

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, mooted, 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.