

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

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.