

Senator Chuck Grassley, Ranking Member
Questions for the Record
Kenneth Allen Polite, Jr.
Nominee to be Assistant Attorney General, Criminal Division of the United States

1. Is it appropriate for a low-level government official (including law enforcement) to be terminated for ‘liking’ a post on social media that:
 - a. Contains views contrary to yours?
 - b. Contains some allusion to violence?
 - c. Contains views contrary to what you perceive to be the prevailing media narrative?

RESPONSE: I would not want to speculate on a hypothetical situation. It would depend on the particular facts and circumstances.

2. In an article with Law360 on November 30, 2020 titled “What to Expect from Federal Agency Leadership Changes,” you stated the following about the Trump-appointed U.S. Attorneys at the Department of Justice:

At the same time there are 93 U.S. Attorneys across the country. While the 50 or so remaining Obama-appointed U.S. attorneys were all fired on the same day under then then-incoming Trump administration, the Biden administration is expected to be more measured, allowing existing U.S. attorneys to stay in their roles until their replacements are all named and confirmed, which will provide a bit of continuity to the department.¹

President Biden summarily fired 56 (all but two) Trump-appointed U.S. attorneys on February 10, 2021, *a full month before* President Trump, during his term, fired all of the remaining Obama-appointed U.S. Attorneys on March 13, 2017.²

- a. Did President Biden take “measured” action in firing 56 (all but 2) Trump-Appointed U.S. Attorneys a full month before President Trump fired all Obama-Appointed U.S. Attorneys on March 13, 2017?
- b. Assuming you are confirmed, how do you intend to handle the lack of “continuity” in the department, given that President Biden summarily fired all but two Trump-appointed U.S. Attorneys before replacements could be “named and confirmed”?

RESPONSE: It is not unusual for Presidents to remove U.S. Attorneys. If confirmed, I look forward to working with the career attorneys in the Criminal Division currently in place as

¹ SJQ 12(a) at November 30, 2020.

² Rick Moran, PJ Media, “Where’s the Outrage? Biden Fires 56 Trump-Appointed U.S. Attorneys,” Feb. 10, 2021, available at: <https://pjmedia.com/news-and-politics/rick-moran/2021/02/10/wheres-the-outrage-biden-fires-56-trump-appointed-u-s-attorneys-n1424466>

well as with the United States Attorneys and Acting United States Attorneys doing the important work of leading the United States Attorney's Offices.

3. Your life story and achievements to date are impressive. In fact, in one of your speeches you detailed your upbringing:

my vision for this office is a direct extension of my own upbringing. At first blush, my personal background appears to be all too familiar: an African-American male, born to teenage parents, raised first in the projects, later in the lower Ninth Ward by a single mother. And yet, my story diverges where my family, especially my mother, instilled in me her passion and commitment to education. I was successful in obtaining a competitively awarded scholarship to DLS. Each day, I took a long ride on public transportation from the last street in the lower ninth ward to the push uptown neighborhood of DLS. I credit that school in teaching me that leadership and public serve are inherently linked; you lead, not for personal glory or benefit, but for the sole objective of lifting those in your community. I was the first black student body president, the second black student elected as Boys' State Governor, and the first and only black valedictorian in the school's history."

In other speeches, you have mentioned the importance of your academic scholarship to De La Salle High School and you have stressed the importance of hard work, detailing your unflagging work ethic. It appears to me that opportunities such as school choice played a prominent role in your life.

- a. Do you believe that parents should have the ability to improve their child's education through programs such as school choice?
- b. Do you believe that educating parents regarding alternate educational choices, such as school choice, might help in reducing the school-to-prison pipeline you frequently reference?

RESPONSE: My educational opportunities have been very important to me, and I am grateful for my mother's commitment to education. I have not studied the laws and state and local polices surrounding school choice and do not have a formed view on that topic at this time.

4. In a speech given to St. Peter's Catholic Church Men's Day on November 10, 2013, you highlighted the "most pressing problem" in the community, identifying it as violent crime. You further stated that "this crisis of mostly black on black violence kills, on average 40 people every day across our nation. Worse than Newtown every 24 hours. Worse than 9/11 every 2.5 months."

- a. If confirmed as the Assistant Attorney General for the Criminal Division, how do you plan to address, combat and reduce this “most pressing problem”?
- b. Do you still agree with your 2013 assessment that this particular form of violence—“black on black violence”—is the “most pressing problem” in the community? If not, why not?

RESPONSE: Violent crime continues to pose a significant threat to public safety in many communities. If confirmed, I would support efforts to ensure that federal, state, local, Tribal, territorial, and international law enforcement partners are collaborating on the investigation and prosecution of violent crime. In addition, I would encourage efforts to utilize all tools at our disposal. If confirmed, I look forward to being a part of the Attorney General’s recently announced effort to reduce violent crime which includes building law enforcement trust within our communities, prevention and intervention, targeted enforcement priorities, and measuring results.

5. In an Infragard Regional Meeting speech regarding Cybersecurity delivered on February 12, 2014, you noted that:

For most of us, it is easy to comprehend the significance of a physical attack on critical infrastructure. Over 38% of U.S. chlorine production is located in coastal Louisiana. 43% of total U.S. oil refining capacity is along the Texas and Louisiana coasts. We have our Port. We have our LOOP. We can agree and appreciate the fact that an attack on these physical assets would be disastrous indeed. The reality is that it does not take a bomb to cause this damage. Indeed, one committed individual with one computer could possible [sic] do much more. Imagine all of our financial institutions being hit. It would render our infrastructure irrelevant. And in our increasingly global economy, all economic transactions would stop. The President has called cyber-terrorism ‘one of the most serious economic and national security challenges we face as a nation.’

- a. You underscored the importance of cyber-security in the speech quoted above. If confirmed as the Assistant Attorney General of the Criminal Division, how do you intend to address, combat, and reduce cyber-security attacks against critical infrastructure?
- b. Does gas qualify as “critical infrastructure”?
- c. What do you believe qualifies as “critical infrastructure”?
- d. Whereas President Obama and his DOJ appeared to tout the importance of cyber-security, do you agree with President Biden that the decision by Colonial Pipeline to pay a ransom following a Russian cyber-attack was a “private sector decision”?

RESPONSE: I believe criminal investigations and prosecutions play an important role in protecting critical infrastructure. Arrests and convictions deter future offenders. Investigations yield valuable information about offenders’ tools, tactics, and goals, which

can be used to educate network defenders. And lawfully authorized online operations can disrupt ongoing criminal activity. If confirmed, I intend to support whole-of-government efforts and, in particular, the efforts of the Criminal Division's Computer Crime and Intellectual Property Section (CCIPS) in addressing online crime and attacks against critical infrastructure.

As defined in Executive Order 13636, critical infrastructure means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

As I am not in the Department now, and have not been briefed on the matter, I cannot speak to any specific aspects of the Colonial Pipeline matter.

6. In several of your speeches, you discussed a hiring question that you answered while applying to the U.S. Attorney's Office SDNY. In response to the question of whether you have any reservations about doing this job, you stated:

Of course, I do. I have been committed to helping people as much as possible throughout my life, and while I will be vindicating the rights of victims in our community, the truth is, for most citizens that interact with me in this job, this is the end of the line. This process will end up destroying a life, and uprooting families, and it becomes particularly when, in the case of narcotics cases, the defendants are all men of color.

Do you still stand by that statement—that only “men of color” are defendants in narcotics cases today?

RESPONSE: While I have not done research on specific data, in my experience as both a U.S. Attorney and Assistant U.S. Attorney, I have prosecuted narcotics offenses committed by a wide array of defendants, including those representing various racial, ethnic, and gender identities. My statement was intended to reflect that Black and Hispanic males comprise a significant and disproportionate number (in comparison to their representation in the general population) of defendants in federal narcotics prosecutions.

7. In a speech delivered at the Investiture of St. Tammany Parish Sheriff Randy Smith on July 1, 2016, you stated that “heroin is cheaper and more potent than ever. We see it mixed up with fetenayl [sic], a synthetic opiad [sic], that makes the narcotic even more deadly.”
 - a. Do you agree that eliminating fentanyl abuse and overdose deaths should be a top priority for the Department?
 - b. What are your plans with regard to tackling, combatting and deploying resources throughout the Department to combat this issue?

RESPONSE: Each life lost and each life diminished by using these dangerous drugs harms families and communities, not just the individuals experiencing the addiction. Reducing fentanyl abuse and overdose deaths – including by reducing the supply of opioids in the United States, prosecuting significant traffickers of these substances, and supporting efforts to reduce the demand for and abuse of these substances should be a top priority.

Many components of the Department are engaged in these efforts. If confirmed as Assistant Attorney General, I will support the Criminal Division’s focus on investigations and prosecutions that target significant international and domestic opioid traffickers. This includes the work of attorneys from the Narcotic and Dangerous Drug Section (NDDS) who participate in multi-agency initiatives that target Chinese chemical precursor and opioid sources of supply and Mexican transnational criminal organizations that manufacture and distribute opioids for illegal importation into the United States.

8. In a speech you delivered to the De La Salle high school in September, 2020, you defined a set of “terms,” including “equity.” You defined equity as: “[a]n approach that ensures everyone access to the same opportunities. Equity is process that begins by acknowledging that advantages and barriers exist, that we don’t all start from the same place, and then making a commitment to correct and address that imbalance.” Equity appears to be a favored term of senior officials within the Biden administration. If confirmed, how do you intend to enforce “equity” within the Criminal Division?

RESPONSE: To me, “equity” is not enforced, but is instead a goal that is achieved through the consistent and systematic fair, just, and impartial treatment of all individuals. If confirmed, I would work to promote these objectives in the Criminal Division.

9. Many people define “equity” as equality in *outcome* opposed to equality, which is traditionally seen as equality of *opportunity*. Your definition of equity seems to equate equity with equality of opportunity. Do you see equity as ensuring equality of opportunity?

RESPONSE: Equity usually refers to treating people fairly, and equality to treating people the same. But at the core, reference to either term is an attempt to address discrimination and unequal treatment. If confirmed, I will work to see that discrimination in violation of federal law is not tolerated and is prosecuted.

10. In 2017, the Trump administration formally discontinued and repudiated Operation Choke Point. This program, which involved the Justice Department and other federal agencies, pressured banks against transacting with certain industries which, while legal and financially viable, were considered to pose a “reputation risk” to banks. The Obama/Biden administration has been accused of using Operation Choke Point to target disfavored business sectors, including makers and sellers of firearms and ammunition. More recently, the Office of the Comptroller of the Currency issued a rule that would prohibit banks from discriminating against lawful, financially sound customers for ideological or political reasons.

Does the Justice Department have a valid role in telling banks which lawful and financially viable industries they should serve? If not, would you pledge as Assistant Attorney General not to repeat the tactics of Operation Choke Point?

RESPONSE: I do not recall having any involvement in the operation referenced. If confirmed, I will comply with applicable statutes, regulations, rules and policies in this area.

11. There are many gun control proposals being proposed or introduced in Congress, including licensing and registration schemes, bans on popular types of firearms, and repeal of the Protection of Lawful Commerce in Arms Act.
 - a. Do you support the enactment of additional federal gun control laws? If so, which proposals do you support?
 - b. Do you believe any proposal goes too far in infringing Second Amendment rights?

RESPONSE: I have not carefully studied all the proposals or developed positions on them. I share the Attorney General's view that, as a general matter, we should be careful that people who are entitled to have guns get the background checks, and that for those who are not entitled to have them (because they are felons or for whatever reason barred by the law), there is an opportunity to determine that they are not permitted to have a gun.

12. What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?

RESPONSE: My understanding of the law regarding the Second Amendment is informed by the Supreme Court of the United States' opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010). *Heller's* central holding is that the Second Amendment confers an individual rights to bear arms, and *McDonald* holds the right is fundamental and applies to the states and the federal government.

13. According to press reports, the Biden administration recently reactivated a "migrant child facility" that was open "for only a month in summer 2019" during the Trump administration.³ The practice of keeping children in these facilities was routinely criticized as "kids in cages" by Democrats and members of the media.
 - a. What's the difference between a "migrant child facility" and a "cage"?
 - b. According to an updated *Washington Post* article, as of March 10, under the Biden administration "[m]ore than 8,500 migrant teens and children who crossed the border without their parents are being housed in Department of Health and Human

³ Siliva Foster-Frau, *First migrant facility for children opens under Biden*, Washington Post (Feb. 22, 2021), available at https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html.

Services shelters.” How do you plan on dealing with the rise in unaccompanied minors arriving at the Southern Border?⁴

RESPONSE: I do not expect to be called upon to address these issues within the Criminal Division. I understand these issues generally fall under the jurisdiction of the Department of Homeland Security and the Department of Health and Human Services.

14. What factors should the Justice Department consider in deciding whether or not to continue to defend the death sentences of Dzhokhar Tsarnaev and Dylann Roof on direct appeal?

RESPONSE: As a Department nominee, it would not be appropriate for me to comment on specific deliberations about any pending case.

15. In your view, is a personal philosophical or religious objection to the death penalty on the part of President Biden a valid justification to abandon the defense of Dylann Roof’s death sentence on direct appeal?

RESPONSE: As a Department nominee, it would not be appropriate for me to comment on specific deliberations about any pending case.

16. In December 2020, the Justice Department finalized a rule prohibiting the inclusion of provisions in settlement agreements directing or providing for a payment or loan to a non-governmental person or entity that is not a party to the dispute, except in certain defined circumstances. The rule follows a 2017 memo from then-Attorney General Jeff Sessions, which was codified in the Department’s “Justice Manual.” As Attorney General Sessions stated, “[w]hen the federal government settles a case against a corporate wrongdoer, any settlement funds should go first to the victim and then to the American people—not to bankroll third-party special interest groups or the political friends of whoever is in power.” Should you be confirmed, then, will you oppose the repeal of that regulation?

RESPONSE: I believe corporate resolutions serve a critical function in our justice system, including by holding corporate wrongdoers accountable for the criminal conduct of their agents and employees, helping to improve corporate compliance programs, and ensuring that victims of the corporate malfeasance are compensated. If confirmed as Assistant Attorney General of the Criminal Division, I would follow the statutes, regulations, rules, and Justice Manual policies related to settlement agreements.

17. As you are aware, Hunter Biden publicly announced that he is under criminal investigation for his taxes and financial matters. The current Acting Assistant Attorney General for the Criminal Division, Nicholas McQuaid, was employed at Latham & Watkins until January 20, 2021, and worked with Christopher Clark, who Hunter Biden reportedly hired to work

⁴ Nick Miroff, *At border, record number of migrant youths wait in adult detention cells for longer than legally allowed*, Washington Post (March 10, 2021), https://www.washingtonpost.com/national/unaccompanied-minors-detention-cells/2021/03/10/a0d39390-81c6-11eb-bb5a-ad9a91faa4ef_story.html.

on his federal criminal case a month before President Biden's inauguration. This presents a potential conflict. Congress has a constitutional oversight responsibility to ensure the proper application of conflicts of interest laws and regulations which demands that the Justice Department produce a recusal memo, should one exist. Do you agree? If not, why not?

RESPONSE: As I am not in the Department now, I cannot speak to the particular matter you reference. When I was U.S. Attorney each attorney in my office received ethics and professional responsibility training as mandated by the Department, and, if I become Assistant Attorney General for the Criminal Division, I will confirm that this continues to be the case for the Criminal Division. I will also seek to ensure that career ethics officials continue to review all recusal issues based on the facts and circumstances in each matter.

18. In the absence of a regulation prohibiting the use of settlements with non-affected third parties, what is the constitutional justification for their continued use?

RESPONSE: During my time in the Department of Justice, I do not recall entering into settlements with non-affected third parties and, as a result, have not had the opportunity to study this issue.

19. Do you agree with the Supreme Court that the free exercise clause lies at the heart of a pluralistic society (*Bostock v. Clayton County*)? If so, does that mean that the Free Exercise Clause requires that religious organizations be free to act consistently with their beliefs in the public square?

RESPONSE: I understand that case clarified that it was illegal under Title VII of the Civil Rights Act of 1964 to fire an employee who is gay or transgender. I have not studied the opinion further. I do not expect that it would be part of my duties, if confirmed as Assistant Attorney General of the Criminal Division, to enforce the provisions of this law.

20. Do you intend to advocate for the continuation of Operation Lady Justice?

RESPONSE: I am aware that various components of the Department of Justice have been part of Operation Lady Justice, i.e., The Presidential Task Force on Missing and Murdered American Indians and Alaska Natives. If confirmed, I look forward to learning whether the Criminal Division has been contributing or could contribute to the important mission of the Task Force.

21. Does illegal immigration impose costs on border communities?

RESPONSE: I do not have any particular expertise in this area and, without further research and study, would not have a basis to provide an answer. Of course, if it were to be an issue in a case before the Criminal Division, I would learn more about the specifics.

22. When was the last time you visited the U.S.-Mexico border?

RESPONSE: My last visit to the U.S.-Mexico border occurred in or about February 2018.

23. When was the last time you visited the U.S.-Mexico border outside of a port of entry?

RESPONSE: I have not visited the U.S.-Mexico border outside of a port of entry.

24. As you may know, the Obama Administration had instituted a policy where legal settlements between the Department of Justice and companies were used to fund third-party, special interest groups that were not parties to the litigation. I have a number of problems with these settlement slush funds. I think they go against the appropriation power of Congress. The Justice Department justified “slush fund settlements” by claiming that business defendants were “voluntarily” making these third-party payments as part of settling claims. This is like a mugger saying that his victim voluntarily handed him her wallet to make him go away.

In 2017, the Trump Administration forbade this practice. The Biden Administration, on the other hand, recently announced that it is reviewing the bar on this potentially unlawful and unethical practice. Will you commit to oppose the reinstatement of this potentially unlawful and unethical practice if you are confirmed?

RESPONSE: During my time in the Department of Justice, I do not recall entering into settlements with non-affected third parties and, as a result, have not had the opportunity to study this issue.

25. Over the past four years, the Department has updated and reformed the enforcement of the Foreign Corrupt Practices Act (FCPA), a process that began under the Obama Administration. Specifically, in 2016, under Attorney General Lynch, the Justice Department announced an FCPA “pilot project,” which was designed to promote voluntary self-disclosure, cooperation with the government, and remediation of violations in exchange for mitigated penalties. In 2017, the Justice Department enhanced this pilot project and incorporated it into the U.S. Attorneys’ Manual as the FCPA Corporate Enforcement Policy (CEP); the Department has since stated that it will apply the principles of the CEP to contexts other than the FCPA. If you are confirmed, will you continue to support and improve the Corporate Enforcement Policy in a way that appropriately incentivizes the private sector to invest voluntarily in compliance programs and cooperate with the Department?

RESPONSE: The Corporate Enforcement Policy (CEP) provides guidance to prosecutors regarding how to resolve corporate cases and provides transparency to corporations

regarding what they need to do to achieve voluntary disclosure, cooperation, and remediation credit. The CEP also provides what benefits will flow to the corporation if it engages in such behavior, and, as a result, the CEP incentivizes good corporate behavior, including voluntary disclosures, cooperation, and remediation. If confirmed, I look forward to continuing the Criminal Division's commitment to provide transparency and guidance to the prosecutors in the Criminal Division and to the business and compliance community, and to incentivize good corporate behavior.

26. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform.

- a. Do you agree with Attorney General Garland, Lisa Monaco, and Vanita Gupta that a member of the Federalist Society should be allowed to serve on front-office staff within the Justice Department?

RESPONSE: Yes.

- b. If so, does that mean you would allow a member of the Federalist Society to serve on the Criminal Division front-office staff?

RESPONSE: Yes.

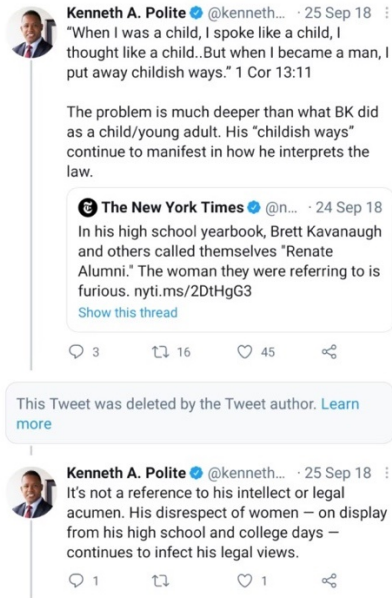
- c. Do you agree with Attorney General Garland, Lisa Monaco, and Vanita Gupta that a member of the Federalist Society should be allowed to be promoted to chief, assistant chief, section head, or any other career supervisory position in the Justice Department?

RESPONSE: Yes.

27. Do you believe potential voter fraud or other elections abnormalities are concerns that the Justice Department should take seriously?

RESPONSE: I believe that the Department should investigate credible allegations of voter fraud. The Department of Justice plays a pivotal role in protecting the right to vote and ensuring that elections are not influenced by fraud.

28. This is from your Twitter account:



- a. What do you think “BK did as a child/young adult”?
- b. In what way does it “manifest in how he interprets the law”?
- c. In what way does “[h]is disrespect of women ... continue[] to infect [Brett Kavanaugh’s] legal views”?

RESPONSE: My tweets were in response to a highly charged confirmation process on both sides at a time when I was a private citizen. A fair and independent judiciary is critical for preserving equal justice under the law. Justice Kavanaugh was confirmed by this body, and I have respect for his role on the Supreme Court.

29. We have experienced a dramatic increase in homicides across the United States in 2021, compared to this point in 2020. As of May 27, 2021, homicides in [Minneapolis](#) are up 83 percent. As of May 23, 2021, homicides in [New York City](#) are up 23. As of May 27, 2021, they are up 42 percent in [Philadelphia](#). And as of May 28, 2001, homicides in [Washington, D.C.](#) are up 25 percent. To the extent such increases are related to violations of federal statutes, will you commit to fully prosecuting the perpetrators of such crimes?

RESPONSE: On May 26, 2021, the Attorney General announced a new “whole of Department” strategy that includes a focused effort to reduce violent crime in our communities. As part of the Department’s efforts, the Criminal Division’s Organized Crime and Gang Section is working with United States Attorney’s Offices to prosecute those violent criminal organizations and gangs that are disproportionately responsible for violent crime, including homicides, in local communities. If confirmed, I will ensure that the Division continues to support these efforts.

30. As you've probably experienced for yourself, telemarketing scams have been on the rise in recent years. Most nefariously, many of these scams target the elderly. They run the gamut from the callers impersonating Medicare employees to pretending to be grandchildren needing financial assistance. They all have the same goal of tricking senior citizens out of their money. Will you commit to fully prosecuting the perpetrators of such scams?

RESPONSE: As I understand it, the Criminal Division's Fraud Section has devoted substantial resources to the investigation and prosecution of such schemes, including investment fraud, Ponzi schemes, and other financial fraud schemes, as well as related health care fraud schemes. If confirmed, I will continue the Division's commitment to bring the perpetrators of such crimes to justice.

31. There has been a marked and deplorable increase in violent crimes committed against Asian-Americans in California and Jewish Americans in New York. Given the reporting on many of these crimes it is unfortunately the case that many of them may count as hate crimes.
- a. Should the Justice Department take the race of the perpetrator into account in determining whether to bring federal hate-crime charges in these cases?
 - b. In determining whether to bring federal hate-crime charges in these cases should the Justice Department worry about any disparate impacts such charges might have on other minority communities?

RESPONSE: I do not expect to be responsible for hate crimes prosecutions if confirmed as the Assistant Attorney General of the Criminal Division; such prosecutions are overseen by the Assistant Attorney General of the Civil Rights Division. As a general matter, in determining whether to bring federal charges, I believe it is appropriate to follow the facts and the law.

32. Please describe the selection process that led to your nomination to be Assistant Attorney General, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

RESPONSE: In November 2020, after the election, I submitted an application via the Biden-Harris Transition portal for consideration for a leadership position in the U.S. Department of Justice. In March 2021, I participated in vetting interviews with White House officials, and on or about April 12, 2021, the White House formally announced my nomination for the post.

33. During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice? If so, what was the nature of those discussions?

RESPONSE: No.

34. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society? If so, what was the nature of those discussions?

RESPONSE: No.

35. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.

RESPONSE: No.

36. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation. If so, what was the nature of those discussions?

RESPONSE: No.

37. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.

RESPONSE: See my answer to Q 32.

38. Please explain, with particularity, the process whereby you answered these questions.

RESPONSE: The Department of Justice received these questions on June 2, 2021. I worked with Department attorneys, conducted research, and answered the questions. I finalized and approved all answers to the questions and authorized their transmission to the Committee on June 7, 2021.

Senator Mike Lee
Questions for the Record
Kenneth Polite, Assistant Attorney
General of the Criminal Division

1. The Religious Freedom Restoration Act is the leading federal civil rights law that protects all Americans' religious freedom. It was championed by Senator Ted Kennedy and Senator Orrin Hatch to pass the Senate by a vote of 97-3 and to pass the House by a unanimous voice vote. President Bill Clinton proudly signed it into law in 1993. For nearly three decades, it has protected the religious freedom of all Americans of all faiths. If confirmed, will you commit to oppose any legislative or executive action that would alter in any way the Religious Freedom Restoration Act's protection for Americans of all faiths?

RESPONSE: If I am confirmed, I will enforce all laws in the Criminal Division's jurisdiction. I am not familiar with proposals to alter the Religious Freedom Restoration Act, but if the statute were applicable in a case in the Division, I would apply it as written.

2. Do you believe that hateful speech alone, without any attendant conduct, should be a crime?

RESPONSE: No.

3. What are your thoughts on the Department of Justice's ("DOJ") policy concerning civil asset forfeiture?

RESPONSE: Because I do not currently work at the DOJ, I am not familiar with the current policy concerning civil asset forfeiture. I am aware that you have introduced a law to reform the process, and if confirmed, I look forward to learning more about it and discussing it with you.

4. Do you think this incentive for law enforcement agencies to participate in equitable sharing is a problem? If so, is it something you will work to address?

RESPONSE: I understand that there is criticism of equitable sharing, and if I am confirmed, I look forward to discussing it with you and learning more about reform proposals.

5. We've seen disturbing reports recently of websites posting obscene content involving minors and parents unable to convince or force websites to remove obscene content involving their minor children. Will you commit to prioritize enforcement of our anti-trafficking and child pornography laws against these heinous online actors?

RESPONSE: Yes. The trafficking of children and child pornography are among the worst crimes and prosecuting the perpetrators would be a top priority of mine if I am confirmed.

6. As an Assistant Attorney General, what will you do if the President takes a position that is contrary to the law or not in the interests of the United States?

RESPONSE: An Assistant Attorney General has a duty to enforce the laws without regard to politics, and that is what I would do if I am confirmed.

7. As a nominee for a position in the Executive branch, do you think there are any limits on the President's use of prosecutorial discretion?

RESPONSE: The exercise of prosecutorial discretion is necessary – there will never be enough resources for every prosecutor to investigate and prosecute every crime. I believe prosecutorial decisions should be made based on the facts, the law and considerations such as those set forth in the Department of Justice *Principles of Federal Prosecution*.

8. Please state for the record your thoughts on the Second Amendment?

RESPONSE: My understanding of Second Amendment law is informed by the Supreme Court of the United States' opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010). *Heller's* central holding is that the Second Amendment confers an individual rights to bear arms, and *McDonald* holds the right is fundamental and applies to the states and the federal government.

9. A number of states have enacted so-called "red flag laws" that authorize judges to issue orders for the seizure of otherwise lawfully owned firearms when the owner is found to be a danger to self or others. Do you support the use of red flag orders to seize lawfully-owned firearms? If so, what due process protections should apply to the issuance of these orders? Should a judge be able to order firearm seizures in *ex parte* proceedings, before the respondent has had a chance to answer the allegations in the petition?

RESPONSE: I understand that the President and the Department of Justice support "red flag laws" and that DOJ is in the process of drafting model legislation to assist states in keeping guns out of the hands of people in crisis, consistent with Constitutional requirements of due process. I look forward to seeing the draft model legislation.

10. Do you support banning specific types of firearms?

RESPONSE: Reducing gun violence in ways consistent with the Constitution is an important goal at a time when violent crime is rising. If I am confirmed, I would enforce any applicable laws on firearms as written.

11. Do you support banning large magazines?

RESPONSE: Reducing gun violence in ways consistent with the Constitution is an important goal. If I am confirmed, I would enforce any applicable laws on firearms as written.

12. Do you support holding firearms manufacturers liable for damage caused by people using their firearms to commit a crime?

RESPONSE: I have not studied this issue, and it would not be likely to arise in the Criminal Division if I were to be confirmed.

13. You've tweeted that you disagreed with a school's decision to suspend a 9-year-old simply for having a toy B.B. gun in the background of his video feed while participating in virtual schooling. Do you believe that law abiding Americans without a criminal history should be allowed to own firearms?

RESPONSE: Americans who comply with the applicable laws governing the ownership of firearms should be able to own them.

14. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition?

RESPONSE: I do.

- a. What is the difference between "equity" and "equality?"
- b. In order to achieve "equity," is it ever necessary to discriminate *against* members of some groups in favor of others?

- c. If treating people equally before the law results in disparate outcomes, is it acceptable to discriminate against those with favorable outcomes before the law in order to correct that disparity?

RESPONSE: I know that these terms – particularly equity – have come into more common use as we address discrimination. As I understand it, equity usually refers to treating people fairly, and equality to treating people the same. But in either case, it is an attempt to address the problem of discrimination. My view on that is clear: It is never acceptable to discriminate in violation of federal law.

15. How do you define “systemic racism?”

RESPONSE: In my opinion, the term “systemic racism” refers to inequality in the access to or administration of a particular system or institution, as reflected in its policies, practices, and procedures, that arises from the historical, collective and/or persistent influence of deliberate and implicit bias against a group based on racial identity.

16. How do you define “critical race theory?”

RESPONSE: I understand “critical race theory” to be an academic theory and not a legal theory.

Do you distinguish “critical race theory” from “systemic racism,” and if so, how?

RESPONSE: My understanding of “critical race theory” is not extensive enough to compare it or contrast it with the idea of “systemic racism”.

17. Do you think America’s criminal justice system, including the federal courts, U.S. Attorney’s offices, and the Department of Justice are “systemically racist?”

RESPONSE: I think all institutions in America have been affected by our country’s history of slavery and racial discrimination, and that is true of some aspects of the institutions you name.

18. Congresswoman Ayanna Presley has said, in relation to criminal justice policy: “[w]e must now be every bit as intentional in legislating justice and equity, and that starts with embracing anti-racism as a central tenet of the policymaking process.” Do you plan to institute “anti-racist” policies in the Criminal Division at the Justice Department? If so, which policies do you plan to institute?

RESPONSE: If confirmed, I plan to enforce the law fairly and impartially.

19. Do you believe that members of historically oppressed minority groups should be treated more favorably than those of other races in prosecutions and sentencing decisions to correct for the effects of systemic racism?

RESPONSE: Current DOJ guidance on prosecutorial discretion, charging, and sentencing calls for decisions to be “based on the merits of each case and reflect an individualized assessment of relevant facts.” January 29, 2021 Memorandum from the Acting Attorney General on “Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing.” If confirmed, I intend to follow that guidance.

20. Recently, there has been growing discussion in the United States concerning the establishment of “supervised consumption services” or “safe consumption sites” for individuals to come to a designated area for the purpose of using drugs. What are your views on these sites? How would the DOJ handle any attempts to establish more of these sites throughout the country?

RESPONSE: This is not a debate I have followed closely but if confirmed, I look forward to learning more about it if it comes before the Criminal Division.

21. In *United States v. Safehouse*, the DOJ sued a Philadelphia planned “safe consumption sites” on the grounds that it would violate the federal Controlled Substances Act’s (“CSA”) so-called “crack house provision.” The 3rd Circuit found that this statute prohibits operation of safe injection facilities and as a result the site could not open. Do you agree with this decision? If so, would you commit to enforcing the CSA in its entirety, a law that President Biden was a proponent of while serving in the U.S. Senate? What if the policy of the Biden-Harris Administration, advocates or encourages the creation of these sites?

RESPONSE: I was not aware of this case or its decision, and the debate about “safe consumption sites” is not one I have followed closely, but if confirmed, I look forward to learning more about it if it comes before the Criminal Division.

22. Do you believe, if confirmed as an Assistant Attorney General, that you would have a duty to act in line with your moral code? If so, would you agree that it is part of your duty to ensure that the division under your care does not violate that code?

RESPONSE: If confirmed, I would have a duty to uphold the oath I would swear to the support and defend the Constitution, and to carry out my duties in line with that oath.

23. Along the same lines, let's assume that someone acting as an agent of the Department of Justice under your control takes actions which contradict your moral code. What responsibility do you feel you would owe for those actions?

RESPONSE: If confirmed, I would have a duty to uphold the oath I would swear to support and defend the Constitution, and to carry out my duties in line with that oath. I would expect employees who report to me to do the same.

24. For purposes of federal law, when does life begin?

RESPONSE: In *Roe v Wade*, 410 U.S. 113 (1983), the Supreme Court stated that the court "need not resolve" the question of when life begins. *Id.* At 159.

25. Does the definition of when human life begins for purposes of federal law differ from the scientific definition of when human life begins?

RESPONSE: In *Roe v Wade*, 410 U.S. 113 (1983), the Supreme Court stated that the court "need not resolve" the question of when life begins. *Id.* At 159.

26. At what point in human development does the United States have a compelling interest in protecting a human life?

RESPONSE: In *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992), the Supreme Court held that states may regulate abortion prior to viability based on the state's interest in maternal health and potential life, provided those regulations did not impose and do not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

27. Do you support laws penalizing fetal homicide?

RESPONSE: If confirmed, I will enforce the law as written.

28. Do you support the Unborn Victims of Violence Act of 2004, which provides that a person guilty of killing a child in utero may be punished to the same extent as if they had killed the child's mother, and that a person who intentionally kills a child in utero may be charged as a homicide (i.e., murder or manslaughter)?

RESPONSE: If confirmed, I will enforce the law as written.

29. Given that "homicide" requires the killing of an innocent human being, do you agree that in order to punish someone for violating this statute, the child in utero would have to be a human being?

RESPONSE: If confirmed, I will enforce the law as written.

30. Are there any circumstances which justify the killing of an innocent human being?

RESPONSE: The law prescribes the situations where intentional killing is justified (e.g., self-defense). I will enforce the law as written.

31. Do you support the Born Alive Infants Protection Act?

RESPONSE: If confirmed, I will enforce the law as written.

32. Relatedly, would you support any policy that would prohibit the killing of children who survive failed abortions outside the womb?

RESPONSE: If confirmed, I will enforce the law as written.

33. Will you commit that the Criminal Division of the Department of Justice will not rely upon data or information compiled by the Southern Poverty Law Center considering the serious allegations of systemic sexual harassment, racial discrimination and their ties to domestic terrorism cases?

RESPONSE: I am not aware of the allegations you reference, nor do I know if the Criminal Division relies upon any data compiled by the organization you reference.

34. In your testimony, you indicated that, if confirmed, you would assume the role of running the day-to-day operations of the Department of Justice and its 115,000 employees. Does this role extend to both policy-making and administrative matters? When do you envision being involved, and when not?

RESPONSE: If confirmed I would assume the role of running the day-to-day operations of the Criminal Division of the Department of Justice, which includes administrative matters as well as

matters related to managing investigations and prosecutions, and consulting with Department leadership on some policy matters. I will offer my opinion, based on my years of experience as a prosecutor, if consulted.

35. There's been a lot of rhetoric over the last year from critics of our criminal justice system suggesting that we should "defund" the police. Do you agree with those critics?

RESPONSE: I do not. I come from a family of police officers, and I have worked with police agencies during my career as a prosecutor and have great respect for the job they do. I am proud to have the endorsement of both New Orleans area and national law enforcement officials. Today's police agencies face great challenges, among them having to deal with problems that might be better handled by mental health workers or social workers so police could be freed to prevent and investigate crimes.

36. Do you believe our federal criminal justice system requires reforms, and if so, what reforms?

RESPONSE: I believe that all institutions can be improved, and our federal criminal justice system is no exception. Reforms that help improve public safety (e.g., targeted enforcement, intervention, prevention, treatment, and reentry efforts) and strengthen public trust (e.g., community policing, transparency, fair and proportional sentencing) should be at the forefront of our considerations.

37. Do you believe federal prosecutors should push for the maximum sentence available in every case? Why or why not?

RESPONSE: Current DOJ guidance on prosecutorial discretion, charging, and sentencing calls for decisions to be "based on the merits of each case and reflect an individualized assessment of relevant facts." *January 29, 2021 Memorandum from the Acting Attorney General on "Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing.* If confirmed, I intend to follow that guidance.

38. In 2016 a former St. Charles, Louisiana District Attorney Harry Morel was accused of criminal sexual conduct by around 22 separate women, according to F.B.I. reports. Despite these heinous allegations, under your watch, Morel pleaded guilty to only one count of obstructing justice, resulting in just a three-year prison sentence and a \$20,000 fine. In a news conference around that time, you stated that Morel “perverted his position of power to take sexual advantage of desperate women who needed help—and he did this over and over again.” If that was the case, why did the U.S. Attorney’s office—under your leadership—charge Morel with just a single count of obstruction of justice?

RESPONSE: The prosecution of Harry Morel for terrible crimes of exploiting people during some of the worst times of their lives had been closed when I became U.S. Attorney in New Orleans. I am proud that my office chose to take a fresh look at the admissible evidence, and based on that review, was able to revive the case and obtain a guilty plea, imprisonment, a fine, and permanent disbarment. Not every case can be a complete vindication for the victims, but every case deserves the objective, rigorous review my office was able to give.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Mr. Kenneth Allen Polite, Jr. to be an Assistant Attorney General, Criminal Division

1. Do you personally own any firearms? If so, please list them.

RESPONSE: Yes. I currently own a Glock 43.

2. Have you ever personally owned any firearms?

RESPONSE: Please see my response to Question #1.

3. Have you ever used a firearm? If so, when and under what circumstances?

RESPONSE: Yes. I have used a firearm for recreational hunting. In addition, I have received firearms training on several occasions.

4. Is the ability to own a firearm a personal civil right?

RESPONSE: My understanding of the law regarding the Second Amendment is informed by the Supreme Court of the United States' opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010). *Heller's* central holding is that the Second Amendment confers an individual rights to bear arms, and *McDonald* holds the right is fundamental and applies to the states and the federal government.

5. Is the criminal justice system systemically racist?

RESPONSE: Our criminal justice system(s) are committed to the fair, just, and impartial enforcement of law and administration of justice. It is important that we ensure that deliberate and/or implicit biases do not undermine the pursuit of these important objectives.

Nomination of Kenneth Allen Polite, Jr.
to be an Assistant Attorney General of the United States
Questions for the Record
Submitted June 2, 2021

QUESTIONS FROM SENATOR COTTON

1. Since becoming a legal adult, have you ever been arrested for or accused of committing a hate crime against any person?

RESPONSE: No.

2. Since becoming a legal adult, have you ever been arrested for or accused of committing a violent crime against any person?

RESPONSE: No.

3. Should illegal aliens who commit crimes in the United States face deportation?

RESPONSE: A person who is convicted for a criminal offense in the United States faces a number of penalties under the law including, in some circumstances, possible deportation.

4. Should the United States prosecute aliens who illegally re-enter the United States after being deported?

RESPONSE: The Department of Justice does, and should, prosecute undocumented persons who illegally re-enter the United States after being previously deported.

5. Should the United States reduce prison sentences for fentanyl traffickers?

RESPONSE: A defendant convicted of committing a federal fentanyl trafficking offense should be sentenced consistent with applicable statutory provisions (particularly the factors articulated in 18 U.S.C. §3553(a)) and in consultation with the Federal Sentencing Guidelines.

6. Should the United States reduce prison sentences for heroin traffickers?

RESPONSE: A defendant convicted of committing a federal heroin trafficking offense should be sentenced consistent with applicable statutory provisions (particularly the factors articulated in 18 U.S.C. §3553(a)) and in consultation with the Federal Sentencing Guidelines.

7. Should the United States reduce prison sentences for meth traffickers?

RESPONSE: A defendant convicted of committing a federal methamphetamine trafficking offense should be sentenced consistent with applicable statutory provisions (particularly the factors articulated in 18 U.S.C. §3553(a)) and in consultation with the federal Sentencing Guidelines.

8. Should the United States reduce prison sentences for gang members who commit violent crimes?

RESPONSE: A defendant convicted of committing a federal violent crime offense should be sentenced consistent with applicable statutory provisions (particularly the factors articulated in 18 U.S.C. §3553(a)) and in consultation with the Federal Sentencing Guidelines.

9. Based on your experience as a federal prosecutor, does the Department of Justice prosecute and seek lengthy prison terms for low-level, non-violent drug possession offenses?

RESPONSE: In my experience, the Department of Justice routinely prioritizes the prosecution of individuals and organizations responsible for either trafficking (not simply possessing) high quantities of illegal drugs or engaging in related criminal activity (e.g., violent crime, money laundering, human trafficking).

10. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

RESPONSE: I received questions for the record from members of the Senate Judiciary Committee on June 2, 2021. To answer these questions, I consulted with Department attorneys, conducted my own research, and conferred with colleagues. After answering the questions, I authorized their transmission to the Senate Judiciary Committee on June 7, 2021.

11. Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. If government officials assisted with writing or drafting your answers, please also identify the department or agency with which those officials are employed.

RESPONSE: Please see my answer to Q. 10.

Senator Blackburn
Questions for the Record to Kenneth Allen Polite, Jr
Nominee to be Assistant Attorney General, Criminal Division

1. Do you believe in defunding police services and reallocating resources to other government services?

RESPONSE: No, I do not believe in defunding police services. Additional community resources – including, but not limited to, mental health treatment, substance abuse treatment and counseling, and housing resources – should also be supported, particularly when a non-law enforcement response is more appropriate.

2. The United States struggles with an unprecedented drug epidemic. According to the National Institute on Drug Abuse, nearly 50,000 people in the U.S. died due to an opioid related overdose in 2019. U.S. Customs and Border Protection seized more than 2,000 pounds of fentanyl which is more than enough to poison the entire American population. The culmination of prescription opioid drug misuse and illegal drug trafficking of methamphetamines, cocaine, heroin and cannabis has created a plethora of options for drug abusers. If confirmed as Assistant Attorney General, how do you plan address this public health emergency and to combat the domestic and international trafficking of illegal drugs?

RESPONSE: If confirmed, I would support efforts to utilize all tools at our disposal – including enforcement, intervention, and treatment – to help address both the public health and public safety concerns posed by opioid drug abuse and illegal drug trafficking.

3. As Assistant Attorney General, how do you plan to address the law enforcement needs in cities experiencing a surge in violent crime and a spike in murder rates?

RESPONSE: If confirmed, I would support efforts to ensure that federal, state, local, Tribal, territorial, and international law enforcement partners are collaborating on the investigation and prosecution of violent crime. In addition, I would encourage efforts to utilize all tools at our disposal. If confirmed, I look forward to being a part of the Attorney General’s recently announced effort to reduce violent crime which includes building law enforcement trust within our communities, prevention and intervention, targeted enforcement priorities, and measuring results.

4. Federal law enforcement agencies have aggressively worked to disable “dark web” marketplaces such as the Silk Road to curtail criminals from acquiring controlled substances, guns, and other dangerous contraband. More must be done as other sites emerge and it becomes easier to carry out illicit transactions through digital currencies. How will you ensure that DOJ partners with the Department of Treasury to strengthen the cryptocurrency enforcement framework?

RESPONSE: If confirmed, I look forward to being briefed on the Department of Justice's current enforcement efforts in this area, including coordination with the Department of Treasury. Further, I would ensure that the Criminal Division's Computer Crimes and Intellectual Property Section and Money Laundering and Asset Recovery Section continue as trusted partners to all law enforcement agencies engaged in the investigation and prosecution of cyber-related criminality.