

Senator Mazie K. Hirono

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

“Nominations”

Stephen S. Schwartz:

- 1) You have not been admitted to the bar of the Court of Federal Claims. Have you ever litigated a case before the Court of Federal Claims? Has any of your work involved the Court of Federal Claims? If not, what qualifies you to serve as a judge on the Court of Federal Claims?

Response: I have not litigated in the Court of Federal Claims. I have litigated in the U.S. Court of Appeals for the Federal Circuit, which resolves appeals from the Court of Federal Claims. I have also litigated a variety of matters that involved fields of law that the Court of Federal Claims regularly addresses, legal standards it regularly applies, and/or the federal trial court procedures that its cases involve.

In particular, my experience has included many areas of law that regularly come before the Court of Federal Claims, including Takings Clause issues, *see Horne v. U.S. Department of Agriculture*, 133 S. Ct. 2053 (2015), as well as other subjects including unconstitutional exactions and certain patent questions. A large number of my cases have involved claims under the Administrative Procedure Act, which governs many of the so-called “bid protest” cases which reach the Court of Federal Claims under the Tucker Act. *See* 28 U.S.C. § 1491(b). Most of my litigation experience, furthermore, has involved complex issues of statutory and regulatory interpretation arising from federal agencies. Those issues are comparable in subject matter and methodology to the types of cases a Court of Federal Claims judge must resolve. My experience has involved a significant amount of district court work—including pleadings, dispositive motions, written discovery, depositions, trial preparation, and presenting witness testimony—much of which I led, and all of which is applicable under the rules of the Court of Federal Claims.

- 2) You are one of only three partners at a boutique litigation firm that has championed a number of conservative causes. Is it fair to hold you accountable for the choice of which clients and cases you take, and the positions you advocate for? If not, why not?

Response: In any law firm, and particularly a small one, the decision to take on a particular representation is a complicated one that involves a variety of factors. Those factors include the nature of the issues the case raises, the firm’s capacity to take on additional work, the kind of work that litigating the matter to a successful conclusion would entail, the consistency of the matter with the firm’s overall business development strategy, the positions taken by the firm’s pre-existing clients, and many other

considerations. New matters come to a firm, furthermore, through a wide variety of channels such as personal and professional connections, news reports of past matters, and the general reputation of the firm's partners. *See also* ABA Model Rules of Professional Responsibility 1.2(b).

- 3) You represented Louisiana in a case challenging a variety of abortion restrictions. The restrictions include a requirement that doctors who perform outpatient abortions have admitting privileges, a three-day waiting period, a prohibition on the most common method of second trimester abortion, and terms of imprisonment for receiving reimbursement for the costs of collecting and storing tissue from abortions for medical research.

- a. Why did you choose to defend these restrictions?

Response: This question appears to address at least two different cases. Both matters were pending with my firm when I joined in 2016, and I was not part of the decision to take on either of the representations.

- b. Is it your understanding that the Constitution provides for a right to abortion free of undue burdens? Would you consider the burdens you defended in this case to be undue after *Hellerstedt*?

Response: This question refers to pending cases in which I currently represent some of the parties. My obligations as an advocate make it inappropriate for me to answer this question in detail.

- 4) You submitted an amicus brief in the *Hobby Lobby* case which argued that the Court should recognize corporations as having the right to free exercise of religion. Are there any limits, and what are the limits, on what a corporation may claim as a religious belief in justifying the denial of health or other benefits to its employees?

Response: The scope of the Supreme Court's holding in *Hobby Lobby* is an issue that is subject to current litigation, potentially including litigation in which I currently represent various parties. My obligations as a judicial nominee, *see* Code of Conduct of United States Judges Canon 3(A)(6), and as an advocate make it inappropriate for me to answer this question in detail. However, I would apply all applicable precedents if I am fortunate enough to be confirmed.

- 5) You have represented the Gloucester County School Board in its defense of a policy requiring children to use bathrooms that correspond to their biological sex. Why did you choose to defend that policy?

Response: That matter was pending with the firm when I joined in 2016, and I was not part of the decision to take on the representation.

- 6) You submitted an amicus brief on behalf of Jeb Bush arguing that DACA, the executive immigration policy that defers action on undocumented immigrants who were brought to the United States as minors, is unconstitutional. Why did you choose to defend this position?

Response: That matter was pending with the firm when I joined in 2016, and I was not part of the decision to take on the representation.

- 7) You represented North Carolina in a case challenging a variety of voting restrictions. The restrictions include a photo ID requirement, a reduction in early-voting days, a ban on out-of-precinct voting, the elimination of same-day voter registration, and the elimination of pre-registration for those under the age of 18. The Fourth Circuit concluded that these restrictions were enacted with discriminatory intent, and that they “targeted African Americans with almost surgical precision.”

- a. Why did you choose to defend these restrictions?

Response: That matter was pending with the firm when I joined in 2016, and I was not part of the decision to take on the representation.

- b. Do you believe that there is a fundamental right to vote?

Response: The Supreme Court has stated that “the political franchise of voting ... is regarded as a fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). I would apply all applicable precedents if I am fortunate enough to be confirmed.

- 1) You are a member of the Federalist Society. 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. For how long have you been a member of the Federalist Society? Will you maintain your membership during your service as a federal judge if confirmed? Will you attend Federalist Society events? If so, what steps will you take to ensure that they do not have an undue influence on your judging?

Response: To my recollection, I joined the Federalist Society in law school. If I am fortunate enough to be confirmed, I will evaluate all my professional memberships and participation in professional events in light of the applicable Canons of the Code of Conduct for United States Judges.

- b. 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 cannot speculate as to what motivates others to join the Federalist Society, or as to the President's reasons for each individual exercise of his authority under the Constitution to nominate judges. In my case, I believe that I was nominated because the President believes I have the ability to manage a docket of cases as a judge on the Court of Federal Claims, and that I would apply all precedents fairly and impartially.