

QUESTIONS FOR THE RECORD
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QUESTIONS FROM SENATOR BLUMENTHAL

1. In June 2018, the FCC's plan to abdicate its authority over net neutrality came into effect. While the FCC has signed a memorandum of understanding with the FTC over unfair and deceptive practices by internet service providers, these actions have left consumers without clear rules and effective enforcement over net neutrality violations.

While the FCC and FTC are primarily responsible for oversight over internet service providers, the Department of Justice has interceded in cases regarding net neutrality in the past. Most recently, the California Attorney General reached a temporary agreement with the Department of Justice to delay their law from taking effect until federal lawsuits over the FCC's rollback of net neutrality are resolved.

When you were in private practice, you were significantly involved with telecommunications companies and other interests that were implicated in net neutrality. Most significantly, you served as General Counsel and Executive Vice President of Verizon Communications for eight years, during which you argued against net neutrality based on concerns over its impact on Verizon's revenue. For example, you reportedly stated that net neutrality regulations might prevent broadband providers like Verizon from earning "an adequate return." You also recently served on the board of Time Warner, which is seeking to merge with AT&T. Both affiliations create the appearance of potential conflicts of interest with regard to oversight of internet service providers and enforcement of net neutrality.

- a. At least four states have passed their own net neutrality laws since the FCC abdicated its responsibility and still more are considering taking action to protect their residents. Do you intend to continue to pursue litigation to prevent states from enforcing their own laws to protect net neutrality? Under what specific conditions will the Department of Justice intervene against states that regulate discriminatory conduct within their state?

RESPONSE: It is my understanding that this issue is the subject of ongoing litigation. While I am not involved in that litigation, it is the longstanding policy of the Department of Justice to not comment on pending matters, and thus it would not be appropriate for me to comment on this matter.

- b. Verizon and other internet service providers originally sued California to prevent the implementation of their net neutrality protections, and have been parties to most fights over the open internet. Considering the potential appearance of conflicts of

interest based on your previous professional affiliations and statements on net neutrality, will you commit to recuse yourself from any cases that involve the enforcement or defense any net neutrality laws?

RESPONSE: I have not been at Verizon for over a decade. Moreover, because I do not know the scope of the matter referenced in your question, and because I do not know all the facts and circumstances, I cannot commit to such a recusal at this time. If I am confirmed and a matter comes before me where I believe recusal might be warranted, I will review the facts, consult with career ethics officials at the Department, and will recuse myself whenever appropriate.

- c. Given concerns over the appearance of conflicts of interest, will you recuse yourself from any cases that involve specific claims of discriminatory conduct by Verizon that may come before the Department of Justice? Will you recuse yourself from any cases that involve specific claims of discriminatory conduct by other internet service providers?

RESPONSE: If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials at the Department and recuse myself whenever appropriate.

2. The Music Modernization Act was the result of years of bipartisan work by many members of the Judiciary Committee. The Department of Justice is currently conducting a sweeping review of 1,300 consent decrees, including the ASCAP and BMI consent decrees. These decrees play a critical role in allowing Americans to hear their favorite songs. I am concerned that terminating the ASCAP and BMI consent decrees could undermine the Music Modernization Act and permit the accumulation and abuse of market power.
 - a. Can you commit that the Department of Justice will work with Congress to develop an alternative framework prior to any action to terminate or modify the ASCAP and BMI consent decrees?

RESPONSE: I commit that, if I am confirmed, the Department will stand ready, as always, to provide this Committee with technical assistance on any legislative proposal regarding music licensing. I also commit that, if confirmed, I will work with the Antitrust Division to ensure that this Committee is informed of the Division's intentions a reasonable time before it takes any action to modify or terminate the decrees.

3. The Federal Correctional Institution in Danbury, Connecticut is home to over 1,000 federal inmates. It hosts important education and literacy programs, including some programs that bring in students from outside the institution to study with students housed

inside the institution. Educational programs such as these are critical to restoring fairness to our criminal justice system and preparing inmates to contribute to society once have finished serving their time.

- a. Do you agree with me that education and literacy programs are important parts restoring fairness and opportunity to our criminal justice system?

RESPONSE: I have not had the opportunity to review the programs currently offered by the Bureau of Prisons and presently have no basis to disagree or agree with the statement. If I am confirmed, I will fully and fairly enforce the laws within the Department's jurisdiction.

- b. What steps will you take as Attorney General to ensure that programs like the ones at the Federal Correctional Institution in Danbury are provided with the necessary resources?

RESPONSE: If I am confirmed, I look forward to reviewing the Bureau of Prisons' resource allocation in this area, current educational offerings, and inmate needs.

- c. What steps will you take to expand successful prison education programs on a nationwide basis?

RESPONSE: I am not currently at the Department, and I am not familiar with details regarding educational programs provided by the Bureau of Prisons. Since I have not had the opportunity to review this matter, I am not in position to comment. If confirmed, I look forward to learning more about the educational programming offered by the Bureau of Prisons.

- d. Do you supporting restoring Pell grant funding to people in prison? Please explain the reasoning behind your position.

RESPONSE: I have not had the opportunity to study this issue. If confirmed, I look forward to learning more.

4. During your confirmation hearing I asked you if you maintained the position you expressed in 1991, that *Roe v. Wade* should be overruled. You responded:

“I said in 1991 that I thought as an original matter it had been wrongly decided, and that was, what, within 18 years of its decision? Now it's been 46 years, and the department has stopped, under Republican administration, stopped as a routine matter asking that it be overruled, and I don't see that being turned--you know, I don't see that being resumed.”

- a. Are you suggesting that you will not direct the Department of Justice to advocate to overturn *Roe*, or that it is merely unlikely that you will issue such an order?

RESPONSE: I would respond to any case presenting that question by consulting with the Solicitor General and other members of the Executive Branch to determine our position based on the facts of the case, the governing law, and the federal government's interests.

- b. In your answer at the hearing you indicated that proximity in time to a Supreme Court ruling determines when you respect a precedent. In your opinion, when between 18 and 46 years does the principal of *stare decisis* attach?

RESPONSE: All Supreme Court decisions (except those that have been overruled) are entitled to respect under principles of *stare decisis*.

- c. How do you determine when to give deference to a precedent?

RESPONSE: The Supreme Court has explained that deciding whether to overrule precedent requires weighing (among other factors) whether a prior decision is correctly decided, well-reasoned, practically workable, consistent with subsequent legal developments, and subject to legitimate reliance interests.

- d. Does societal reliance on a precedent matter for *stare decisis* considerations?

RESPONSE: Yes, as noted above, it is one of several factors that are relevant under principles of *stare decisis*.

5. As you know, American student loan borrowers now collectively owe more than \$1.5 trillion in student debt. The U.S. Department of Education relies on a number of large private-sector financial services firms to manage accounts and collect payments for more than \$1.2 trillion dollars of this debt. These firms have been the target of investigations and litigation by a range of state law enforcement agencies and regulators, alleging widespread abuses. This led Connecticut to pass the first comprehensive consumer protections in this area.

In the face of mounting litigation, beginning in 2017, the United States adopted the new legal position that it was never the government's expectation that these firms comply with state consumer law, including state prohibitions against unfair and deceptive practices, because these laws were preempted by federal law. To this end, in early 2018, the U.S. Department of Justice took the extraordinary step of filing a "statement of interest" in a lawsuit brought by the Massachusetts Attorney General related to one company's alleged mishandling of the federal Public Service Loan Forgiveness program in which DOJ urged a state trial court judge to side with the student loan company over that state's top law enforcement official. In late 2018, DOJ filed a second "statement of interest" in a federal trial court supporting affirmative litigation brought by a student loan industry trade

association, which opposed an effort by the District of Columbia to empower its banking department to oversee the practices at these firms. In both instances, the United States departed from its long-held position supporting federalism and states' historic police powers in the student loan market-- a position that spanned administrations of both parties-- to side with the student loan industry.

- a. Will you commit to restoring the past position of the DOJ and refraining from filing further actions opposing state consumer protection litigation in the student loan market?

RESPONSE: It is my understanding that this issue is the subject of ongoing litigation. While I am not involved in that litigation, it is the longstanding policy of the Department of Justice to not comment on pending matters, and thus it would not be appropriate for me to comment on this matter.

6. In recent years, Congressional investigations and leaked financial documents (i.e. Panama and Paradise Papers) have shown the extent to which the wealthiest citizens and corporations around the world—including the United States—use sophisticated financial strategies to avoid and evade taxes. Some of these moves are illegal, depriving the federal government of revenue and preventing the wealthiest from paying their fair share in the process.
 - a. Will you commit to making the full, fair, and consistent enforcement of tax laws a priority of the department during your tenure?

RESPONSE: I am generally aware that in the past several years the Tax Division has engaged in well-publicized and successful criminal and civil enforcement actions to combat offshore tax evasion. These efforts send the important message that violations of the tax laws will not be tolerated. If I am confirmed, I will work to support these efforts on behalf of the law-abiding taxpayers of this country.

7. Former White House Chief of Staff John Kelly recently stated that Attorney General Jeff Sessions “surprised” the Administration when he instituted a zero-tolerance policy that led to the family separation crisis on the border.
 - a. Can you commit to me that you will never support a policy that leads to mass family separation?

RESPONSE: President Trump’s June 20, 2018 Executive Order directed that families should be kept together, to the extent practicable, during the pendency of any criminal or immigration matters stemming from an alien’s entry.

8. President Trump recently issued a Presidential Proclamation barring certain individuals from receiving asylum. This policy could result in deporting asylum seekers back to their

death. In addition to being needlessly cruel, this Proclamation is illegal under our laws and under international law. For this reason, a federal judge has already issued a temporary restraining order blocking it from going into effect. A federal appeals court upheld this temporary restraining order. I have previously written to President Trump demanding that he revoke this unlawful Proclamation rather than continuing to fight a losing battle in court. So far, he has not done so.

- a. INA § 208(a)(1) is clear on this question. It says that any individual who arrives in the United States, “*whether or not at a designated port of arrival,*” may apply for asylum. Can you please explain how President Trump’s Proclamation is legal?
- b. Will you commit to advising the president to rescind this proclamation?

RESPONSE: It is my understanding that this issue is the subject of ongoing litigation. While I am not involved in that litigation, it is the longstanding policy of the Department of Justice to not comment on pending matters, and thus it would not be appropriate for me to comment on this matter.

9. In 1990, you put forward an argument that Congress had very limited ability to control how the Executive spends congressionally appropriated funds. You stated – quote – “there may be an argument that if the president finds no appropriated funds within a given category to conduct activity, but there is a lot of money sitting somewhere else in another category — and both categories are within his constitutional purview — he may be able to use those funds.” In these remarks, you looked for a source of constitutional authority for Congress to control Executive spending, but you weren’t able to find one.
 - a. Do you believe that Congress has constitutional authority to limit or control the Executive’s spending?

RESPONSE: Answering this question in the abstract is difficult. As I stated during the hearing, I would need to examine the specific statute being invoked by Congress to determine whether Congress has the constitutional authority to impose the limits or controls that you mention. As I mentioned during the hearing, that law review article was intended to be a “thought piece” rather than advancing a position on a specific controversy.

- b. In your remarks in 1990, you asked a simple question regarding Congress’s appropriations power: “What is the source of the power to allocate only a set amount of money to the State Department and to restrict the money for that activity alone?” I would like you to answer your own question.

RESPONSE: The question to which you refer was merely a rhetorical question presented as part of a “thought piece,” and I have not recently studied the answer to that question in detail. I will note, however, that Congress’s power to appropriate funds comes from several sources, such as

the Appropriations Clause and the Taxing and Spending Clause. Congress also has authority to appropriate funds for the raising of armies. Whether and in what circumstances Congress may exercise these powers in a way that might interfere with the President's own Constitutional authority by enacting limits on how funds are to be used is a hypothetical question that I cannot answer in the abstract.

10. Late last year, I wrote to the Department of Justice regarding Amazon's use of most favored nation clauses in its contracts with third-party sellers on its site. I am deeply concerned that these hidden clauses are artificially raising prices on goods that millions of consumers buy every year. Amazon's most favored nation clauses prevent sellers operating on its site from selling their goods at lower rates on other online marketplaces. This means that third-party merchants who sell on online marketplaces with lower transaction fees cannot pass on these savings to consumers. Relatedly, e-commerce sites that want to compete with Amazon to attract sellers will have trouble doing so by charging third-party sellers lower fees, given that third-party sellers could not pass these savings on to consumers. As a result, most favored nation clauses can also act as a barrier to entry for competitors. Roughly, five years ago, UK and German antitrust regulators opened an investigation into Amazon's most favored nation clauses – and Amazon announced it would stop enforcing these most favored nation clauses in Europe. However, it continues to enforce them here in the United States.

- a. Do you agree that Amazon's use of most-favored nation clauses in its contracts with third party sellers on its site could raise competition concerns?

RESPONSE: I have not had the opportunity to study Amazon's use of most favored nation clauses and therefore have no opinion on the matter. If confirmed, I will discuss this issue with the Antitrust Division.

- b. Would you commit to investigating Amazon's use of most-favored nation clauses in its contracts with third-party sellers on its site?

RESPONSE: If confirmed, I will commit to discussing this issue with the Antitrust Division. As in all matters, we would look at the individualized facts of the situation and the applicable law to determine what the appropriate next steps might be.

11. Corporate consolidation does not only threaten consumers; it threatens workers. At a hearing last October, I asked Assistant Attorney General Delrahim to provide an example of the last time labor market considerations were cited as the basis for rejecting a merger. Mr. Delrahim has still not provided a single example.

- a. Do you believe that labor market considerations are relevant to merger review?

RESPONSE: Yes. As I understand, the Department is committed to protecting competition in labor markets as well as product markets. I further understand that the Antitrust Division has identified labor market concerns in past enforcement efforts, including its challenges to the Anthem/Cigna merger in 2016 and the Aetna/Prudential merger in 1999.

- b. Can you commit to me that in every merger where the Department of Justice makes a second request, it will include a request for data related to labor market considerations?

RESPONSE: If confirmed, I will look forward to discussing with the Antitrust Division the types of data it seeks when issuing second requests.

- 12. I am deeply concerned about the growth of non-compete clauses, which block employees from switching to another employer in the same sector for a certain period of time. These clauses weaken workers' bargaining power once they are in the job, because workers often cannot credibly threaten to leave if their employer refuses to give them a raise or imposes poor working conditions. According to the Economic Policy Institute, roughly 30 million workers – including one in six workers without a college degree – are now covered by non-compete clauses. Just this past December, President Trump's administration released a report indicating that non-compete clauses can be harmful in particular contexts, such as the healthcare industry.

- a. Do you believe that non-compete clauses pose a threat to American workers?

RESPONSE: Although I believe there can be legitimate uses of non-compete clauses, they potentially can raise concerns for American workers in certain circumstances.

- b. What action do you intend to take regarding non-compete clauses?

RESPONSE: If I am confirmed, I will look forward to discussing this issue with the Antitrust Division.

- 13. Last month, we learned that Facebook has been selling more of users' personal data than previously disclosed. For example, it allowed Netflix and Spotify to read Facebook users' private messages. It is unconscionable and unacceptable that a company is able to act with such disregard for the privacy rights of its users. One reason that Facebook is able to get away with it is that they hold such a powerful market position. This allows them to impose poor privacy conditions on their users.

There is growing evidence that Facebook is willing to go to extreme lengths to protect its market power. Recently, the UK Parliament released documents showing Facebook's

ruthless attempts to shut down competitors. In 2013, Facebook was concerned about competition from Vine. A Facebook executive asked Mark Zuckerberg whether he could target Vine by shutting off Vine users' ability to find their friends via Facebook. Mr. Zuckerberg's response: "Yup, go for it."

- a. Do you believe this sort of action could constitute anticompetitive conduct?

RESPONSE: I am generally aware of these reports, but I have not studied these allegations in detail. As I explained at my hearing, however, I am aware of concerns many have expressed regarding how technology platform companies have taken shape and whether those companies' practices may raise antitrust concerns. If confirmed, I look forward to learning more about these matters.

14. When Americans use Google to search for products, the top result should be the one that best answers users' queries – not the result that is most profitable to Google. But there is growing concern that this is not the case. Just over a year ago, the European Union concluded that Google has been manipulating search results to favor its own comparison shopping service. Now, the European Union is reportedly investigating whether Google is unfairly demoting local competitors in its search results.

- a. Do you believe that there is sufficient evidence for the Department of Justice to act?

RESPONSE: I am generally aware of these assertions, but I have not studied them or the underlying facts in detail. If confirmed, I look forward to discussing these important issues with the Antitrust Division.

15. In a 2017 article, you wrote, "through legislative action, litigation, or judicial interpretation, secularists continually seek to eliminate laws that reflect traditional moral norms." According to your piece, secularists were attempting to, "establish moral relativism as the new orthodoxy" and in the process producing an explosion of crime, drugs, and venereal disease.

As an example of this trend, you discuss laws that, "seek to ratify, or put on an equal plane, conduct that previously was considered immoral. For example, "laws are proposed that treat a cohabitating couple exactly as one would a married couple. Landlords cannot make the distinction, and must rent to the former just as they would to the latter."

The implications of your statement for same-sex couples are troubling. At that time you wrote those words, same-sex couples were not allowed to get married. So, if landlords at that time were allowed to discriminate against unmarried couples, they would have been allowed to refuse to rent to any same-sex couple, essentially forcing millions of Americans to choose between living where they want and living with the person they love.

- a. Do you believe landlords should be able to discriminate against unmarried couples?

- b. Do you believe landlords should be able to discriminate against gay and lesbian Americans?
- c. If landlords can discriminate based on moral condemnation of unmarried couples and gay people, could a landlord refuse to rent to a Jew because he has a moral objection to that faith? If landlords should be allowed to express their moral beliefs by discriminating against groups they consider morally repugnant, where does that stop?

Another example of this trend you highlighted was, “the effort to apply District of Columbia law to compel Georgetown University to treat homosexual activist groups like any other student groups.” You argued that, “This kind of law dissolves any form of moral consensus in society.”

You argued that the law undermined a “moral consensus.” But D.C.’s law was passed by the city’s elected officials. My understanding is that it is broadly popular in the city, and I suspect it is broadly popular on Georgetown’s campus as well. If Georgetown were allowed to discriminate against LGBT organizations, it would be rejecting a moral consensus, not embracing one.

- d. In your view, is there a “moral consensus” against gay and lesbian student groups?
- e. What did you mean when you suggested that protections against discrimination “dissolve[] any form of moral consensus in society”?

RESPONSE: Respectfully, the above question mischaracterizes my views as expressed in the article in several respects. The quotes mentioned above are taken out of context. In addition, the article was written in 1995, not 2017, as your question suggests.

As I stated during my hearing, “We are a pluralistic and diverse community and becoming ever more so. That is, of course, a good thing – indeed, it is part of our collective American identity. But we can only survive and thrive as Nation if we are mutually tolerant of each other’s differences – whether they be differences based on race, ethnicity, religion, sexual orientation, or political thinking. Each of us treasures our own freedom, but that freedom is most secure when we respect everyone else’s freedom.”

The above questions call for speculation, and I cannot speculate on hypothetical questions. If confirmed, I would faithfully enforce all laws that protect individuals against discrimination. As in all matters, if faced

with these issues at the Department, I would look at the individualized facts of the situation and follow the law and any policies of the Department in determining any position or policy.

16. One of the major achievements of the last century is the recognition that racial segregation is a great moral and legal wrong. The Supreme Court recognized this truth in one of its most esteemed decisions, *Brown v. Board of Education*. I would hope that, in 2019, the correctness of the *Brown* decision cannot be in dispute.

Yet here we are, two years into the Trump Administration and judicial nominee after judicial nominee has come before this committee firmly and repeatedly declining to say that they believe *Brown* was correctly decided. If confirmed as Attorney General, you will oversee the Office of Legal Policy. Part of your duties will be to advise the president on judicial nominations, so I ask you this:

- a. Do you believe *Brown v. Board of Education* was correctly decided?

RESPONSE: Yes.

- b. Will you commit to only recommending for nomination individuals who believe *Brown* was correctly decided?

RESPONSE: While I am not familiar with the current judicial-selection process, my understanding is that judicial candidates are not asked for their views on *Brown* or any other case.

17. The 14th Amendment states: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States.” President Trump claims that “the 14th Amendment is very questionable as to whether or not somebody can come over and have a baby and immediately that baby is a citizen.”

- a. Do you agree with President Trump?

- b. Can the president eliminate birthright citizenship by executive order?

RESPONSE: As I said at the hearing, I have not had an opportunity to study the issues raised by this question in detail and therefore do not have an opinion on the matter at this time. If confirmed, and if the issue arose, I would consult with the Office of Legal Counsel and others before forming my own conclusion.

18. In a 2001 interview with the Miller Center at the University of Virginia, you discussed how you prepared to advise President George H.W. Bush to deploy the army to address the Rodney King riots in Los Angeles. You said that, “basically the President has to issue a proclamation telling people to cease and desist and go to their homes. . . And then if they don’t cease and desist, you’re allowed to use regular army.” This seems like remarkably cavalier position on the use of the American military against the American people.

- a. As you know, President Trump has expressed a willingness and desire to invoke national emergency powers to build a wall on the southern border. Would you advise him to do so?

RESPONSE: The President’s authority to declare a national emergency, and the authorities that are triggered by such a declaration, would depend upon the specific facts and circumstances at the time. I have not examined those facts and circumstances beyond what has been reported in the media, and, therefore, I am not in a position to comment on this matter.

- b. What factors would you consider before advising the president to declare a national emergency? What do you think constitutes a national emergency?

RESPONSE: Congress has authorized the President to declare a national emergency under the National Emergencies Act, and that declaration may trigger authorities under other statutes. The terms of those statutes, the precedents of prior Presidents, and the factual determinations by the appropriate agencies within the Executive Branch should all inform the President’s decision. I have not examined the facts and circumstances pertaining to security on the southern border with this issue in mind, and therefore, I am not in a position to further comment on what would constitute a national emergency. If confirmed, I will ensure that the Department’s advice on this subject is consistent with any applicable law, including the National Emergencies Act.

- c. In your opinion, what limits – if any – are there to the president’s use of the military in domestic matters?

RESPONSE: The Constitution and applicable statutes set forth the terms under which it is appropriate for the President to use the military in domestic matters. If confirmed, I will ensure that the Department of Justice’s advice is consistent with the Constitution and all other applicable law, including Title 10 of the U.S. Code and the Posse Comitatus Act.

19. Just months before the 1992 presidential election, several employees of the State Department — at the direction of the Assistant Secretary of State for Consular Affairs — searched a National Archives warehouse for then-candidate Bill Clinton’s passport files. According to the State Department Inspector General, the search was conducted “in the hope of turning up damaging information about Clinton that would help President Bush’s reelection campaign” — namely, “whether Clinton had ever written a letter at the time of the Vietnam War renouncing or considering renouncing his U.S. citizenship.”

In a 2001 interview, you said you were still bitter about this investigation. Specifically, you said, “the career people in the public integrity section had some kind of wacky theory,

a very broad theory that if the search was done for a political reason, it was improper.”
You went on to say that you believe that, “if an executive official has the power to open a file and look in a file, it’s not illegal that he may have a political motivation in doing so.”

- a. Do you stand by your statement?

- b. Is it your view that law enforcement is free to investigate people to gather political intelligence for a campaign?

RESPONSE: As a general matter, I believe that attempts to impose criminal liability on political officials (whether in the Executive branch or in Congress) for performance of official duties based solely on the officials’ subjective intent raises difficult legal questions and can potentially create dangerous precedents. Nevertheless, in 1992, I personally requested the appointment of an independent counsel in connection with the “Passportgate” matter – an investigation that ultimately determined that no charges should be brought. In my view, it would not be appropriate for law enforcement to investigate people in order to gather political intelligence for a campaign.