Nomination of Judge Neal. Gorsuch, of Colorado,
to be an Associate Justice of the United States Supreme Court
Questions for the Record
Submitted March 24, 2017

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1) In your testimony, you noted that you helped draft Attorney General Alberto Gonzales's statement for a February 6, 2006 Senate Judiciary Committee hearing on the topic of the Bush Administration's Terrorist Surveillance Program. Certain statements made by the former attorney general at that hearing—specifically, with respect to disputes between DOJ and the White House over domestic intelligence activities—were later determined by the Department of Justice Office of Inspector General to have been "confusing, inaccurate, and [to have] had the effect of misleading those who were not knowledgeable about the program."

   a) In addition to drafting Attorney General Gonzales's testimony, did you help to prepare him for the February 6, 2006 Senate hearing? If so, what was involved in the preparation and what were your roles?

RESPONSE: While it is possible that I participated in some fashion in the preparation of Attorney General Gonzales for his testimony on February 6, 2006, as I testified my recollection of events more than eleven years ago is that my involvement related primarily to serving as a speechwriter for his opening statement, working from material supplied by others.

   b) Reports of disputes between DOJ and the White House related to aspects of the NSA's warrantless surveillance programs surfaced in the press more than a month prior to the February, 2006 hearing. What did you know about these disputes at the time of the hearing?

RESPONSE: I do not recall what I knew about those disputes at the time of the February 6, 2006 hearing, as it happened more than eleven years ago.

2) Your positions *Burwell v. Hobby Lobby* and *Allstate Sweeping v. Black* seem to directly contradict each other. In *Hobby Lobby*, you joined the holding that an artificial entity like a for-profit corporation <u>can</u> exercise religion, independently of its owners. But in *Allstate*, you say the opposite—namely, that "[b]eing offended presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience." How do you reconcile the reasoning behind the two decisions, beyond the fact that in both of the cases you voted for results that weakened anti-discrimination protections?

RESPONSE: Please see the response to Senator Blumenthal's Question 9.

3) Under current law, what rights does Congress have to documents, materials, and testimony *vis a vis* claims of executive privilege?

RESPONSE: The Supreme Court has recognized the doctrine of executive privilege but also held that such claims may give way to competing interests. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 708 (1974). The exact dimensions and scope of executive privilege—especially vis-à-vis Congress—remain matters of controversy. As these and similar issues may come before me as a judge, it would not be proper for me to comment further on them. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

4) The media has circulated a photo of you and Justice Scalia on a fishing trip on the Colorado River.

    a) When and where did this trip take place?

RESPONSE: The picture was taken during a fishing trip in Colorado after Justice Scalia's delivery of the John Paul Stevens Lecture at the University of Colorado Law School on October 1, 2014.

    b) Did you and Justice Scalia use your own funds to pay for the trip? If not, who paid for the trip?

RESPONSE: I paid my own expenses. I do not know who paid Justice Scalia's.

    c) Who else joined you?

RESPONSE: To my recollection, other judges and one of the Justice's former law clerks joined us.

    d) Did you take other sporting or vacation trips with him or the other Justices of the Court?

RESPONSE: Other than travel associated with visits to Tenth Circuit Judicial Conferences and other professional events, such as the UK-US Legal Exchange, I do not recall other sporting or vacation trips with Justice Scalia or other Justices of the Court.

5) On Question 26 of your Judiciary Committee Questionnaire, you described your experience in the selection process and listed all interviews or communications with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign. Question 26 also asked you to list any interviews or communications with outside groups at the behest of the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign.

    a) You indicated that you communicated with Leonard Leo on December 2, 2016 and the week following January 6, 2017. Please provide more information circumstances (how those calls were arranged, who else participated) and content of your communications with Mr. Leo.

b) Did you have any addition communication with Mr. Leo? If so, please describe the date and contents of the communication.

c) You did not list any communication with outside groups. Is that answer still accurate? If you have communicated with outside groups, please list the names of groups, the representatives involved, the dates of the communications, and the contents of the communications.

d) Did any outside groups assist in preparing you for your Senate Judiciary Committee hearing? If so, which groups?

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family.

6) On numerous occasions in your testimony, you stated that the Supreme Court's campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a "government interest" that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.

   a) Is fighting corruption or its appearance the only constitutionally sound reason for limiting political spending or contributions?

   b) Does "corruption" only encompass quid pro quo corruption?

   c) As you know, bribery is already illegal under other federal laws. Can laws governing how elected officials finance our campaigns do anything beyond what bribery laws already do?

RESPONSE: In *Buckley v. Valeo*, the Supreme Court found that concerns regarding *quid pro quo* corruption, or the appearance of such corruption, were sufficiently important to permit limitations on some contributions. 424 U.S. 1, 26-28 (1976). In *Buckley*, the Supreme Court considered whether contribution limits added anything beyond bribery laws. On this point, the Court observed that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 27-28. Please also see the response to Senator Leahy's Question 13.

7) On numerous occasions in your testimony, you stated that the Supreme Court's campaign finance jurisprudence left Congress ample room to legislate. In *Buckley v. Valeo* the Court recognized a "government interest" that it deemed sufficiently strong to justify limits on campaign contributions or spending -- preventing corruption or its appearance.

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RESPONSE: Please see the response to Question 6.

8) What is the originalist argument that *Brown vs. the Board of Education* was correctly decided?

RESPONSE: As I have stated during my testimony, "*Brown v. Board of Education* corrected an erroneous decision, a badly erroneous decision, and vindicated a dissent by the first Justice Harlan in *Plessy v. Ferguson.*" As I further stated during my testimony, "Justice Harlan got the original meaning of the Equal Protection Clause right the first time, and the Court recognized that belatedly. It is one of the great stains on the Supreme Court's history that it took so long to get to that decision."

9) You currently serve as the Chair of the Advisory Committee on Appellate Rules for the Judicial Conference of the United States. As you may know, Judges David Campbell and John Bates, who are the Chairs of the Judicial Conference Rules of Practice and Procedure Committee and the Advisory Committee on Civil Rules, respectively, recently wrote letters urging Congress not to enact legislation that would make changes to the Federal Rules of Civil Procedure. Judges Campbell and Bates raised serious concerns about Congress circumventing the Rules Enabling Act, which Congress itself wrote and which is intended to ensure that the Federal Rules are amended only after broad public participation and careful review by judges, lawyers and experts. The Judges wrote:

> The Rules Enabling Act charges the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. The Rules Committees undertake extensive study of the rules, including empirical research, so that they can propose rules that will best serve the American justice system while avoiding unintended consequences … The Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act.

As a senior member of the Judicial Conference, do you agree that Congress should not directly amend the Federal Rules of Civil Procedure and whether the procedures established by the Rules Enabling Act are preferable to congressional enactment?

RESPONSE: Respectfully, I do not speak for the Judicial Conference, and I do not believe it is appropriate for me as a nominee to opine on questions of Conference policy.

10) You said that no one asked you about your position on *Roe v. Wade* or abortion *after* the election. Did anyone associated with the Trump Campaign or an interest group ask about your position regarding *Roe v. Wade* or the legality of abortion *prior* to the election?

RESPONSE: Not to my recollection. As I testified at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

11) You repeatedly cited the *Youngstown* case and its reasoning and holding, yet under questions in front of the Judiciary Committee, you refused to discuss the reasoning and holding of other cases. How do you justify discussing one case and not another?

RESPONSE: Respectfully, during the hearing I discussed the reasoning and holdings of many cases besides *Youngstown*. For example, in addition to discussing at length the cases I have written or joined in the Tenth Circuit (*e.g.*, *Gutierrez-Brizuela v. Lynch* and *TransAm Trucking v. Administrative Review Board*), I discussed the reasoning and holdings of several Supreme Court decisions—including *Myers v. United States*, 272 U.S. 52 (1926) (Mar. 22 Hrg. Tr. 232:21-233:4); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Mar. 22 Hrg. Tr. 232:21-233:4); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (Mar. 22 Hrg. Tr. 233:5-234:17); *Roe v. Wade*, 410 U.S. 113 (1973) (Mar. 21 Hrg. Tr. 104:25-105:19); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Mar. 21 Hrg. Tr. 104:25-105:19); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Mar. 21 Hrg. Tr. 348:24-350:2); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Mar. 21 Hrg. Tr. 348:24-350:2); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Mar. 21 Hrg. Tr. 350:8-20); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Mar. 21 Hrg. Tr. 350:8-20); *Employment Division v. Smith*, 494 U.S. 872 (1990) (Mar. 21 Hrg. Tr. 132:18-133:9); *United States v. Jones*, 132 S. Ct. 945 (2012) (Mar. 21 Hrg. Tr. 52:18-53:8); *Kyllo v. United States*, 533 U.S. 27 (2001) (Mar. 21 Hrg. Tr. 219:12-21); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Mar. 21 Hrg. Tr. 219:12-21); *United States v. Booker*, 543 U.S. 220 (2005) (Mar. 21 Hrg. Tr. 219:12-21); *Crawford v. Washington*, 541 U.S. 36 (2004) (Mar. 21 Hrg. Tr. 219:12-21).