

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

SENATOR PATRICK LEAHY

1. If the President seeks to do something unlawful or unconstitutional, should the Solicitor General refuse to defend the action or policy? If so, are you prepared to say “no” to this White House?

RESPONSE: Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches upon the President’s Article II powers. I believe that a similar standard applies to Executive Orders and other executive action. If confirmed, I will defend laws passed by Congress, the President’s Executive Orders, and other executive action when a reasonable defense is available, but not otherwise. I am fully prepared to say “no” to the White House or any other entity that I am charged with advising if they seek to advance positions for which no reasonable defense is available.

2. As Acting Solicitor General, you defended President Trump’s Muslim ban executive order. What troubles me is not only that you defended it, but also how you defended it. As lawyers, we have an ethical obligation to affirmatively acknowledge and disclose adverse precedent to the court.

On February 4, 2017, you signed the administration’s brief submitted to the Ninth Circuit that argued “Judicial second-guessing of the President’s national security determination in itself imposes substantial harm on the federal government and the nation at large.” The Circuit’s decision rejected that argument, citing *Boumediene* and noting that “There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.”

Why did your brief fail to cite *Hamdi*, *Hamdan*, or *Boumediene* when making that argument? Please also explain why you are not in violation of your ethical obligations for failing to cite to those critical Supreme Court precedents.

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, or the legal arguments made in support of, that order outside the context of the ongoing litigation.

3. When crafting the litigation strategy to defend President Trump’s Muslim ban executive orders, did anyone outside the Justice Department direct or provide guidance on the types of arguments the Justice Department should or should not make?

RESPONSE: As a general matter, the Department of Justice often solicits the views of other entities within the Executive Branch that have an interest in a particular case. As to the handling of any specific case, I believe it would be inappropriate to comment on internal Executive Branch deliberations.

4. Last week, President Trump cited the FBI's investigation into Russian interference in the 2016 election as a basis for dismissing Director Comey. The Deputy White House Press Secretary said, "We want this to come to its conclusion . . . And we think that we've actually by removing Director Comey, taken steps to make that happen." President Trump himself admitted that "I was gonna fire [Comey] regardless of [Mr. Rosenstein's] recommendation. . . . And in fact when I decided to just do it, I said to myself, I said you know, this Russia thing with Trump and Russia is a made up story." Should those statements and justifications for FBI Director Comey's dismissal raise concerns?

RESPONSE: I have no knowledge of the facts and circumstances surrounding these issues beyond what I have seen reported in the news media and, therefore, am not in a position to comment on this matter.

5. Is it proper for the President to pressure a law enforcement official to terminate an ongoing investigation into one of the President's associates?

RESPONSE: See Response 4.

6. Have you ever been asked by the President, or any other individual associated with the White House, to express loyalty to President Trump? If so, please describe that conversation in detail, including the participants of that conversation.

RESPONSE: No.

7. If confirmed, will you be loyal to the Constitution or to President Trump? Do you believe there is a difference? If so, will you put your obligation to uphold the Constitution above any personal loyalty to President Trump?

RESPONSE: If confirmed, my oath will be to protect and defend the Constitution of the United States. That obligation transcends any personal loyalty to any individual. If confirmed, I will honor that oath.