

Senator Mazie K. Hirono

Questions for the Record

Scott Palk:

- 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 confirmed, I will apply the controlling precedent from the United States Supreme Court and the Tenth Circuit Court of Appeals in considering any such challenges.

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

Response: The United States Supreme Court has ruled that restrictions on campaign contributions are subject to a “rigorous standard of review”. *Buckley v. Valeo*, 424 U.S. 1, 29 (1976). If confirmed, I would follow the precedent of the United States Supreme Court and the Tenth Circuit Court of Appeals.

- 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: It would be improper for me to attempt to quantify the consideration of any particular factor in the review of any case that may come before me. If confirmed, I would apply the

controlling precedents and consider the relevant factors outlined by the United States Supreme Court and the Tenth Circuit Court of Appeals.

- 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: I am unable to opine, and believe it would be improper to do so, as to any limitations on a potential litigant's claim in a case that could come before me. I would analyze any such claim with adherence to the relevant laws and precedents of the United States Supreme Court and the Tenth Circuit Court of Appeals.

- 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: I believe judicial decisions should be made on the law and precedent without regard to a judge's personal beliefs. The United States Supreme Court's decision in *Roe*, re-affirmed in *Planned Parenthood v. Casey*, is binding precedent.

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

Response: I do not believe so.

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

Response: While I have not been called upon in my professional experience to analyze the entirety of the United States Supreme Court's body of rulings in this area, my understanding is that the Court has not ruled that the 14th Amendment confers personhood on a fetus.

- 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: As this is an issue that could come before me, should I be confirmed, it would be inappropriate for me to offer an opinion.

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

Response: I have not had the opportunity to extensively study the *Whole Woman's Health* case. In the event a case related to *Casey* came before me, I would apply the controlling precedents of the United States Supreme Court and the Tenth Circuit Court of Appeals.

- 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: It would be improper for me to comment or express an opinion on a ruling of the United States Supreme Court.

- 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 any precedential value?

Response: Although the defendant's conviction was subsequently overturned, only the United States Supreme Court can modify or disregard its prior holding regarding the constitutionality of the Executive Order.

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

Response: Other than those holdings abrogated or superseded by constitutional amendment or legislative action, I am unaware of any such cases.

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

Response: Please see above answer.

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

Response: While my professional experience has not included legal analysis in the subject area of Presidential powers, I am aware that the powers of the President are limited to those provided to him or her by the United States Constitution or an act of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). I believe it would be inappropriate for me to speculate as to any remedies a party may pursue in response to an act of the President or Executive Branch.

- 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 believe judges are bound by the law and precedent, not to be influenced by the judge's personal values.

- 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: My personal values would have no place in the analysis of cases before me. I will be bound by the law and precedents of the United States Supreme Court and the Tenth Circuit Court of Appeals in any questions of constitutional analysis that come before me.

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

Response: I have demonstrated a commitment and dedication to the rule of law throughout my career. I have never allowed personal opinions, feelings, political ideology, or motivation to influence my professional conduct. If confirmed, I will faithfully follow the text of the law, guided by the precedents of the United States Supreme Court and the Tenth Circuit Court of Appeals.

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

Response: I believe judicial decisions should be made based on the law and precedent without regard to a judge's personal views.