**Senator Mazie K. Hirono**

*Questions for the Record*

***David Nye:***

1) In the 2010 *Citizens United* decision, the Supreme Court struck down bipartisan laws limiting campaign contributions that went back more than a century, and opened a flow of money and potential corruption. The Court has also opened up a floodgate of new legal challenges and questions that had previously been foreclosed by long-standing law.

    a. If confirmed, how would you evaluate challenges to attempts by a foreign company to funnel money into our elections through an American subsidiary or intermediary?

**Response:** If a campaign contribution case came before me, I would study the briefs and oral arguments of the parties, determine the facts, and the relevant Supreme Court and Ninth Circuit precedent, and apply the law to the case at hand. I would faithfully follow the binding precedent of the Supreme Court and Ninth Circuit. Beyond that, I cannot comment further because doing so would violate my ethical obligations as a judge to not give advisory opinions, to be fair and impartial, and to not impair judicial independence by suggesting what I am willing to do in exchange for confirmation.

    b. What is the appropriate level of scrutiny to apply to challenges to campaign contribution limits or bans?

**Response:** In *Citizens United*, 558 U.S. 310 (2010), the Supreme Court stated that a law that restricts campaign contributions is a ban on speech and is subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. In *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011), the Ninth Circuit recognized a distinction between laws limiting campaign expenditures and laws limiting contributions to individual candidates. Laws limiting campaign expenditures are subject to strict scrutiny; however, laws limiting contributions to individual candidates are judged under a lesser standard in that they must be "closely drawn" to match a sufficiently important interest to survive a constitutional challenge. If the issue is raised before me, I will follow the Supreme Court and Ninth Circuit precedent in this area.

2) The Supreme Court in a narrow 5-4 decision in a case called *Hobby Lobby* ruled that a corporation with tens of thousands of employees has rights to the exercise of religion protected by the Religious Freedom Restoration Act, and that it could use those rights to

deny the tens of thousands of women it employed access to certain kinds of health care coverage.

**a.** Justice Ginsburg's dissent in *Hobby Lobby* took into account the impact to the employees. She wrote: "The exemption sought by Hobby Lobby and Conestoga would…deny legions of women who do not hold their employers' beliefs access to contraceptive coverage." As a judge reviewing cases that test the extent to which corporations can use their newfound religious rights, how much will you consider the burdens imposed on the corporation's employees by the exercise of these rights?

**Response:** Respectfully, the majority opinion in *Hobby Lobby* did not determine that a corporation could use its religious rights to deny the tens of thousands of women it employed access to certain kinds of health care coverage. Instead, the majority specifically found that "the effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies would be precisely zero." Further, the majority opinion in *Hobby Lobby* makes it clear that the cases involved focus on closely held corporations, each owned and controlled by members of a single family and do not involve publicly traded corporations. For that reason, the majority opinion held "that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA." With that in mind, the majority opinion stated that under the Religious Freedom Restoration Act of 1993 (RFRA), a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest and must also constitute the least restrictive means of serving that interest. Burdens imposed on employees would be part of the determination of whether the federal regulation is the least restrictive means of serving the compelling government interest. In applying this test, I would follow the precedent set by the Supreme Court and the Ninth Circuit.

**b.** 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:** The majority opinion in *Hobby Lobby* points out that there is no example of a publicly traded corporation ever asserting RFRA rights and that numerous practical restraints would likely prevent that from occurring. As to closely held corporations, the majority focused on whether the religious beliefs were sincerely held by the owners of the corporation. The Court recognized that Congress was confident of the ability of federal courts to weed out insincere claims. This requires a determination on a case-by-case basis. Beyond that, I cannot comment further because doing so

would be pure speculation; however, I would follow the binding precedent from the Supreme Court and the Ninth Circuit.

3) 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:** It would be improper to state my personal beliefs or views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. The majority opinion in *Planned Parenthood* represents the binding precedent of the Supreme Court. I will faithfully apply that decision and any precedent from the Ninth Circuit on the issue.

    b. Does the Constitution define what a "person" is?

**Response:** No.

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

**Response:** To the contrary, in *Roe v. Wade*, 410 U.S. 113, 158 (1973), the Supreme Court held "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Additionally, the Supreme Court concluded that the word "person" has application only postnatally.

        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:** No, not necessarily, as Justice Stevens recognized in his separate opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a State's interest in protecting potential life is not necessarily grounded in the Constitution. There may be humanitarian and pragmatic concerns that create a legitimate interest in redefining a fetus as a legal person. However, in terms of constitutional rights and who is entitled to those rights, such a redefining of fetus may very well violate the Supreme Court's holding in *Roe. Roe* is the binding precedent of the Supreme Court and I will faithfully apply that decision and any precedent from the Ninth Circuit on the issue.

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

**Response:** It does not. It is impossible to speculate as to every question or issue that may arise regarding pre-viability regulations allowed under *Casey*. The test imposed by *Casey* is whether the regulations are unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion. If so, the regulations impose an undue burden on the woman's constitutional right to decide to have an abortion. By its very language, the test is fact and case specific. In *Whole Woman's Health*, the Supreme Court held that certain abortion regulations failed the *Casey* test and were to be enjoined. That does not mean every abortion regulation fails the *Casey* test. Any further comment would be speculation and improper.

4) 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 *Shelby County* decision is precedence from the Supreme Court. As a judge, I am bound to follow it and it is not proper for me as a sitting judge to criticize or critique the Supreme Court's reasoning in these proceedings. Doing so would violate my ethical obligations as a sitting judge.

5) 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 <u>any</u> precedential value?

**Response:** Although I have not studied this matter in detail, I do know that on or about May 20, 2011, the Acting Solicitor General of the United States acknowledged that the Solicitor General at the time of *Korematsu* withheld a key intelligence report and other facts that undermined the rationale behind the internment of Japanese-Americans. Moreover, my understanding is that while technically not overruled, *Korematsu* has been limited to its facts.

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

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

**Response:** I am sure there have been Supreme Court decisions that have lost precedential value due to changes in the law after the decision was announced, but it would not be my place as a district judge to create a list of such cases. Doing so would suggest that I have already formed an opinion about issues relative to the decisions and subsequent statutory changes even though the issue has not arisen in my court. This would be unethical and would appear to deny future litigants a fair and impartial judge.

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

**Response:** "Remedies" should not be necessary. One of the most fundamental concepts of American government is the Constitution's scheme of three separate and distinct branches of government. Each branch has different powers and authorities. The failure of the President or Executive Branch to accept the judgments of the Judicial Branch breaches that fundamental concept and violates the Constitution. That does not mean the Executive Branch cannot properly appeal a judgment of a lower court, but it is bound by that judgment until and unless a higher court overturns the judgment. I would expect both the Executive Branch and the Legislative Branch to honor the independence of the Judicial Branch and to comply with court orders.

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

**Response:** I do not. A judge should interpret the Constitution and the statutes according to the meaning of the words as used by the framers and as interpreted by the Supreme Court and applicable Circuit Court. Binding precedent is to be followed without regard to a judge's personal values and philosophies and without regard to societal changes. If confirmed, I would adhere strictly to the constitutional and statutory interpretations of the Supreme Court and the applicable Court of Appeals.

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:** As a district judge, both on the State and Federal level, my job is to discern what the words in the Constitution mean and apply them to the current case. I am also to follow the precedent of the Supreme Court and applicable Court of Appeals. To do otherwise would be to engage in judicial activism and that is not the proper role of the judiciary.

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

**Response:** As a State judge for ten years, I have demonstrated my commitment to the rule of law. I firmly believe that such commitment is necessary for our judicial system to provide justice in a fair and equitable manner. Justice does not occur if a judge has a personal agenda or is motivated by any political ideology. I have always adhered to the law and to principles of basic fairness, even when not necessarily in conformance with my personal views. The rule of law is greater than any person, case, or personal view. If confirmed, I will continue to put aside any ideological or partisan views and decide matters before me based upon the rule of law as applied to the facts. I take my oath as a judge very seriously. That oath requires me to administer justice without respect to persons, to treat everyone fairly and impartially.

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

**Response:** If you are asking whether life experiences and unconscious biases should play a role in judging, the answer is no. I know many judges, mostly at the State level but also some at the Federal level. They work hard every day to fulfill their duties as a judge. They each have different life experiences, even different legal experiences, but they consistently reach the same disposition on cases. They do that by applying the rule of law and not their personal beliefs as shaped by their life experiences. One of my greatest satisfactions as a State judge is knowing that most of my colleagues, given similar cases with similar facts, will decide cases the same way. If you are asking whether unconscious biases exist in judging, the answer is yes. The research is overwhelming clear that unconscious biases impact how judges treat litigants and attorneys, issues and claims, staff and the public. A judge must be diligent in recognizing and rejecting unconscious biases. I have made it a point in my judicial career to obtain training on unconscious biases in an effort to make sure it does not play a role in my judging.