval of the January 27 Muslim ban executive order?**
- b. **Were you consulted on, or aware of, the decision to keep the Acting Attorney General in the dark?**

Response: I am not aware of the facts and circumstances described by Ms. Yates in her testimony. I am currently an attorney in private practice and was not consulted on, or aware of, any such decision.

6. You worked in the Office of Legal Counsel from May 2006 to January 2009. In February 2007, you were promoted to Deputy Assistant Attorney General of OLC.

During your tenure as Deputy Assistant Attorney General, OLC provided a July 2007 memo to the CIA Acting General Counsel which concluded that six enhanced interrogation techniques authorized for use by the CIA were legal under the War Crimes Act, Common Article 3 of the Geneva

Conventions, and the Detainee Treatment Act. These techniques included, for example, extended sleep deprivation by shackling detainees in a standing position wearing a diaper for days at a time.

- a. **Were you involved in any way, including drafting or reviewing, this memo?**
- b. **Do you agree with its assessment that such techniques complied with Common Article 3 of the Geneva Conventions, which specifies that detainees “shall in all circumstances be treated humanely”?**

Response: When I was a Deputy Assistant Attorney General, the Office required that draft opinions be reviewed by at least two Deputy Assistant Attorneys General. Consistent with that practice, I believe that I reviewed and commented upon the draft July 2007 memo. I would note that the law in this area has changed significantly in the past decade. Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 provides that no individual in U.S. custody may be subjected to any interrogation technique that is not authorized or listed in the Army Field Manual.

7. In July 2009, you testified before the House Judiciary Committee on “Proposals for Reform of the Military Commission System.” You discussed your work on developing the military commission system and argued in favor of trying detainees in military commissions rather than Article III courts. Specifically, you suggested that military commissions “are better suited than Article III courts” in wartime because commissions involve fewer procedural protections.

In July 2011, you testified before the House Armed Services Committee in support of a provision in the National Defense Authorization Act prohibiting the Executive Branch from using appropriated funds to transfer Guantanamo detainees to the U.S. for trial before an Article III court.

Since 9/11, more than 550 terrorists have been tried and convicted in federal courts and are now being safely held in federal prisons. And no one has ever escaped from a federal supermax prison. In contrast, only eight individuals have been convicted by military commissions in fifteen years. Three of these convictions have been overturned and another one was partially invalidated.

- a. **Do you maintain your belief that Guantanamo detainees should only be tried by military commissions, rather than by Article III courts?**

Response: I believe that the United States should use all available and lawful means to prosecute war crimes committed by members of Al Qaeda, the Taliban, and associated forces. Article III courts may be an appropriate forum for such prosecutions, particularly where the offenses were committed in the United States and the terrorist has been apprehended by law enforcement authorities. At the same time, as I testified in July 2009, the United States has traditionally not treated its wartime enemies as ordinary domestic criminals, and military commissions are well-suited for prosecuting offenses arising out of wartime circumstances.

- b. Last year, then-candidate Trump endorsed the idea that U.S. citizens accused of terrorism could be tried by military commissions at Guantanamo. **Do you believe that such a system would be legal or constitutional?**

Response: I am not familiar with the statement by President Trump referenced in the question. The Supreme Court, in *Ex parte Quirin*, 317 U.S. 1 (1942), did hold that it would be constitutional to prosecute an American enemy combatant by military commission. *See id.* at 37 (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”). However, the military commissions established under the Military Commissions Act are limited

only to alien enemy combatants. Therefore, they could not lawfully be used to prosecute American citizens.

- c. Time and again, our most senior national security and military leaders have called for the closure of Guantanamo Bay because it weakens our alliances, inspires our enemies, and calls into question our commitment to human rights. In contrast, during his campaign, President Trump stated that “we are keeping open [Guantanamo]... and we’re gonna load it up with some bad dudes.”

Do you agree with President Trump that the United States should continue to bring suspected terrorists captured abroad to Guantanamo?

Response: If I am fortunate enough to be confirmed as Assistant Attorney General, it will be my role to provide legal advice to the President and to other policy makers. However, it will not be my role to opine on policy questions, such as whether suspected terrorists captured abroad should be brought to the detention facility at Guantanamo Bay.

8. In *United States v. Texas*, you filed an amicus brief in the Supreme Court on behalf of 43 Republican Senators in support of Texas’s partisan challenge, which was joined solely by Republican governors and attorneys general, to the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA).

In your brief you stated that President Obama “chose to implement his policy preferences by the extra-constitutional assertion of a unilateral executive power.”

The Supreme Court did not determine that DAPA and the expansion of DACA are illegal. However, the result of their 4-4 deadlock was that the decision of one district court judge in Texas blocked the implementation of DAPA and the expansion of DACA.

- a. **Please describe the circumstances by which you came to represent Republican Senators in this matter.**

Response: To the best of my recollection, several of the clients requested that I represent them in the matter. As an attorney, I cannot address the substance of confidential attorney-client communications, including with respect to these initial communications.

- b. **Please describe your views on the legality of DACA, a subject on which you surely have a well-formed opinion, given your work on this matter.**

Response: As you know, I filed an amicus brief that argued, on behalf of my clients, that the DAPA program was unlawful. The U.S. Court of Appeals for the Fifth Circuit agreed with those arguments, and the Supreme Court affirmed by an equally divided Court. I have not had occasion separately to study the DACA program.

- c. **Given your legal representation in this matter, will you pledge that if you are confirmed you will recuse yourself from any involvement in reviewing the legality of the Obama Administration’s immigration actions, including DACA?**

Response: Because I am not currently in the Department, I do not know whether the Office of Legal Counsel has been asked, or will be asked, to review the legality of the DACA program or any other immigration action by the Obama Administration. If a situation arose where I believed

my impartiality might reasonably be questioned based upon my past legal representation or any other reasons, I would consult with the Department's ethics professionals to determine the most appropriate way to proceed.

- d. **Given the well-known views of the Attorney General on DACA, how will you ensure that any OLC review of the legality of DACA and any related matters is independent and respects OLC precedent?**

Response: If I am fortunate enough to be confirmed, I will ensure that the Office of Legal Counsel provides candid, independent, and principled legal advice with respect to all matters that come before me. Under established practices, the Office will ordinarily give its precedents great weight and will not lightly depart from such past decisions. At the same time, the Office would have to take into account any subsequent judicial decisions that may bear upon such past opinions.

- e. **Does President Trump's assertion of unilateral executive power in his Muslim ban executive order raise any constitutional concerns?**

Response: As you know, the Department of Justice is currently defending the President's executive order, "Protecting the Nation from Foreign Terrorist Entry into the United States," against constitutional challenges in the federal courts. As such, I do not believe that it would be appropriate for me to comment upon any legal issues raised by the order.

- f. **What is your view on the President's and Attorney General's criticism of the federal judges who blocked this order from moving forward?**

Response: I am not aware of the particular statements to which you refer. Speaking generally, as a nominee to a position at the Department of Justice, I do not believe it would be appropriate for me to comment upon public statements that the President or the Attorney General may have made on pending litigation.

9. In *Independence Institute v. Federal Election Commission*, a 501(c)(3) group challenged the Bipartisan Campaign Reform Act's requirement that organizations engaged in electioneering communications right before an election must report to the FEC and publicly disclose their donors.

A three-judge federal district court panel upheld the law. When the decision was appealed to the Supreme Court, you filed an amicus brief on behalf of a number of 501(c)(3) groups, in which you argued that the district court's decision should be reversed. However, the Supreme Court affirmed the lower court's decision in a one-line opinion earlier this year.

I wholeheartedly disagreed with the Supreme Court's decision in *Citizens United*, but there was one statement in the majority's opinion that I strongly support. Justice Kennedy wrote: "[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

- a. **Do you disagree with the Court's statement on the importance of disclosure and transparency?**
- b. **If not, how can you reconcile the position you took in the *Independence Institute v. FEC* amicus brief?**

Response: In the *Independence Institute* matter, I represented a group of 501(c)(3) organizations

that do not engage (and are prohibited from engaging) in any partisan political activities. In the amicus brief, my clients accepted the Supreme Court's holding in *Citizens United*, but argued that, as applied to the facts in *Independence Institute*, BCRA's definition of "electioneering communications" swept beyond campaign-related speech and "encompassed the bona fide exchange of ideas, where such expression was completely divorced from the outcome of any election."

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

Response: I believe that additional progress can always be made in terms of fighting racial discrimination. If I am confirmed, I will work to ensure that the laws protect the rights of all Americans without regard to race.

11. 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 believe that Chief Justice Roberts and Justice Sotomayor expressed their positions eloquently in their opinions in *Parents Involved*. If I were fortunate enough to be confirmed as Assistant Attorney General, I would advise policy makers on the requirements of the law as set forth by the Supreme Court.

12. In the 2014 Second Circuit case *Floyd v. City of New York*, you represented three police unions. The District Judge had entered an order finding that the City of New York had violated the Fourth and Fourteenth Amendments by acting with "deliberate indifference" toward the NYPD's practice of making suspicionless "stops" and "frisks" and by adopting "a policy of indirect racial profiling by targeting racially defined groups" for "stops" and "frisks."

The Court issued an order imposing remedies in the form of various "reforms" to the NYPD's "stop and frisk" practices to be overseen by a court-appointed monitor. The parties decided to settle, and agreed to "substantially comply" with the remedies in the Court order, with additional provisions. You, however, moved to intervene in the action on behalf of police unions. You argued that NYPD should not be required to adhere to these policy modifications. You argued "it is the business of cities, not federal courts or special masters, to run police departments."

Do you oppose federal oversight of local law enforcement through enforcement of consent decrees?

Response: No, the propriety of federal oversight of local law enforcement would have to depend

upon the facts and circumstances of each case. In *Floyd v. City of New York*, the police unions argued that the District Court's liability findings against the New York Police Department were erroneous, and therefore, the remedial order should be vacated.

13. Since 2009, the Justice Department has opened 25 investigations into law enforcement agencies and has been enforcing 14 consent decrees, along with some other agreements.

However, Attorney General Sessions has publicly criticized the Department's use of consent decrees, and on March 31, 2017, he issued a memorandum directing the Deputy Attorney General and Associate Attorney General to review all existing or contemplated consent decrees.

If you are confirmed as Assistant Attorney General for the Office of Legal Counsel, your job will be to advise the President, agencies of the Executive Branch, and offices within the Department. You may be called upon to evaluate the constitutionality or legality of existing or contemplated consent decrees, or the Departments' policy regarding consent decrees.

- a. **Have you had any conversations with Attorney General Sessions or Deputy Attorney General Rosenstein concerning consent decrees?**

Response: No.

- b. **Have you had any conversations with Attorney General Sessions or Deputy Attorney General Rosenstein concerning this March 31 Sessions memo?**

Response: No.

- c. **Do you agree that if you are confirmed as head of OLC, your role will be limited to opining on the legality of the Department's actions, not offering policy advice on consent decrees?**

Response: Because I am not in the Department of Justice, I am not aware of any discussions concerning existing or contemplated consent decrees. I do agree, however, that the role of the Office of Legal Counsel is to offer legal advice to policy makers, not to offer policy advice.

- d. **What are your views as to the Department's power to re-consider existing consent decrees already entered into?**

Response: I am not familiar with the issue. If I were confirmed to be Assistant Attorney General, and such a question came before me, I would review the existing judicial precedents in this area, any relevant Attorney General and OLC opinions on the subject, and the terms of the particular decree at issue, before providing any advice on the matter.

14. In 2010 I sponsored a law that directed the Securities and Exchange Commission to require companies to disclose their use of conflict minerals in their products. This bipartisan measure has helped stop mining companies operating in conflict zones like the Democratic Republic of the Congo from funding warlords.

You have represented industry groups in amicus filings in litigation challenging the SEC rules implementing this law. You have also written an article questioning the legality of these rules. **Given your past representation and advocacy, if you are confirmed will you recuse yourself from all matters at OLC involving the conflict minerals law?**

Response: I have not previously represented any client in connection with challenges to the conflict minerals regulations. I did co-write an article identifying potential legal issues with respect to the SEC's rules, but that piece was not a work of advocacy. Because I am not currently in the Department, I do not know whether the Office of Legal Counsel has been asked, or will be asked, to review matters related to the conflicts mineral law. If a situation arose where I believed my impartiality might reasonably be questioned, I would consult with the Department's ethics professionals to determine the most appropriate way to proceed.

15. 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 do not have any knowledge concerning the communications between President Trump and former FBI Director Comey.

16.

- a. **Do you think the Office of Legal Counsel has the responsibility to say no to the President if he asks for something that's improper?**
- b. **If the views that the President wants to execute are unlawful, should the Office of Legal Counsel say no?**

Response: Yes, that is part of the job. The Office of Legal Counsel has the responsibility to provide independent, principled and candid advice, even if that advice may not always support the Administration's policy goals. If the President proposes a course of action that is unlawful, then the Office of Legal Counsel has a duty to tell him so.