

Senator Mazie Hirono
Questions for the Record following hearing on May 10, 2017 entitled:
"Nominations"

Steven A. Engel

- 1) The Office of Legal Counsel exercises statutory authority to provide legal advice to the President and executive agencies. By tradition, its advice is binding on executive branch officials. If confirmed, you will be confronted with some of the most difficult and novel legal questions that arise in the executive branch, particularly those involving the scope of executive authority and the separation of powers.

- a. In the first several months of this presidency, we've seen the courts strike down a number of the President's executive orders, many of which seemed not to consider constitutional implications. Would you ever sign off on an executive order if you did not believe it to be constitutionally sound?

Response: No.

- b. In a statement you made on a panel hosted by the Constitution Project, you stated "I was at the Office of Legal Counsel from 2006-2009 and some of what the office did didn't live up to its usual standards." What did you mean by that? If confirmed, how will that experience inform your work in the current administration?

Response: To the best of my recollection, I was referring to certain opinions issued by the Office of Legal Counsel in the wake of the September 11th attacks. Those opinions were subsequently withdrawn or replaced by the Office of Legal Counsel prior to my service in the Office. I believe that those opinions departed from OLC's best practices because they did not benefit from comment from interested agencies within the Executive Branch, they addressed hypothetical issues that were not necessary for decision, and they failed to consider contrary authority bearing upon the questions at issue. If I am confirmed, I will ensure that OLC provides candid, independent, and principled advice, consistent with the high standards that have traditionally governed the work of the Office.

- c. Did you have any involvement in the executive orders issued shortly after President Trump's inauguration, such as the Muslim ban executive order (EO 13769, issued on January 27)?

Response: I have not been in the Department of Justice, and accordingly, I have not provided advice to the White House or to the Department of Justice in connection with the 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.

- d. It is my understanding that, under ordinary procedure, a proposed executive order must be sent to the Office of Management and Budget and to any interested agencies for review, and that this process, which helps make sure agencies understand the orders they will be implementing, has been in place since 1962. However, the *Washington Post* reported that this process was not followed for the Muslim ban executive order. Do you think this

interagency process is important to ensuring the legality and integrity of all executive orders that come out of the White House?

Response: Because I have not been in the Department of Justice, I am not familiar with the process followed with respect to Executive Order 13769. In my experience in the Department, the interagency process does play an important role in ensuring prudent and lawful decision-making by the Executive Branch.

- 2) In *Independence Institute v. FEC*, you filed an amicus brief on behalf of a group of 501(c)(3) non-profits challenging the disclosure requirements of McCain-Feingold. You argued that such requirements were “draconian,” and said they chill speech by forcing non-profits “either to restrict the timing and content of their speech or to publicly disclose their financial donors, who often do not wish to be publicly identified with a potentially controversial issue campaign.” A three-judge panel of the US District Court for DC found in favor of the FEC, and the Supreme Court affirmed.
- a. Even though the Supreme Court has steadily dismantled the legal framework for fighting the corruption of our campaign finance system, it has stated that disclosure and disclaimer requirements advance the government’s interest in providing the electorate with information concerning the sources of election-related spending. Even in *Citizens United*, eight of the nine justices held that this interest survives the “exacting scrutiny” the Constitution requires. Doesn’t the public deserve to know who is behind an ad, like the one in the *Independence Institute* case, that asks them to contact their elected officials about pending legislation? Do you believe that the Supreme Court’s disclosure holding in *Citizens United* was correct?

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.”

- b. Is it your position that we can only constitutionally require disclosure of campaign ads that expressly include words like “vote for” or “vote against” a candidate, notwithstanding the Supreme Court’s clear and repeated holdings to the contrary?

Response: No. The Supreme Court has held that disclosure requirements may constitutionally apply, not only to express advocacy, but to communications that are the functional equivalence of express advocacy.

- c. How are voters supposed to make informed decisions when they are bombarded by anonymous messaging? How can we engage in a robust debate on an issue if we don’t know all the facts, namely, who is making the argument in the first place?

Response: I agree that the identity of a speaker is one fact that may be relevant in evaluating the message conveyed by the speaker. By the same token, as the Supreme Court recognized in *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995), in an opinion by Justice Stevens, anonymous speech may also promote a robust public debate by permitting

speakers to air unpopular views without fear of retaliation. *See id.* at 357 (“Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”).

- d. Under the legal argument you advanced in the *Independence Institute* case, what is to stop a billionaire donor from hiding behind a 501(c)(3) in order to advance his or her agenda on a particular issue at the expense of ordinary Americans?

Response: In the *Independence Institute* case, my clients expressed concern that 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.”

- e. Do you agree with Justice Scalia’s statement, in his concurring opinion in *Doe v. Reed*, that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed?”

Response: Yes.

- 3) In 2012, you filed an amicus brief in the Supreme Court in *Fisher v. University of Texas* on behalf of individuals who had served in civil rights positions in Republican administrations. The brief argued that the university did not fulfill its obligation to seriously consider race-neutral alternatives to its admissions program, which considered race as one factor among many for a small percentage of applicants. You argued that race should not be a factor when schools seek to promote diversity in higher education. The Supreme Court affirmed the Fifth Circuit, which had upheld the university’s program.

- a. Justice Kennedy’s opinion in *Fisher* found that the university “articulated concrete and precise goals” with regard to its affirmative action program, so its “holistic review process” for applicants survived strict scrutiny. Do you agree with that finding?
- b. Do you believe there is a compelling government interest in the diversity of our nation’s higher education institutions? How are we to further diversity without taking race into account as one of many factors?
- c. Do you believe that *Brown v. Board* mandates an approach to the Constitution that ignores our history of racial discrimination in education and other contexts, and treats pernicious racial discrimination that imposed segregation the same as efforts to remedy that discrimination? Do you agree with Chief Justice Roberts’ opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, which stated that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race”?

Response: I filed an amicus brief in connection with *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), on behalf of present and former civil rights officials. My clients recognized that the Supreme Court had held diversity to be a compelling government interest, but argued that the Fifth Circuit had failed to apply strict scrutiny correctly. The Supreme Court agreed with that view, vacated the Fifth Circuit’s decision, and sent it back for further consideration. 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.

- 4) I understand that, because OLC often considers questions that courts have not decided, its prior opinions play an important role in its decision making. When is it appropriate for OLC to withdraw or reconsider OLC opinions from a prior administration? What criteria do you think should be used in determining whether to revisit a prior OLC opinion? How much should OLC's legal conclusions—or even the way OLC approaches legal interpretation—depend on which party is in office?

Response: OLC's Best Practices Memorandum provides that the Office ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration where appropriate. OLC's respect for its precedents helps ensure that the Office fulfills its mission to provide candid, independent, and principled legal advice. In my experience, the most common reason why OLC would revisit an earlier opinion would be to reflect subsequent developments in the law. The Office's analysis of the facts and law pertinent to a particular matter also may lead to either distinguishing or revisiting positions articulated in previous opinions. The Assistant Attorney General for OLC must use his or her best judgment in applying these principles to the particular facts and circumstances before him, but none of that should depend upon which political party is in office.