

Senator Mazie K. Hirono

Questions for the Record following hearing on July 25, 2017 entitled:

“Nominations”

Dabney L. Friedrich:

- 1) In 2004, you gave a speech to the Detroit Federalist Society in which you said that “undue White House influence on the Department [of Justice]’s law enforcement decisions could create a serious potential for unfair use of prosecutorial power and a political problem for the Administration.”

- a. Would you consider the President firing the FBI Director in an attempt to end an FBI investigation to be undue White House influence on the Department of Justice’s law enforcement decisions?

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion.

- b. Would you consider the President publicly criticizing the Attorney General for a recusal decision, decisions not to start specific investigations, and decisions not to replace his subordinates to be undue White House influence on the Department of Justice’s law enforcement decisions?

Response: See my response to Question 1.a.

- c. Would you consider the President alleging that the Acting FBI Director has a conflict of interest due to his wife’s political activities to be undue White House influence on the Department of Justice’s law enforcement decisions?

Response: See my response to Question 1.a.

- d. Would you consider the President stating that a Special Counsel should not investigate his personal finances to be undue White House influence on the Department of Justice’s law enforcement decisions?

Response: See my response to Question 1.a.

- 2) Given your role in the 2005-07 U.S. Attorney firings, do you think it is appropriate for the President to dismiss a U.S. Attorney or other DOJ official for political reasons? If so, please clarify what reasons should qualify. If not, please explain when it is appropriate for the President to dismiss a U.S. Attorney or other DOJ official.

Response: I did not have a decision-making role in the removal of U.S. Attorneys during the Bush Administration. I left the White House Counsel's Office in April 2006. My recollection is that the overwhelming majority of the U.S. Attorneys were removed in December 2006, several months after I left the White House Counsel's Office. Moreover, as a nominee for federal judicial office, I believe it would be inappropriate to offer an opinion as to the circumstances under which the President may dismiss any Executive Branch official.

- 3) You participated in a 2003 forum on behalf of the Bush White House in which you criticized Democrats for "using unprecedented tactics to obstruct President Bush's court of appeals nominees." Would you consider the refusal to hold a hearing on Judge Garland to be an unprecedented tactic to obstruct a presidential nominee to an even higher court?

Response: The remarks I made during a 2003 forum regarding President Bush's judicial nominees were made in my capacity as an Associate Counsel to the President. At that time, a large number of President Bush's court of appeals nominees had not received a hearing. As a nominee for judicial office, it would be inappropriate for me to comment in this context on the Senate Judiciary Committee's decision not to hold a hearing on another nominee.

- 4) In *Hobby Lobby*, the corporation made claims about contraception based on religious beliefs which are directly contravened by scientific research. By accepting as facts these religious beliefs and probing no further in agreeing that the corporation could deny coverage, the Hobby Lobby decision leaves us in a tough spot. Are there any limits --and what are the limits -- on what a corporation may claim as a belief in justifying its denial of health care for its employees?

Response: It is my understanding that the scope of the *Hobby Lobby* decision is currently being litigated. As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion with respect to an issue of law that may come before me if I am confirmed. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make a public comment on the merits of a matter pending or impending in any court.).

- 5) In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe* that the right to an abortion is constitutionally protected. The Court held that these decisions are protected because they are among "the most intimate and personal choices a person makes in a lifetime."
- a. Do you believe the Constitution protects the right to make "intimate and personal" decisions?

Response: I do not believe it would be appropriate for me to offer an opinion as to an issue of law that might come before me if I am confirmed. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make a public comment on the merits of a matter pending or impending in any court.). If I am confirmed, I will adhere to *Planned Parenthood v. Casey* and all precedent of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

- b. Does the Constitution define what a “person” is?

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion with respect to an issue of law that may come before me if I am confirmed.

- i. Has the Supreme Court ever ruled that the 14th Amendment confers personhood on a fetus?

Response: I am not aware of any such holding by the Supreme Court.

- ii. If a state were to enact a personhood measure by redefining a fetus as a legal person, would that not be in direct contradiction to the Supreme Court’s holding in *Roe*?

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion with respect to an issue of law that may come before me if I am confirmed. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make a public comment on the merits of a matter pending or impending in any court.”).

- c. Did *Whole Woman’s Health* fully answer the remaining questions about the permissible breadth of pre-viability regulations allowed under *Casey*?

Response: See my response to Question 5.b.ii.

- 6) What is the appropriate level of scrutiny to apply to challenges on campaign contribution limits or bans?

Response: The Supreme Court held in *Buckley v. Valeo*, 424 U.S. 1, 29 (1976), that campaign contribution limits are subject to a “rigorous standard of review.” I will adhere to *Buckley* and all other relevant precedent of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

- 7) When Congress reauthorized the key expiring provisions of the landmark Voting Rights Act in 2006 it did so with a nearly unanimous vote. Before reauthorizing the protections of Section 5 in jurisdictions with a long history of discrimination in voting, the Judiciary Committee alone held 9 hearings on the Voting Rights Act. The thousands of pages of material the Senate reviewed, together with the record developed in a dozen hearings in the House, clearly established the continuing need for Section 5. And yet, in *Shelby County*, the Roberts Court ignored this evidence and the Court’s long precedent, made its own determination about the value of the extensive evidence reviewed by Congress.

- a. Does the *Shelby County* decision raise concerns about the limits of judges as policy-makers and the problems that arise when a Court steps outside of the judicial role and acts as a legislative body?

Response: The Supreme Court's decision in *Shelby County* is binding on all lower courts. If I were fortunate enough to be confirmed as a district judge, I will faithfully apply *Shelby County* and other relevant precedents to the best of my ability.

- 8) The Supreme Court's decision in *Korematsu* has never been overturned, but has joined the short list of most regrettable decisions in the Court's history. Does *Korematsu* hold any precedential value?

Response: To my knowledge, the Supreme Court has not explicitly overruled *Korematsu*. However, the *Korematsu* decision has been widely criticized and is viewed as limited to its specific facts. For lower courts, all Supreme Court decisions that have not been overruled have precedential value.

- a. Are there other Supreme Court decisions that have not been overruled that you believe lack precedential value? And if so, which ones?

Response: For lower courts, all Supreme Court decisions that have not been overruled have precedential value.

- i. For the cases listed, please explain why those cases lack precedential value.

- 9) What remedies are available should the President or Executive Branch disregard a ruling of the Supreme Court or a lower federal court?

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to offer an opinion.

- 10) Do you believe that when analyzing a statute, and choosing to use the construction of original public meaning, such a choice reflects your values?

Response: If confirmed as a federal district court judge, I will consult a statute's text, structure, and history, as well as relevant precedent, to interpret its meaning. My personal values and beliefs will have no bearing on my case decisions.

- a. Why choose to discern the original meaning rather than considering tradition, current norms, and precedent as baseline or foundation of your constitutional analysis?

Response: For issues of constitutional interpretation, I will follow a similar approach to that I set forth above for statutory analysis. I will consult the text, structure, and history

of the constitutional provision, as well as Supreme Court and District of Columbia Circuit precedents interpreting the specific constitutional provision, to determine its meaning.

- b. Why do you believe that you are able to separate ideological and partisan views when judging?

Response: I appreciate that the role of a federal judge is a limited one – to interpret the law faithfully, consistent with applicable precedents. I understand that it would be improper to allow my personal beliefs or political views to influence my decisions in any case.

- c. Do you believe that life experiences and unconscious biases play a role in judging?

Response: Judges bring their own individual life experiences to the bench. However, when a judge takes the judicial oath to apply the law faithfully and to decide cases impartially, based on the law and the facts, irrespective of the parties, the judge pledges adherence to the rule of law. If confirmed, I will endeavor to do all in my power to honor the judicial oath.

- 11) Judges of the U.S. District Court for D.C. are not required to live in the district they serve, unlike most federal judges, and nominees to these positions do not have representation in the Senate to advocate for them during the confirmation process. If confirmed, will you commit to living in the District of Columbia during your term?

Response: My family recently moved from California to a Maryland neighborhood immediately adjacent to the District of Columbia where we lived in 2014, before we moved to California. We decided to move back to our old neighborhood to minimize the disruption that a second cross-country move would cause our children. We have no immediate plans to move to the District of Columbia.

- 12) It has been reported that President Trump has essentially outsourced the presidential responsibility of nominating judges to the Federalist Society. Almost every judicial nominee to come before the Committee so far in this Congress has been a member or leader of the Federalist Society, as have many Trump Justice Department nominees.

- a. Are you a member of the Federalist Society? If so, since when? And will you maintain your membership during your service as a federal judge if confirmed?

Response: I am not, and have never been, a member of the Federalist Society.

- b. You were quoted in a 2005 article as saying that “the Federalist Society ha[d] no official role in the judicial nomination process” during the Bush administration. Can you say the same about the Trump administration?

Response: I do not know what role, if any, the Federalist Society currently plays in the judicial nomination process.

- c. What does it tell us that nearly every judicial nominee to come before us in this Congress is a member of the Federalist Society?

Response: I do not know how many current judicial nominees are members of the Federalist Society.