

Senator Mazie K. Hirono

Questions for the Record following the hearing on May 14, 2017 entitled:

“Nominations”

Damien M. Schiff

- 1) In 2009, you wrote that dialogue on reproductive rights issues is useless until the Supreme Court “releases the issue to the democratic branches.” Should we understand that to mean that you think states and the federal government should be free to place limits on the fundamental right to choose that the Court recognized in *Roe* and re-affirmed in *Casey*?

The blog post in question simply restated the widely accepted proposition that, to the extent that the Supreme Court holds a certain activity to be protected by the Constitution, to that extent the activity is not subject to regulation by the politically accountable branches, whether state or federal. Similarly, to the extent that the Supreme Court holds a certain activity *not* to be protected by the Constitution, to that extent the activity is subject to regulation by those politically accountable branches.

To the extent that the question asks whether, as a Judge of the Court of Federal Claims, I would faithfully apply all precedent of the Supreme Court, my response is that I would do so, regardless of any personal views I may have on any such precedent. To the extent that the question asks for my personal views, I should like to respond, respectfully, that those would not be relevant to my role as a judge. If confirmed, I would decide all matters strictly according to the law and the facts.

- 2) In 2011, you co-wrote a piece for the Federalist Society journal and the University of Texas where you called for an end to affirmative action in college admissions, and compared Court approval of affirmative action to its upholding of Japanese internment in *Korematsu*. Do you believe there is no difference between government action intended to correct the historical harms of discrimination and government-sanctioned actions to round up and inter citizens based on race?

The referenced law review article draws a parallel between *Grutter*, on the one hand, and *Dred Scott*, *Plessy*, and *Korematsu*, on the other hand, only in this sense: that all of these cases dealt with race and the Constitution, and that all of these cases are wrongly decided.

- 3) In 2009, you joined an *amicus* brief in support of Citizens United in their infamous case before the Supreme Court. The brief stated that the only constitutional rationale for limiting corporate spending on elections was to prevent actual quid pro quo corruption—essentially, bribery. Does that mean you disagree with the Supreme Court’s holding in *McConnell v. FEC* that there is a government interest in preventing both actual corruption *and the appearance of corruption*?

Please see the final paragraph of my response to Question 1.

- 4) Throughout your legal career, you have represented and advocated for clients who oppose environmental regulations that protect clean air, clean water, and endangered species. Although you have represented these clients pro bono, your organization, the Pacific Legal Foundation, receives funding from right-wing millionaires and corporate polluters. As a member of the Court of Federal Claims, you would be required to decide of claims against the federal government by individuals and corporations.

- a. Can you guarantee that you would judge these cases fairly, without regard to your career-long opposition to environmental laws or your personal views?

Yes. As stated in my response to Question 1, I solemnly pledge that, should I be confirmed and appointed as a Judge of the Court of Federal Claims, I would decide every matter to come before me strictly on (i) the law, as established by the Constitution, statute, regulation, and judicial precedent, and (ii) the facts, as determined by the submissions of the parties and the rules of evidence and procedure.

- b. How would you handle a case involving a party that has a financial connection to the Pacific Legal Foundation?

If confirmed and appointed as a Judge for the Court of Federal Claims, I would resolve any potential conflict of interest by adhering to the Code of Conduct for United States Judges, 28 U.S.C. § 455, and all applicable policies and procedures of the United States Courts generally and of the Court of Federal Claims in particular. I also would engage in prompt and immediate review of the parties, their affiliates, and the issues presented by any matter assigned to me so that I could make a prompt, informed decision regarding the need for recusal.

- 5) During your hearing, you apologized for using the term “judicial prostitute” to describe Justice Anthony Kennedy’s style of judging in a blog post, calling the term intemperate and unartful, and saying that you did not intend to call him that. However, you stated that you stood by the point made in that blog post, that the media should not applaud “strategic judging.”

- a. Judges, particularly those that hear arguments as a panel, are often required to write opinions that can command the support of their colleagues. Do you think that writing such an opinion would be “strategic judging,” and that it should be avoided?

By "strategic judging," I mean judging that is not based exclusively on the law and the facts. It is certainly plausible to imagine a statement of law or fact that could be phrased in more than one way, without changing the underlying meaning. A judge choosing to rephrase such a statement in a non-substantive way in order to convince a colleague to join an opinion would not, in my view, be guilty of strategic judging.

- b. Could you give examples of cases where you think Justice Kennedy engaged in “strategic judging,” rather than offering his forthright opinion? What evidence do you have to support this claim?

I do not recall whether I had any particular decision in mind. Based on the text of the blog post, I believe that the post's critique was not directed at any decision in particular, but rather at the *SCOTUSBlog*'s observation that "Justice Kennedy's just-completed October Term 2006 will certainly go down as one of the most 'successful' in the Court's modern history" in part because during that Term he was "a perfect 24-for-24 in 5-4 (or 5-3) cases."

- c. In what ways did you "not intend" to call Justice Kennedy a "judicial prostitute" when you chose to use those words in your blog post? What steps did you take to change the language of your blog or correct the record so that it would reflect your apparent intent?

The point of my blog post, "Kennedy the most powerful justice?" was not to attack any person but rather to attack a certain style of judging. That being said, I acknowledge that the language and tone of the blog post were intemperate and uncharitable. I injudiciously appeared to ascribe to him the media caricature of his judging style as a strategic judge. I should not have used such inappropriate language. I reiterate my sincere apology to anyone who may have taken offense.

- d. In light of the deeply troubling nature of your blog post, how can you reassure us that you have the appropriate temperament to be a federal judge, one that all litigants could trust would fairly apply the law?

Appropriate judicial temperament constitutes the ability to decide cases without being influenced by one's personal views or opinions regarding the law, the facts, the parties, or their counsel. Put another way, it constitutes the ability to decide cases exclusively based on (i) the law, as established by the Constitution, statute, regulation, and judicial precedent, and (ii) the facts, as determined by the submissions of the parties and the rules of evidence and procedure.

I solemnly pledge to all members of the Committee that, if I am confirmed and appointed as a Judge of the Court of Federal Claims, I will set aside any personal views or opinions that I may have about any matter that may come before me, and decide such matter based solely on the law and the facts.

- 6) You were asked in the hearing about a blog post you wrote entitled "Teaching Gayness," in which you criticized a California school district for its LGBTQ anti-bullying lesson plan. You wrote: "Until consensus is reached on the moral implications of homosexuality, any attempt on the part of the public schools to take sides on those implications is wrongheaded." During the hearing, you characterized the point of your blog post as an exploration of when it was appropriate for schools to weigh in on a contested issue.

- a. Is it your opinion that whether or not it is appropriate to bully LGBTQ youth constitutes a contested issue? What makes it a contested issue?

No. The blog post in question was not intended in any way to express approval of the bullying of LGBTQ children for any reason.

- b. In addition to your blog post, you have stated in the past that you "strongly disagree with the [sic] *Lawrence*," that the legalization of gay marriage in California was incorrect, and that the "empirical foundations" of anti-LGBT animus are not without merit. It is clear that you have been an opponent of LGBTQ rights. Do you stand by your testimony that your blog post was not meant to reflect your own views criticizing the "moral implications of homosexuality" as you described it?

Correct. The purpose of the anti-bullying curriculum blog post was not to take sides on the morality of homosexuality but instead to make the broader point that it may be counterproductive for public schools to weigh in on any contested moral issue.