

**Senator Dick Durbin**  
**Chair, Senate Judiciary Committee**  
**Written Questions for Christopher Schroeder**  
**Nominee to the Office of Legal Counsel**  
**June 30, 2021**

1. When the Intelligence Community Inspector General (ICIG) determines that a whistleblower complaint involves an “urgent concern,” the law requires the Director of National Intelligence to send that complaint to Congress. The Trump Administration did not follow this directive on several occasions. Notably, it withheld the initial whistleblower complaint regarding President Trump’s July 25, 2019, phone call with Ukrainian President Volodymyr Zelensky, despite the fact that the ICIG concluded the complaint addressed an “urgent concern.” These events led to President Trump’s first impeachment trial.

It appears that the Trump Administration relied on a September 3, 2019, Office of Legal Counsel Memorandum Opinion titled “‘Urgent Concern’ Determination by the Inspector General of the Intelligence Community” in deciding to withhold the Ukraine whistleblower complaint. This opinion disagreed with the ICIG’s finding that the complaint addressed an “urgent concern.”

On October 22, 2019, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) sent a letter to then-Assistant Attorney General Steven Engel expressing concern about OLC’s opinion. Their letter stated that the OLC opinion was “wrong as a matter of law and policy” and warned that, if not withdrawn or modified, it could “seriously undermine the critical role whistleblowers play in coming forward to report waste, fraud, abuse, and misconduct across the federal government.”

- a. Do you agree that whistleblowers play a “critical role” in reporting government waste, fraud, and abuse?

**RESPONSE: Yes.**

- b. Do you support maintaining IG independence across the federal government?

**RESPONSE: Yes.**

- c. Will you commit that, if confirmed, you will review the September 3, 2019, Office of Legal Counsel (OLC) Memorandum Opinion titled “‘Urgent Concern’ Determination by the Inspector General of the Intelligence Community?” to determine if it is consistent with the law and whether it should be withdrawn or modified?

**RESPONSE: It is longstanding OLC practice not to announce what questions the Office is considering. Should a question of interpreting the statute addressed in the**

**September 3, 2019, Memorandum come to the Office, the Memorandum will be thoroughly reviewed in the course of determining what the best view of the statute and relevant law is.**

**Senator Chuck Grassley, Ranking Member**  
**Questions for the Record**  
**Christopher H. Schroeder**  
**Nominee to be Assistant Attorney General for the Office of Legal Counsel**

1. In a 2008 book chapter, you described the law of preemption as “importantly influenced by the policy preferences of the administration in office,” because the preemption positions taken by federal agencies “could be reversed by an administration that thought greater deference to state law was appropriate.”<sup>1</sup> Based on your extensive environmental-policy scholarship, I also understand your support for cities, counties, and states pursuing environmental policies that may differ from federal goals.
  - a. What principles do you apply in determining whether a presidential administration should defer to state policies or preempt state policies?
  - b. If a presidential administration has the legal authority to preempt state laws—specifically where state laws do not align with the administration’s preferences—would you ever counsel the administration against preemption? If you would counsel against preemption in situations, please provide some examples.

**RESPONSE: The question whether federal law should preempt state law is a question for Congress in the first instance. In order for the executive branch to have the authority to preempt state law that authority must be supplied by Congress. A federal decision to preempt will typically be dependent on the context. Federal law can address a nationwide problem with a consistent approach, such as safety standards for automobiles; it can protect rights that all citizens enjoy, such as civil rights; and it can avoid inefficiencies that can attend conflicting state laws on the same subject. Local or state laws can be tailored for local conditions and they can be responsive to local or state values and needs. Decision makers ought to evaluate these values, which can sometimes be in tension, in making a preemption decision. At times, these values can be accommodated by federal law establishing a floor or ceiling while respecting federalism values by permitting local variation above or below the federal standard.**

**The core responsibility of the Office of Legal Counsel is to provide legal advice, not policy advice. The Office could be asked whether the law authorizes or prohibits federal preemption in a certain circumstance, and in that case it would be the role of OLC to provide its best view of what the law requires.**

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<sup>1</sup> Christopher H. Schroeder, *Supreme Court Preemption Doctrine, in Preemption Choice: The Theory, Law, and Reality of Federalism’s Core Question* 119, 143 (William Buzbee ed., 2009) (SJQ Attachments Folder 12(a)).

2. In 1996, you authored an OLC opinion advising that the National Park Service’s denial of a commercial climbing license at a Native American sacred site, during a religiously important month, was not a violation of the Establishment Clause.<sup>2</sup> As the OLC head, will you continue to counsel that the Establishment Clause does not ban all government regulation that happens to coincide with religion?

**RESPONSE: The Establishment Clause is a hallmark of the First Amendment, and along with the Free Exercise Clause, provides important protections for religious freedom. The question of whether a federal law or regulation violates the Establishment Clause depends on facts and circumstances of the particular situation. If confirmed, and if called upon to provide a legal opinion on the Establishment Clause, I would endeavor to provide the best view of what the law, including judicial precedents, requires as applied to those facts and circumstances.**

3. My understanding is that, in 2012, you helped the Obama administration develop a series of gun-control recommendations. These recommendations included administrative options that you called “certainly a less involved process” than going through Congress.
  - a. Do you expect to work on gun-control issues in this current administration?

**RESPONSE: The Office of Legal Counsel could be asked to interpret an aspect of the Gun Control Act, or another federal law bearing on permissible gun regulation under statutes that Congress has enacted. It could also be asked to review related regulations. The Office does not typically offer policy advice on gun regulation issues.**

- b. If so, what are the top four or five priorities in the area of gun regulation?

**RESPONSE: The Office of Legal Counsel does not formulate policy advice on possible gun regulations, and I would come to the Office, should I be confirmed, with no agenda on this or any other departmental policy.**

4. Does the Second Amendment include the right to carry a personal firearm? Why or why not?

**RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects “an individual right to keep and bear arms.” *Id.* at 595. Under that ruling, there is, then, a right to “bear” arms in at least some circumstances. If confirmed and presented with a question related to the Second Amendment, I would work to ensure any OLC opinion offers the best view of the law consistent with *Heller* and other relevant precedents.**

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<sup>2</sup> Permissible Accommodation of Sacred Sites, 20 Op. O.L.C. 331 (1996) (SJQ Attachments Folder 12(c)).

5. Does the Twenty-Third Amendment prevent Congress from statutorily admitting the District of Columbia as a state? Why or why not?

**RESPONSE: This is an issue raised by legislation currently under consideration by Congress and as I stated at my confirmation hearing, this is also an issue under review by the Office of Legal Counsel. The review is still under deliberation and not yet complete.**

6. You have spoken critically in the past about the unitary view of presidential power, going as far as to say that the Bush administration's theories of executive power were not faithful to the Constitution. Will you please describe the view of presidential power that you advocate?

**RESPONSE: This is a complex subject and my views vary depending on the particular situation. I believe the remarks you reference were made in connection with the President's war powers, the extent of which has raised an issue called the "Commander-in-Chief override." Early in the George W. Bush administration, this override was asserted as one basis for the President's constitutional authority to disregard lawfully enacted statutes prohibiting torture, as well as a defense for the Bush administration's warrantless wiretapping program, which was prohibited by the Foreign Intelligence Surveillance Act. The best view of the Constitution's grant of the Commander in Chief power does not authorize the President to disregard such laws.**

7. As you stated in your hearing, the Office of Legal Counsel's job is to interpret the law and offer impartial legal advice, not to make policy. You gave an example of a time when your legal counsel differed from the then-current administration's policy preferences.
  - a. If the law conflicts with your personal policy preferences—on an issue that requires your legal counsel—what analytical process do you follow to ensure that your counsel conforms with the law?
  - b. If the law conflicts with the policy preferences of the presidential administration—on an issue that requires your legal counsel—what process do you follow to ensure that your counsel conforms with the law?

**RESPONSE: Should I be confirmed, I will adhere to the best practices of the Office that are designed to promote answers that reflect the best view of the law and that avoid bias toward personal policy preferences, the policy**

**preferences of the administration, or any other improper biases. Most prominent of these practices are ensuring that opinions are thoroughly discussed with all the participating attorneys in the office, soliciting expert advice from other components and offices in the Department when appropriate, and guaranteeing that the final opinion is carefully reviewed by at least two deputies in the Office.**

8. In June 2017, I wrote to President Trump to raise concerns about an erroneous opinion issued by the Office of Legal Counsel which claimed that individual members of Congress are not constitutionally authorized to request information from the Executive Branch. The opinion created a false distinction between oversight and what it called “non-oversight” requests. It relegated requests from non-chairmen and individual members of Congress to the same status as Freedom of Information Act requests. I believe this position was inconsistent with the Constitution, which does not even mention committee chairmen. Each member of Congress is a duly elected constitutional officer with the authority to conduct oversight and request information from the Executive Branch. Before his confirmation to the position you are seeking, Steve Engel agreed, saying, “In my view, the Executive Branch should seek to satisfy the legislative interests reflected in the information requests of individual Members ....”

- a. Do you agree with me that every member of Congress is a constitutional officer with the authority to conduct oversight?

**RESPONSE: Individual Members of Congress are constitutional officers and, as such, are authorized to seek information from the executive branch. The Department should respond to requests for information made by any member of Congress as fully as possible, consistent with the law and the Department’s litigation, law enforcement, and national security responsibilities.**

- b. Do you agree that it is the responsibility of the executive branch to answer all congressional inquiries, regardless of whether the member making the request is a committee chairman or not?

**RESPONSE: The Attorney General has stated that members of Congress are entitled to responses to their letters and that the Department should be as responsive as possible consistent with longstanding Department policies and practices. I agree with the Attorney General.**

9. *The Hill* reports that some former Trump appointees now hold career positions in the federal government. Various liberal activist groups are trying to purge these career employees from the federal payroll. These employees potentially include four individuals in national security positions, nine individuals in environmental regulation positions, and

three Justice Department officials.<sup>3</sup> What is your view on removing federal employees who joined the government during the last presidential administration—whether as appointees and career employees—and now hold career positions?

**RESPONSE: Personnel decisions at the Department of Justice should be made consistent with civil service laws and Department policies. Prohibited considerations, including political affiliation, in hiring for career positions should play no part in such decisions.**

10. As a Justice Department veteran, you are likely familiar with the murals created for the Department's main building. When the Justice Department building was created during the Great Depression, the Treasury Section of Fine Arts commissioned artists to create 68 murals for its halls, depicting scenes, figures and subjects "cover[ing] everything from Rome and the Bible to medieval Europe to English common law and the U.S. Constitution."<sup>4</sup> In a January 5, 2009, NPR article, a Justice Department tour guide explained that "we drip symbolism in this building. This building is a sermon, a hymn to justice."<sup>5</sup> The article described the murals as "real art on the walls, showing America at its worst, and the redemptive power of law and justice."<sup>6</sup> Do you agree that this public art is important and ought to be maintained and displayed where it is?

**RESPONSE: I greatly support and personally value the display of public art, including that currently on display in the headquarters of the Department of Justice.**

11. Please explain, with detail, the process by which you became a nominee for the Assistant Attorney General for the Office of Legal Counsel.

**RESPONSE: I was contacted on or about February 25, 2021, by the Presidential Personnel Office, and asked if I would consider a position at the Department of Justice. The President announced his intent to nominate me on April 12, 2021.**

12. Have you had any conversations with individuals associated with any outside group in connection with this nomination? If so, please explain the nature of the conversations.

**RESPONSE: I have had no conversations with individuals associated with any outside group in connection with this nomination.**

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<sup>3</sup> Brett Samuels, *Dozens of Trump appointees 'burrow' into Biden government*, The Hill (Mar. 9, 2021), <https://thehill.com/homenews/administration/542324-dozens-of-trump-appointees-burrow-into-biden-government>.

<sup>4</sup> The Living New Deal, *Kennedy Department of Justice: Robinson Murals – Washington D.C.*, <https://livingnewdeal.org/projects/department-justice-boardman-robinson-murals-washington-dc/>.

<sup>5</sup> Ari Shapiro, *Murals Depict Power of Law and Justice*, NPR (Jan. 5, 2009), <https://www.npr.org/templates/story/story.php?storyId=98783331>.

<sup>6</sup> *Id.*

13. Please explain with particularity the process by which you answered these questions.

**RESPONSE: The Department of Justice received these questions on June 30, 2021. I worked with Department attorneys, conducted research, and answered the questions. I finalized answers to the questions and authorized their transmission to the Committee on July 12, 2021**

14. Do these answers reflect your true and personal views?

**RESPONSE: Yes.**

**Nomination of Christopher H. Schroeder  
to be an Assistant Attorney General, Office of Legal Counsel  
Questions for the Record  
Submitted June 30, 2021**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. In recent years, opinions from the Office of Legal Counsel have been highly criticized by Article III judges. In *CREW v. DOJ*, Judge Amy Berman Jackson found “the declarations and the justifications in the agency’s pleadings for invoking Exemption 5 to be misleading.”<sup>1</sup> In *Committee on the Judiciary v. McGahn*, Judge Ketanji Brown Jackson wrote that OLC opinions “do not themselves constitute legal precedents and are manifestly inconsistent with the constitutional jurisprudence of the Supreme Court and the D.C. Circuit in many respects.”<sup>2</sup> In *Trump v. Vance*, Judge Victor Marrero was “not persuaded that [the Court] should accord the weight and legal force the President ascribes to the DOJ Memos, or accept as controlling the far-reaching proposition for which they are cited.”<sup>3</sup> The opinions in both *McGhan* and *Vance* relied on a 2008 case, *Committee on the Judiciary v. Miers*,<sup>4</sup> which held that the former White House counsel was not entitled to absolute or qualified immunity and needed to comply with a subpoena to testify before the House Judiciary Committee. It does not appear that OLC took the court’s repudiation in *Miers* seriously, as it made substantially similar arguments ten years later in *McGahn* and *Vance*. Judge Ketanji Brown Jackson noted that the United States District Court for the District of Columbia has seen “these same facts and these same legal arguments before, and DOJ has done little to persuade this Court that the case should turn out differently in the end.”<sup>5</sup> Suffice it to say OLC’s credibility with the courts and with this committee has been called into question.
  - a. What steps, if any, did OLC take between that date of the decision in *CREW v. DOJ* and the date of your hearing to reconsider its opinion in light of the court’s criticism?
  - b. In *McGahn*?
  - c. In *Vance*?

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<sup>1</sup> *CREW v. DOJ*, No. 18-5116 (D.D.C. 2021) (Judge Amy Berman Jackson) (ordering DOJ’s production of the 2019 OLC Memo concluding that Trump’s conduct did not meet the elements of obstruction of justice, and criticizing DOJ for its “misleading” characterization of that memo).

<sup>2</sup> *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 155 (D.D.C. 2019) (Judge Ketanji Brown Jackson) (holding that a president’s senior-level aide is not a president’s “alter ego,” as asserted by OLC, and did not qualify for absolute immunity from Congressional subpoenas seeking testimony).

<sup>3</sup> *Trump v. Vance*, 395 F. Supp. 3d 283, 305 (S.D.N.Y. 2019) (Judge Victor Marrero) (finding OLC’s assertion of the president’s absolute immunity from criminal process of any kind could be “far-reaching” and “potentially enabl[e] both the President and any accomplices to escape being brought to justice”).

<sup>4</sup> *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (Judge John Bates) (holding that former White House counsel was not entitled to absolute or qualified immunity and must comply with subpoena to testify before House Judiciary Committee).

<sup>5</sup> 415 F. Supp. 3d 148, 155.

d. In *Miers*?

**RESPONSE:** Should I be confirmed, the Office under my leadership will engage with every question presented to us with the intention of providing the best view of the law. In this process, we review the prior work of the Office on or related to the subject. At the same time, OLC should not be hidebound in following the prior opinions of the Office, and should deviate from them when they do not reflect that best view. Whenever an OLC opinion has been the subject of a judicial decision, that decision and its reasoning should inform and will be acknowledged in the Office's subsequent analysis of the topic.

With respect to the specific instances into which you have inquired, I am not aware of any steps prior administrations may have taken, and it has been a longstanding practice of the Office not to announce in advance issues or questions upon which the Office is working. That said, I can make the following comments on the specific instances:

- a. The memorandum at issue in *CREW v. DOJ* is not an OLC opinion and would not be treated as such with respect to any future decision rendered by OLC. To the best of my knowledge, it was written for the Attorney General by the then-Assistant Attorney General for OLC and the Principal Associate Deputy Attorney General, on subjects that would not ordinarily be ones upon which the Office worked.
  - b. and d. If and when the Office is presented with the legal question raised in each of these cases -- whether a former close advisor to the President is categorically immune from appearing before Congress for questioning -- it would be incumbent on OLC to consider and address the criticisms of OLC's views raised by Judges Bates, Jackson and Henderson in the *Miers* and *McGahn* decisions. Under my leadership, OLC will do that.
  - c. In the *Vance* decision, Judge Marrero questioned the Department of Justice's longstanding interpretation of the Constitution that a sitting President enjoys immunity from criminal prosecution. Once again, if and when I am presented with that legal question, I will consider it anew, taking account of Judge Marrero's views as well as the considerable commentary about the Department's position, in the course of that reconsideration.
2. Recently, the American Constitution Society coordinated a statement that declared the Justice Department's "Office of Legal Counsel has been in crisis for some time."<sup>6</sup> The authors state that OLC has issued tenuous legal opinions justifying torture, provided cover for presidential activities that exceeded the law's limits, and distorted our system of separation of powers. They say that OLC failed to recognize Congress's prerogatives as a co-equal branch of government in politically charged disputes. These are serious concerns.

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<sup>6</sup> American Constitution Society, *The Office of Legal Counsel and the Rule of Law*, <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf>.

Contributors to the statement, which included legal scholars and former OLC attorneys, have a specific recommendation: transparency. “OLC should maintain a strong presumption in favor of publishing its final opinions within a reasonable period of time after they have been issued.” In rare instances where OLC withholds its opinions from the public, the opinions should be provided to Congress, and OLC should publish an index listing those memos individually and describing their contents. Twenty civil society organizations endorsed this approach in a May 26th letter to you.<sup>7</sup> You also endorsed this framework in 2004, in a letter that declared “OLC should follow a presumption in favor of timely publication of its written legal opinions.”<sup>8</sup>

- a. Currently only a subset of OLC opinions become publicly available, and OLC policy appears to lean towards nondisclosure. Should you be confirmed, will you agree to revisit the policies concerning disclosure of OLC opinions and consult with the Committee regarding the implementation of automatic, timely, and proactive disclosure of all final OLC legal opinions?
- b. Neither Congress nor the public knows how many OLC opinions exist as controlling law. Will you revisit OLC policies and consider providing to Congress the full text of all final OLC opinions that an agency relies upon to justify a major policy decision or executive action?
- c. Will you consider updating OLC policies in consultation with the Judiciary Committee to address the issue of automatically making publicly available an index of all final OLC opinions without exception?

**RESPONSE: Transparency is important. The presumption in the Office under my leadership, should I be confirmed, will be in favor of publication of the Office’s formal opinions. I intend to follow the 2010 OLC memorandum titled “Best Practices for OLC Legal Advice and Written Opinions” which states that “the Office operates from the presumption that it should make significant opinions fully and promptly available to the public.” If confirmed, I would be pleased to continue to discuss with you and other members of the Judiciary Committee ways by which OLC can improve transparency of its work.**

3. What do you see as the benchmarks that will give you and others comfort that OLC has restored its integrity and credibility? What do you see as policies or constraints that will tend to prevent the failings that have blemished OLC?

**RESPONSE: Holding OLC to the highest standards of quality and impartiality, conducting thorough and thoughtful analysis of every question presented to OLC, and ensuring OLC opinions represent the best view of the law are all essential to the**

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<sup>7</sup> Letter from Demand Progress et al. to Christopher Schroeder, Assistant Attorney General for the Office of Legal Counsel (May 26, 2021),

[https://s3.amazonaws.com/demandprogress/letters/Letter\\_Assistant\\_Attorney\\_General\\_OLC\\_2021-05-26.pdf](https://s3.amazonaws.com/demandprogress/letters/Letter_Assistant_Attorney_General_OLC_2021-05-26.pdf).

<sup>8</sup> Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel*, (Dec. 21, 2004),

[https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2927&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2927&context=faculty_scholarship).

**integrity and credibility of the Office. Making the Office's significant opinions publicly available, thereby permitting scrutiny and evaluation by others, is also an important ingredient in demonstrating that integrity and credibility.**

**Nomination of Christopher H. Schroeder**  
**to be Assistant Attorney General for the Office of Legal Counsel** Questions for the Record  
**Submitted June 30, 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. Please describe with particularity the process by which you answered these questions and the written questions of the other members of the Committee.

**RESPONSE: The Department of Justice received these questions on June 30, 2021. I worked with Department attorneys, conducted research, and answered the questions. I finalized answers to the questions and authorized their transmission to the Committee on July 12, 2021.**

4. 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: No person outside the federal government wrote or drafted answers to these questions. I did consult with attorneys at the Department of Justice in preparing these answers.**

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

**Questions for the Record for Christopher Henry Schroeder, Nominee to be Assistant Attorney General for the Office of Legal Counsel, Department of Justice.**

**I. Directions**

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

1. What, if any, are the limitations on a President's prosecutorial discretion?

**RESPONSE:** As Attorney General Garland testified at his confirmation hearing, prosecutors and other government agencies may exercise discretion about how to allocate their limited enforcement resources. However, the Executive Branch cannot simply decide, based on a policy disagreement, that it will not enforce a law at all. The decision – or the exercise of discretion – to start an enforcement action, as the Supreme Court has articulated, requires an agency to “balanc[e] ... a number of factors which are peculiarly within its expertise.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). These factors include “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.” *Id.* An officer also must abide by any limits on prosecutorial discretion enacted by the Congress.

2. In a 2014 article on the DACA program, you described immigration as a “very poor field” for challenging the constitutionality of presidential authority and action. Please explain the basis for this statement.

**RESPONSE:** The legal actions taken to establish the program were taken by the Secretary of Homeland Security based upon statutory authority. As a result, challenges to the action are challenges to the exercise of that statutory authority and provided no occasion to examine what constitutional authority the President might have or what the limits of that authority might be.

3. What limits, if any, does the Take Care Clause of the Constitution place on Presidential prosecutorial discretion?

**RESPONSE:** The President rarely exercises prosecutorial discretion. With respect to a department's exercise of prosecutorial discretion, a Secretary must abide by the limits on prosecutorial discretion enacted by the Congress and, to the extent available, exercise discretion by considering the complex of values identified by the Supreme Court in *Heckler v. Chaney*. As for the President, he or she must “take care that the laws be faithfully exercised,” and this applies to all executive branch exercise of federal authority, including the exercise of prosecutorial discretion. This requires that the officer assigned by law performs his or her “duty faithfully - that is, honestly: not with perfect correctness of judgment, but honestly.” *The President and Accounting Offices*, 1 U.S. Op. Att'y Gen. 624, 626 (1823).

4. Other than the Take Care Clause, are there any Constitutional limits on the president's prosecutorial discretion? If so, what are they?

**RESPONSE:** Prosecutorial discretion is primarily exercised by agencies and departments. Their actions are cabined by numerous constitutional limits. For

**example, such discretion may not be exercised to discriminate on the basis of race, sex, or religion, or to favor political supporters or punish political enemies.**

5. Do you believe that prosecutorial discretion must be exercised on a case-by-case basis?

**RESPONSE: Earlier this year, the Acting Attorney General issued a memorandum underscoring that, “[f]or decades, consistent with the Principles of Federal Prosecution, the Department of Justice has provided guidance to federal prosecutors underscoring the importance of making careful, case-specific assessments as to what matters to investigate, which charges to bring, when to enter into plea agreements, and how to advocate at sentencing.” An Attorney General or other officials may set more categorical enforcement priorities, but that is not the same as announcing that certain categories of unlawful conduct will never be prosecuted.**

6. Would it be unlawful for a president to create a program in which he declines to enforce income tax laws? Why or why not.

**RESPONSE: The IRS, like any government agency, can set enforcement priorities, but that is different from declining to enforce the income tax laws.**

7. Could the IRS lawfully exempt a defined group of people from paying taxes by announcing that it will not pursue any action against members of this group as a matter of prosecutorial discretion?

**RESPONSE: Exercising prosecutorial discretion does not entail “exempting” anyone from an obligation to comply with the law. The individuals remain subject to the law and they can be punished for violating it at any time.**

8. I understand that you believe the President has the authority to decline to deport categories of individuals, and that this aspect of DACA was lawful. But DACA also made recipients eligible for a work permit. Do you believe this affirmative grant of benefits was lawful? If so, please explain in detail your reasoning.

**RESPONSE: The eligibility for a work permit for individuals covered by DACA is not an exercise of prosecutorial discretion. Deferred action is a longstanding classification that is recognized by statute. Regulations promulgated in the Reagan administration provide that employers may lawfully hire many categories of persons who are not lawfully entitled to remain in the United States but whose removal has been deferred for different reasons. See 8 C.F.R. 274a.12(c)(14); see also 8 C.F.R. 274a.12(a)(11). The authority to establish such categories of work eligibility is recognized in federal statute. See 8 U.S.C. 1324a(h)(3)(B).**

9. Can a President create an immigration status that was never authorized by Congress?

**RESPONSE: No. The President has certain authorities relating to foreign affairs**

**and military affairs that may authorize him/her to admit to the United States certain persons, such as an ambassador, in spite of the absence of congressional authorization. Otherwise, the President and the executive branch cannot create an immigration status.**

10. Does the President have the power to return to the United States an individual who was deported from the United States pursuant to a lawful order of removal absent that individual qualifying for and being awarded a visa? If so, under what circumstances and under what authority?

**RESPONSE: I am unaware of any such power, with the possible exception noted in Response to Question 9 of a foreign affairs or military affairs authority.**

**Senator Mike Lee**  
**Questions for the Record**  
**Christopher Schroeder, AAG, Office of Legal Counsel**

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: Religious freedom is a founding principle of the United States. If confirmed, I will seek to ensure that all Department of Justice guidance, including any guidance on this subject, is consistent with relevant constitutional and statutory provisions and with applicable precedent. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

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

**RESPONSE: The government must respect the rights enshrined in the Constitution, including the right to freedom of speech, which extends to what some call hate speech. The Supreme Court has repeatedly held that the First Amendment presumptively bars viewpoint discrimination. See, e.g., *Matel v. Tam*, 582 U.S. \_\_\_ (2017). If confirmed, I will seek to ensure that all Department of Justice guidance, including any guidance on this subject, is consistent with any relevant constitutional and statutory provisions and with applicable precedent.**

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

**RESPONSE: Civil asset forfeiture is authorized under federal law, including 18 U.S.C. § 981. If confirmed, whenever I am requested to review Department of Justice guidance, including any guidance on this subject, I will seek to ensure that it is consistent with the Constitution and federal laws, including applicable precedent.**

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 have not considered this question. If confirmed and then asked to provide a legal opinion on this subject, I will provide guidance based on the law, Constitution, and applicable judicial precedent.**

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: If confirmed as Assistant Attorney General for the Office of Legal Counsel, I would not have responsibility for enforcing laws. As a general matter, I support enforcement of statutes that criminalize the trafficking and exploitation of children.**

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: A core function of OLC is to help the President follow his constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." Under my leadership if I am confirmed, the Office will assist the President by providing its best view of what the law, the Constitution, and precedents require. OLC opinions should never be written merely to justify the policy preferences of the President or other officials. If OLC concludes that an Executive Branch proposal is unlawful, where possible and appropriate, OLC will seek to propose lawful alternatives.**

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: As Attorney General Garland testified at his confirmation hearing, prosecutors and other government agencies may exercise discretion about how to allocate their limited enforcement resources. However, the Executive Branch cannot simply decide, based on a policy disagreement, that it will not enforce a law at all. The decision – or the exercise of discretion – to start an enforcement action, as the Supreme Court has articulated, requires an agency to "balanc[e] ... a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* An officer also must abide by any limits on prosecutorial discretion enacted by the Congress.**

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

**RESPONSE: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects "an individual right to keep and bear arms." *Id.* at 595. Under that ruling, there is, then, a right to "bear" arms in at least some circumstances. If confirmed and presented with a question related to the Second Amendment, I would work to ensure any OLC opinion offers the best view of the law consistent with *Heller* and other relevant precedents.**

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: While I am not familiar with this category of laws, if confirmed and if I am asked to advise about this or any legislation, I will consider all relevant constitutional principles, including due process, in providing a legal opinion.**

10. Do you support banning specific types of firearms?

**RESPONSE: If confirmed as Assistant Attorney General for the Office of Legal Counsel, I will not have a policy making role concerning firearms. Any legal advice I provide would be based on the law and Constitution as interpreted by the courts. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

11. Do you support banning large magazines?

**RESPONSE: If confirmed as Assistant Attorney General for the Office of Legal Counsel, I will not have a policy making role concerning firearms. Any legal advice I provide would be based on the law and Constitution as interpreted by the courts. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

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

**RESPONSE: If confirmed as Assistant Attorney General for the Office of Legal Counsel, I will not have a policy making role concerning firearms. Any legal advice I provide would be based on the law and Constitution as interpreted by the courts. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

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: I did not write or publish any such tweet.**

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: Yes.**

a. What is the difference between “equity” and “equality?”

**RESPONSE: Although I am not an expert in this area, my understanding is that some distinguish between these two terms—which do not have one simple universal meaning—taking equality to mean treating everyone who is similarly situated the same, and taking equity to mean fairness and understanding that there are communities that may face particular historical and present-day barriers. Equity requires accounting for the fact that not everyone starts from the same footing, and works to address more longstanding barriers. In Executive Order 13985, President Biden 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.”**

b. In order to achieve “equity,” is it ever necessary to discriminate *against* members of some groups in favor of others?

**RESPONSE: Please see response to subpart a.**

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: Please see response to subpart a.**

15. How do you define “systemic racism?”

**RESPONSE: Attorney General Garland testified that “there is discrimination and widespread disparate treatment of communities of color and other ethnic minorities in this country.” I agree with his view.**

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

**RESPONSE: Critical race theory has no single definition. For me, it is an inquiry into whether there are institutions or practices that contribute to “systemic racism” as defined in my response to the prior question.**

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

**RESPONSE: Please see response to Question 16.**

18. 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 do not consider any of these institutions racist. Acknowledging the existence of systemic racism in society does not mean that any particular institution or individual is systemically racist.**

19. 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 Office of Legal Counsel at the Justice Department? If so, which policies do you plan to institute?

**RESPONSE: If confirmed, I would abide by the policies of the President and the instructions of the Attorney General to ensure fair and impartial administration of justice for all Americans. Any policies that I may adopt in the Office of Legal Counsel will be consistent with the overall Department-wide policies determined by Attorney General Garland, and will be consistent with the law, regulations, and applicable court precedents.**

20. 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: If confirmed, I would abide by the policies of the President and the instructions of the Attorney General to ensure fair and impartial administration of justice for all Americans.**

21. 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, any legal opinions offered by me or of the Office of Legal Counsel would be based on the law and not on my own personal preferences.**

22. 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, any legal opinions offered by me or of the Office of Legal Counsel would be based on the law and not on my own personal preferences.**

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

**RESPONSE: If confirmed and asked to render a legal opinion, I would follow the law, including Supreme Court precedent. I note that in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court stated that the court “need not resolve” the question of when life begins. *Id.* at 159.**

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

**RESPONSE: If confirmed and asked to render a legal opinion, I would follow the law, including Supreme Court precedent. I note that in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 777 (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 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.”**

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

**RESPONSE: Please see the response to question 24.**

26. Do you support laws penalizing fetal homicide?

**RESPONSE: I am not familiar with the laws referenced in this question and do not have an opinion about them.**

27. 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: I have never studied this law. If confirmed and asked to provide a legal opinion about this law, I would study carefully the text of the law, the Constitution, and all relevant judicial precedent. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

28. 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 and asked to provide an opinion regarding the applicability of federal law, I would look to the statute, the Constitution, and judicial precedent.**

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

**RESPONSE: I am not aware of what circumstances you may be referring to in your question. If confirmed and asked to provide an opinion regarding the applicability of federal law, I would look to the statute, the Constitution, and judicial precedent.**

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

**RESPONSE: I have not closely studied this law. If confirmed and asked to provide a legal opinion about this law, I would look to the statute itself and any relevant judicial precedent. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

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

**RESPONSE: If confirmed, I would render legal opinions based on the law, the Constitution, and judicial precedent. The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice**

32. Will you commit that the Office of Legal Counsel 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 do not know the extent, if any, to which the Department of Justice relies on or receives information from this source. If confirmed, I will evaluate legal questions based on the law, Constitution, and judicial precedent.**

33. 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: Like Attorney General Garland, I personally do not support defunding police. That said, the primary role of the Office of Legal Counsel is to provide legal advice, not policy advice.**

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

**RESPONSE: The primary role of the Office of Legal Counsel is to provide legal advice, not policy advice. If I am confirmed as Assistant Attorney General for the Office of Legal Counsel, and asked to provide a legal opinion as to specific policies, I would do so based on the law, Constitution, and judicial precedents.**

35. In 2007, you wrote that "[b]y serving its role of connecting law with evolving social values, the Court often makes 'substantial changes in previously governing law.'"

- a. What provision of the United States Constitution endows the Supreme Court with the “role of connecting law with evolving social values?”

**RESPONSE: No provision of the Constitution articulates how federal judges perform their task of judicial review and constitutional analysis. The language you quote above was an attempt to encapsulate part of the thinking of Professor Paul Mishkin, who was himself trying to describe as a matter of historical fact what judges do when applying an over 200-year-old Constitution to a society that the Framers did not experience or contemplate.**

- b. Relatedly, what Constitutional provision empowers the Court (specifically, 5 or more justices on the Court) to change a Constitutional provision ratified by the people’s duly elected representatives or the people themselves?

**RESPONSE: No provision of the Constitution empowers the Supreme Court to change a Constitutional provision.**

- c. If a judge can, as you’ve suggested, constructively amend the Constitution in response to evolving social values, what’s to guarantee that those changes result in desirable (e.g., *Brown v. Board of Education*) rather than unjust (e.g., *Korematsu v. United States*) outcomes?

**RESPONSE: The passage you quote is my articulation of Professor Mishkin’s thinking. Justice Scalia articulated one facet of applying constitutional protections to evolving conditions when he wrote for the Court that the Fourth Amendment prevented use of thermal imaging technology to acquire information from the inside of a house, even though law enforcement did not enter the house to acquire it, which older cases had required in order for the Fourth Amendment to apply. “This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Kyllo v. United States*, 533 U.S. 27, 34 (2001). “To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.” *Id.* As the Constitution ages, Justices often attempt to prevent similar erosions of constitutional guarantees by recognizing the significance of social evolution.**

36. In 2009, you wrote: “If the weasel words [used to carve-out discretion for the President’s executive authority] are not carefully defined—and their slippery nature is why we call them weasel words—then it is not clear whether a president will later drive a truck through them or thread a needle.” In your capacity as AAG for the Office of Legal Counsel, what steps will you take to ensure that the words outlining the scope of executive power favor actions that “thread a needle” rather than “drive a truck” through these “weasel words?”

**RESPONSE: If I am confirmed, in examining all questions of executive power – as**

**well as any other legal question I may be asked -- I will adhere to the best practices of the Office that are designed to promote answers that reflect the best view of the law, without regard to my personal policy preferences, the policy preferences of the administration, or any other improper biases. Most prominent of these best practices are ensuring that opinions are thoroughly discussed with all the participating attorneys in the office, soliciting expert advice from outside the Office when appropriate, and guaranteeing that the final opinion is carefully reviewed by at least two deputies in the Office.**

**Senator Ben Sasse**  
**Questions for the Record**  
**U.S. Senate Committee on the Judiciary**  
**Hearing: “Nominations”**  
**June 23, 2021**

For all nominees:

1. Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?

**RESPONSE: No.**

2. Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?

**RESPONSE: No.**