

QUESTIONS FOR THE RECORD
RACHEL L. BRAND
NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL

SENATOR DIANNE FEINSTEIN, RANKING MEMBER

1. Environment / EPA

During your time representing the U.S. Chamber of Commerce in litigation, you joined a brief filed by a number of organizations in *Utility Air Regulatory Group v. EPA*.¹ You argued that the Environmental Protection Agency (EPA) had exceeded its authority under the Clean Air Act when it proposed to regulate the emission of greenhouse gases from power plants and other stationary sources.

During the course of this lawsuit, you attacked the EPA for imposing a “steady stream of onerous regulations,” and “failing to calculate the costs of the rules.”²

While the Court rules against the EPA in a 5-4 ruling, it upheld the EPA’s ability to regulate greenhouse gas emissions from sources they were otherwise already regulating. In effect, EPA was allowed to regulate 83% of emissions sources, rather than 86% as proposed. Justice Scalia authored the seven-to-two affirmation, [commenting](#) that “EPA is getting almost everything it wanted in this case.”

This authority was the basis for the Clean Power Plan, which will cut emissions from the electricity sector by almost one-third by 2030.

- a. Given your role at the Chamber of Commerce will you recuse yourself from decisions about whether to defend regulations under the Clean Air Act? Or under the Clean Power Plan?
- b. Do you acknowledge that climate change poses a very real threat to the nation and our security?
- c. Do you agree that human beings are at least partly responsible for the profound uptick in global warming that we have seen in recent years?
- d. Given that the EPA has been interpreting the Clean Air Act and other environmental legislation for decades, do you think that the agency’s interpretations warrant considerable deference from the courts?

¹ Joint Reply Brief of Petitioners, *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (Nos. 12-1146, -1248, -1254, -1268, -1269, and -1272) (SJQ Response to Question 14(e) at p. 829 of the PDF).

² Rachel Brand, Speech to the Houston Chapter of the Federalist Society (Oct. 21, 2013) (SJQ Response to Question 12(d) at p. 436 of the PDF).

- e. President Trump has said that he intends to “put the regulation industry out of work and out of business.” Further, he has already taken a number of steps to roll back environmental regulations. What about the longstanding interpretations of the EPA, Army Corps of Engineers, and other expert agencies justifies this regulatory about-face?
- f. Do you think it is appropriate for the President to roll back environmental regulations when the expert agencies tasked with implementing environmental legislation have previously said that the regulations were crucial to protecting the environment?

RESPONSE: I believe that enforcing the environmental statutes within the Justice Department’s jurisdiction and defending regulations promulgated by other agencies are important functions of the Environment and Natural Resources Division. Agencies other than the Department of Justice have primary responsibility for assessing scientific and policy considerations related to climate change, and on those questions, I would defer to the agencies entrusted by Congress with making those judgments. Agencies’ regulatory actions are generally governed by the Administrative Procedure Act, which requires that agencies engage in reasoned decision making, even when an agency amends or repeals a rule. As to the deference due to agencies’ interpretations, there is a well-developed body of case law governing these questions, and the answers depend on a variety of considerations, including what authority Congress granted the agency and what type of text is being interpreted.

Finally, I take recusal questions very seriously and will follow the rules and procedures set forth in federal law and in the canons of legal ethics, consulting with the ethics officials in the Department of Justice.

2. Hate Crimes Investigation and Prosecutions

Since the 2016 election, there has been an alarming rise in hate crimes against religious, racial, and other minorities across the country. Even using the most conservative estimates, since November 9, 2016, there have been over 250 incidents of assault, harassment, vandalism, and even bomb threats against religious, racial, and other minorities across the country. More than 100 of these vicious acts were perpetrated by individuals who specifically invoked President Trump and his election victory while committing the crime. In the last seven weeks alone, there have been more than 100 bomb threats against Jewish community centers across the country. On February 23rd, a man of Indian descent was brutally shot and killed by a Kansas native who screamed “get out of my country” before he opened fire.

Now, more than ever, the Justice Department must put to rest any questions about its willingness to enforce our civil rights laws and protect religious, racial, and other minorities whose safety and security hang in the balance.

- a. What concrete steps will you take to ensure that the investigation and prosecution of hate crimes is an enforcement priority for the Justice Department?
- b. Do you believe the shooting of three Indian men in Kansas by the perpetrator who said “get out of my country” before he opened fired and subsequently bragged about shooting foreigners, be prosecuted as a federal hate crime? If not, why not?

RESPONSE: I am committed to fully and fairly enforcing all laws within the Department’s jurisdiction, including federal hate crimes statutes. If confirmed, I will consult with Justice Department staff responsible for investigating and prosecuting hate crimes to determine whether they have sufficient resources and guidance. I am not familiar with the specific facts of the case you referenced, and therefore do not believe it would be appropriate for me to comment on it.

3. National Security / Travel Ban

In a speech to the Federalist Society Florida Chapters Conference in February 2015, you argued that in the context of national security, the President must be able to exercise his “power with the nimbleness and flexibility required to predict and respond to a very wide array of foreign threats.” President Trump has agreed with this reasoning and used it to assert that his executive order banning refugees and travelers from Muslim-majority countries was “unreviewable” by the courts. This argument was unanimously rejected by the 9th Circuit as “contrary to the fundamental structure of our constitutional democracy.”

- a. Do you believe that the President’s powers in the realm of national security are “unreviewable” by the courts?
- b. How would you articulate the limits of the President’s national security powers?

RESPONSE: The quote above does not address the judicial reviewability of the President’s actions in the area of national security. Statutes specifically provide for judicial review of certain national security-related actions taken by the federal government, and the federal courts have addressed the judicial reviewability of certain other actions. The standards for any judicial review of the President’s exercise of national security powers depend on all the facts and circumstances of the case and the nature of the legal claims at issue. It would be inaccurate to say that the President’s national security actions are never subject to judicial review, as the Supreme Court and the lower courts have engaged in such review in numerous cases.

4. Voting Rights

On January 25, 2017, just days after being sworn in, President Trump wrote on Twitter that he would “be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and even, those registered to vote who are dead (and many for a long time).” Attorney General Sessions has stated that he believes voter fraud is a major problem threatening the integrity of our elections. However, the facts tell a very different story. There is simply no evidence showing wide scale voter fraud, while there is substantial evidence demonstrating systematic voter suppression against minorities.

- a. Will you commit to advocating for and pursuing voter suppression cases against state voter ID laws that are demonstrably disenfranchising certain classes of voters?
- b. Do you agree with Attorney General Sessions’ decision to withdraw the Department of Justice’s objection to Texas’ voter ID law, Senate Bill 14, after years of arguing that the law was enacted with the intent to discriminate?

RESPONSE: I am committed to enforcement of the Voting Rights Act, which has been a critical law enforcement function of the Department of Justice for many years. With respect to any particular case that may come before the Department, I would approach it as I would any case, by consulting with the subject matter experts in the Department to ensure that the Department undertakes a full, fair, and open-minded review of the facts and a serious and impartial analysis of the law. I have not been involved in the case you referenced and had no role in formulating the Department’s position. Because that case involves pending litigation, it would not be appropriate for me to comment on it.

5. Roberts / Alito Nominations: Selection

In an interview after Chief Justice Roberts and Justice Alito were confirmed, you discussed the judicial selection process and referred to the Bush Administration’s Judicial Selection Committee. You said that the Judicial Selection Committee was composed of “only government” officials and employees.

As widely reported in the media, Judge Gorsuch was chosen from a list of nominees that was vetted and composed by outside groups including the Federalist Society and the Heritage Foundation. This unprecedented role played by the Federalist Society and Heritage Foundation is troubling. Based on your own comments, this also appears to be a major departure from the practices of the Bush Administration.

- a. Do you think it is appropriate for outside groups like the Federalist Society and Heritage Foundation to choose judicial nominees?

- b. Given your close affiliation with the Federalist Society, did you play any role in providing names of potential Supreme Court nominees to the Trump campaign?

RESPONSE: The comments that you reference related to the selection process of the White House after President Bush was inaugurated. I am not privy to the details concerning the process by which candidate Trump developed the list of Supreme Court candidates the campaign released. I did not provide names of potential Supreme Court nominees to the Trump campaign.

6. Politicized Hiring—Civil Rights Division Issues

A joint report by the Department’s Office of the Inspector General (OIG) and the Office of Professional Responsibility (OPR) from 2008 chronicled the many problems that arose with respect to politicized hiring in the Civil Rights Division during President George W. Bush’s Administration. This report found that Bradley Schlozman, a high-ranking political appointee in the Civil Rights Division, “considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division. In doing so, he violated federal law—the *Civil Service Reform Act*—and Department policy that prohibit discrimination in federal employment based on political and ideological affiliations, and committed misconduct.

The evidence also showed that Division managers failed to exercise sufficient oversight to ensure that Schlozman did not engage in inappropriate hiring and personnel practices.” [DOJ OIG/OPR Report, “[An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division](#),” July 2008, pg. 64]

If confirmed as Associate Attorney General, you will be responsible for overseeing the Civil Rights Division.

- a. What steps will you take to ensure that politicized hiring and other personnel decisions do not happen again in the Civil Rights Division or anywhere else in the Justice Department?
- b. Specifically, how do you intend to help insulate the Civil Rights Division from improper political influences?

RESPONSE: As I said at my confirmation hearing, I believe it is important that all Justice Department officials understand and comply with the laws that govern their conduct, including the civil service protection laws. I believe that an important component of ensuring compliance is providing adequate training. If I am confirmed, I am committed to ensuring that those with hiring authority in the divisions I supervise receive proper training and understand their obligations with respect to hiring.