

**QUESTIONS FOR THE RECORD
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NOMINEE TO BE ASSISTANT ATTORNEY GENERAL
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QUESTIONS FROM SENATOR FEINSTEIN

1. At your hearing, I asked you about a comment you made during a panel hosted in 2014 by the Federalist Society that the science behind climate change is “contestable.” You said of your comment, “I stand by it because there are clearly scientists and private entities who disagree with regulation in that area.”

I then informed you about an article recently published by *National Geographic* that highlights the work of scientists measuring the effects of rapidly melting Antarctic glaciers and ice shelves. The impacts for the environment and for people living in coastal areas are predicted to be serious. As the article warns, a “massive iceberg poised to break off” one of the ice shelves “may be a harbinger of a continent-wide collapse that would swamp coastal cities around the world.” A copy of the article is attached for you. (“Antarctica Is Melting, and Giant Ice Cracks Are Just the Start,” *National Geographic*, July 2017.)

- a. As I asked you at your hearing, what part, if any, of the scientific evidence discussed in this article do you find “contestable”?

RESPONSE: Senator, thank you for sending the *National Geographic* article by Mr. Douglas Fox and your gracious cover note. I appreciated the opportunity to review it. The article summarizes new measurements from ice on the Antarctic Peninsula — an issue that no doubt should be continuously and carefully monitored by scientists and policymakers. Some of the work reported involves U.S. government scientists at various agencies (NASA and using a National Science Foundation-chartered ice breaker). Notably, there are a range of different predictions made in the article about potential sea level rise ranging from 1.5 feet to 35 feet by 2100. Thus, were the article to be introduced into the record of an agency proceeding, the policymaking agency or agencies in question would need to assess those competing predictions and other evidence on point before reaching any conclusions.

As I noted during my testimony, assessing the importance of information such as that provided in the article would be a matter committed to the discretion of the federal policymaking agencies, consulting with their resident scientists. My role, if I were fortunate enough to be confirmed, would not be to issue regulations in light of such evidence, but to defend in court, consistent with law, the outcome of any policymaking decisions made by governmental bodies such as EPA.

- b. Is it your belief that there is a significant debate in the scientific community about whether global warming is a noticeable phenomenon, and whether the current warming trend is the result of global activity?

RESPONSE: It is my understanding that there are a variety of viewpoints in the scientific community regarding global warming.

- c. What sources of information have informed your views on the issue of climate change and global warming?

RESPONSE: In general, the technical literature that I have read in this area was filed in the administrative records of the matters that I have worked on in litigation.

2. At your hearing, I noted for you several concerning statements that environmental groups have made with regard to your nomination to head the Justice Department's Environment and Natural Resources Division, including the following:

Natural Resources Defense Council: "Clark is just what America doesn't need— another enemy of the environment now charged with protecting it."

Gulf Restoration Network: "Putting an attorney in charge of the environmental division of the Justice Department that denies that climate change exists, means that industry will be given carte blanche to produce greenhouse gases."

At your hearing, I asked you to respond to these statements. You answered that these statements did not take account of your record while at the Justice Department during the Bush Administration. You gave an example of a case you were involved in regarding labor conditions of workers for a private company. Now that you have had a chance to read the statements above, noting that they refer to your positions on climate change and on protections for the environment, please answer the question below.

- a. Please identify public statements or publications in which you have advocated for strengthening regulations or laws to protect the environment.

RESPONSE: Please see the responses in my Senate Judiciary Questionnaire, in particular questions 12 and 17, and related attachments. For example, during the two types of law school classes I have taught, as well as in economics classes taught to undergraduates, I pointed to, for example, the Clean Air Act's acid rain program as a model program that was a welcome addition to the Act and also applauded certain Clean Air Act cross-state-lines programs because those are paradigmatic situations where federal intervention is required to solve environmental problems. And, at a 2008 presentation, I noted that advocacy for green building codes on the local level would help in part to solve for potential externalities relating to greenhouse gas emissions and that such state or municipal legislation should not be preempted.

- b. Please identify cases in private practice or at the Justice Department in which you advocated for strengthening regulations or laws to protect the environment.

RESPONSE: I have handled a number of cases in private practice where I advocated for strengthening regulations or laws to protect the environment. For instance, in *New York, et al., Plaintiffs, Gas Appliance Manufacturers Association, et al., Plaintiff-Intervenors v. Bodman*, No. 05-CV-7807 (JES) (S.D.N.Y. filed 2005), I represented the Gas Appliance Manufacturers Association and the Air-Conditioning & Refrigeration Institute, which was intervening to force the U.S. Department of Energy to issue overdue energy efficiency standards. The Complaint in Intervention that I drafted, among other points made, referred to the Bush Administration Energy Department's "inattentiveness to the rulemaking deadlines fixed in EPCA [Energy Policy and Conservation Act of 1975]" and noted, "[s]pecifically, a long period of inactivity in the area of energy-efficiency standards issued under EPCA by USDOE has led to the agency failing to meet required deadlines for action." *Id.* at ¶ 7. Also, in litigation captioned *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010), *reh'g denied*, 643 F.3d 958, *cert. denied*, 565 U.S. 1014 (2011), I represented a renewable fuels client that intervened to support EPA in a challenge brought against EPA by the petrochemical and refinery industries to renewable fuels standards that Congress established in the Energy Independence and Security Act of 2007.

In addition to supporting the conviction of violators of asbestos removal laws as noted in my testimony (*see United States v. Ho*, 311 F.3d 589 (5th Cir. 2002)), I represented EPA in numerous affirmative civil and criminal enforcement appeals from 2001 through 2005. And several examples of defensive litigation I worked on are relevant. In *Banks v. United States*, 314 F.3d 1304 (Fed. Cir. 2003), I personally briefed and argued an appeal defending the Army Corps of Engineers against a takings claim. In *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004), I defended EPA against a due process constitutional challenge trying to invalidate portions of the foundational CERCLA (Comprehensive Environmental Responses, Compensation, and Liability Act) statute. And in *Davis v. EPA*, 336 F.3d 965 (9th Cir. 2003), another case I personally briefed and argued, I represented EPA against the State of California, which was trying to avoid an oxygen level fuel requirement issued under the federal reformulated gasoline program.

3. The Judiciary Committee has received a letter of support on your behalf from two Republican state solicitors general, from Arizona and Arkansas. They wrote, in part, "We are convinced that Mr. Clark will return the Department to an appreciation of the States as co-regulators and co-equal sovereigns."
 - a. Do you agree with their assessment? If so, what does that statement mean to you?

RESPONSE: Many of the nation's environmental laws are designed as cooperative federalism statutes that allow for joint federal-state enforcement. By working together, the federal government and the States enhance our ability to reach mutual goals, reduce costs, and obtain more comprehensive results. The letter of support from the two State Solicitors General indicates these officials rightly believe, if I am fortunate enough to be confirmed, that I am firmly committed to working cooperatively with States where it is possible and appropriate to do so.

They are also aware that I began my career after college working in the State of Delaware's Division of Revenue and thus have an appreciation for both federal and state government roles.

- b. From your perspective, how has the Department failed to appreciate states as co-equal sovereigns in the past?

RESPONSE: In some areas, States are exclusive actors with reserved powers, but in other areas state authority is subordinate to supreme federal authority. I would enforce and adhere to the appropriate legal lines in this area pursuant to existing federal case law and other sources of law. Each individual situation of potential cooperation with the States would need to be evaluated on its own merits and, in terms of past cases, may have involved information I am not privy to.

- c. What do you expect to change going forward, if you are confirmed?

RESPONSE: Many of the nation's environmental laws envision a primary role for the States, and allow for joint federal-state enforcement. By working together, the federal government and the States enhance their ability to reach mutual goals, reduce costs, and obtain more comprehensive results. It would be premature for me to speculate at this point, however, on what changes I would make should I be so fortunate as to be confirmed as Assistant Attorney General.

4. In a 1999 law review article, you addressed the Kyoto Protocol, an international treaty aimed at reducing greenhouse gas emissions. You wrote: "[W]hether a problem can or should be solved depends in large part on the cost of the solution. . . . In the law, as in everyday life, the cure is often worse than the disease."
- a. When you discuss costs of responding to climate change, what costs are you referring to and to whom do these costs incur?

RESPONSE: In that article, I noted that "[c]ertainly there is a risk that the dire predictions that are by now familiar to most environmental scientists and lawyers may occur." 10 Colo. J. Int'l Env'tl. L. & Pol'y 335, 336 (1999). The costs referred to would be those resulting from the solutions adopted by policymakers as designed to avoid the separate environmental costs referred to in the additionally quoted material I include in this paragraph.

- b. Were the costs of risks to public health caused by climate change part of the "cost of the solution" you considered when evaluating the Kyoto Protocol?

RESPONSE: In that article, my intent was not to assess the costs of implementing the Kyoto Protocol; but rather, to critique the work of a professor who was making policy recommendations without himself assessing all relevant cost considerations. See *id.* at 335 ("In order to make such pronouncements, Professor Nanda has to consider at least three more elements that are missing from his analysis: [including] 1. Excluding the costs of implementation (i.e., assuming

implementation problems can be overcome at relatively low cost) and focusing primarily on the costs and benefits of compliance, is the Protocol justified in cost-benefit (or risk-benefit) terms?”).

5. You have been a member of the Federalist Society since 1992, and have chaired its Environmental Law and Property Rights Practice Group for the past seven years. Since 2016, you have been involved with a Federalist Society working group called the Regulatory Transparency Project. According to the Federalist Society website, the Regulatory Transparency Project “seeks to combat the excesses of the administrative state in this country.” The initiative “want[s] people to look at regulations which are burdensome and extremely inefficient and not simply submit to them as the cost of doing business but rather, look for real and concrete ways to change them for the better.”

- a. Please describe in detail your involvement with and contributions to the Regulatory Transparency Project.

RESPONSE: I have only attended some of the meetings of the Regulatory Transparency Project. I have not authored or edited any documents for the Project.

- b. Do you consider the following to be “burdensome and extremely inefficient”:
- i. The EPA’s endangerment rule, which found greenhouse gases to be a threat to public health and welfare?

RESPONSE: It is possible that the federal policymaking agencies may make decisions that bear on this question that I may be called on to defend and so I cannot risk potentially prejudicing the outcome of any potential rulemaking or other regulatory decision subject to judicial review. Also, EPA may have access to various sources of data not available to the public, but that would be available to me if I am fortunate enough to be confirmed. I would want to review that information before forming any litigation decisions in this area. As a matter of current law, in the *Coalition for Responsible Regulation* case (called *Utility Air Regulatory Group (UARG)* in the Supreme Court), the EPA endangerment rule was upheld by the D.C. Circuit, including after denial of an en banc petition, and the Supreme Court did not accept review of challenges to the endangerment rule. If I am confirmed, I would treat the endangerment rule as binding law.

- ii. The EPA’s regulation of greenhouse gases under the Clean Air Act?

RESPONSE: The Supreme Court has held that EPA has authority to regulate greenhouse gas emissions — from new motor vehicles in *Massachusetts v. EPA*, 549 U.S. 497 (2007) — and under the PSD program of the Clean Air Act in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). These cases remain good law, and I pledge to enforce them, if I am

confirmed.

- c. Please list any other environmental rules and regulations that you currently believe to be “burdensome and extremely inefficient.”

RESPONSE: If I am fortunate enough to be confirmed, I will enforce the lawfully enacted statutes of Congress and regulations of my client agencies.

- d. Given your prior involvement with the Regulatory Transparency Project, if confirmed, would you consider your position leading the Environment and Natural Resources Division an opportunity to enact the goals of the Project?

RESPONSE: No.

According to the Justice Department’s Fiscal Year 2018 Strategy for the Environment and Natural Resources Division, “[t]he Division will play a significant role in the implementation of the 2017 Executive Order (EO) on Border Security and Immigration Enforcement. As a result of actions required by the EO, ENRD will guide the acquisition of land along the U.S.-Mexico border (along with developing associated title and appraisal work)” In a March 2005 speech you gave to the Federalist Society’s Chicago Chapter, you commented that property cannot be secured when taken from one class to benefit another for a “public use.”

- e. Is acquiring property from private land owners to build a border wall a valid use of the government’s eminent domain power?

RESPONSE: As this issue may be the subject of litigation, it would be inappropriate for me to comment on this issue at this time.

- f. Do you believe that a border wall constitutes a “public use”?

RESPONSE: Please see my response to Question 5e.

QUESTIONS FROM SENATOR WHITEHOUSE

1. In your view, if EPA has delegated a program to a state, does the federal government have any remaining enforcement authority? EPA Administrator Scott Pruitt has suggested that the federal government has a very limited role in that situation. But earlier this month, Susan Bodine, President Trump's nominee to be assistant administrator of EPA's Office of Enforcement and Compliance Assurance, said she would maintain a federal enforcement role. What is your view?

RESPONSE: Congress typically defines the roles of the States and the federal government in the relevant statutory law. Most of the statutes administered by the Environmental Protection Agency provide for States to assume responsibility for various regulatory programs but preserve federal enforcement powers following program delegation or authorization to a State. If confirmed, I pledge to work cooperatively with the States in enforcement matters and to vigorously enforce federal law.

2. Given that you have spent much of your career working on behalf of the fossil fuel industry, often in opposition to federal environmental regulations, what assurances can you give the American people that as AAG of ENRD, you will vigorously enforce our environmental laws against the fossil fuel industry?

RESPONSE: Having had the great privilege of working in private practice and at the Department of Justice, I fully appreciate the different functions of private and public counsel. In government, I was responsible for both defending the affirmative enforcement of environmental laws on appeal and defending agency decisions against challenges from all sides, including challenges brought by industry. In fact, I have represented and expressed support for various pro-environmental positions and indeed I have also opposed the fossil fuel industry and prevailed in litigation against it. If confirmed as Assistant Attorney General, I commit to vigorously enforce and defend the environment and natural resources laws without regard to person, position, or sector.

I have handled a number of cases in private practice where I advocated for strengthening regulations or laws to protect the environment. For instance, in *New York, et al., Plaintiffs, Gas Appliance Manufacturers Association, et al., Plaintiff-Intervenors v. Bodman*, No. 05-CV-7807 (JES) (S.D.N.Y. filed 2005), I represented the Gas Appliance Manufacturers Association and the Air-Conditioning & Refrigeration Institute, which was intervening to force the U.S. Department of Energy to issue overdue energy efficiency standards. The Complaint in Intervention that I drafted, among other points made, referred to the Bush Administration Energy Department's "inattentiveness to the rulemaking deadlines fixed in EPCA [Energy Policy and Conservation Act of 1975]" and noted, "[s]pecifically, a long period of inactivity in the area of energy-efficiency standards issued under EPCA by USDOE has led to the agency failing to meet required deadlines for action." *Id.* at ¶ 7. Also, in litigation captioned *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir.

2010), *reh'g denied*, 643 F.3d 958, *cert. denied*, 565 U.S. 1014 (2011), I represented a renewable fuels client that intervened to support EPA in a challenge brought against EPA by the petrochemical and refinery industries to renewable fuels standards that Congress established in the Energy Independence and Security Act of 2007.

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Additionally, during the two types of law school classes I have taught, as well as in economics classes taught to undergraduates, I pointed to, for example, the Clean Air Act's acid rain program as a model program that was a welcome addition to the Act and also applauded certain Clean Air Act cross-state-lines programs because those are paradigmatic situations where federal intervention is required to solve environmental problems. And, at a 2008 presentation, I noted that advocacy for green building codes on the local level would help in part to solve for potential externalities relating to greenhouse gas emissions and that such state or municipal legislation should not be preempted.

3. When asked in your questionnaire to identify any affiliations that are "likely to present potential conflicts," you stated only: "During the nomination process, I consulted with the Department of Justice's Ethics Office. I will continue to consult with that Office if I am fortunate enough to be confirmed and will recuse myself from any matter in which it is required." You are longtime counsel to BP, which has accrued over \$30 billion in fines for environmental violations. Why didn't you list BP as an entity that is "likely to present potential conflicts"?

RESPONSE: If confirmed, I will be subject to the Standards of Conduct for Executive Branch Employees, other federal ethics laws and rules, Department of Justice policies, and the Ethics Pledge for political appointees created by the President through Executive Order. If confirmed, I intend to seek the advice of career attorneys in the Environment and Natural Resources Division (ENRD), as well as attorneys in the Departmental Ethics Office and the Department's Professional Responsibility Advisory Office, in applying particular rules and policies to my actions as Assistant Attorney General. Where advised to recuse myself from specific matters, I will do so, including cases in which BP is a party.

4. Under what circumstances, if any, would you view your participation in a matter involving BP as violating the standard of conduct set out in 5 C.F.R. § 2635.501? Will you commit to recusing yourself from matters involving your former clients, including BP?

RESPONSE: Please see my response to Question 3.

5. Have you signed the Trump Ethics Pledge? If not, when do you intend to do so? Are you seeking or have you been granted any waivers to that pledge? Please specify.

RESPONSE: I have not yet signed the Ethics Pledge. If confirmed, I will sign the Ethics Pledge when I begin work at the Department. I have neither sought, nor been granted, waivers to the Ethics Pledge.

6. You have represented clients including Halliburton, Sherwin Alumina, du Pont, and BP, as well as pharmaceutical companies such as Forest Labs, Merck, and GSK. How has advocating on behalf of these companies affected your view of enforcement actions against such large corporations for environmental violations? What specific lessons would you take from having represented these firms in your new role enforcing our nation's environmental laws against those same companies, and other violators?

RESPONSE: BP and Sherwin Alumina are the only companies referenced that I have ever represented in an environmental enforcement action brought by a government body. For instance, I represented the listed pharmaceutical companies in intellectual property matters. My private sector work involved managing cases of great size and complexity, and I believe that my experience in the private sector has prepared me to go up against the best private practice lawyers in the country. If confirmed, I will be honored to put my litigation skills—developed during my prior service at the Department of Justice and in private practice—to work for the United States and its agencies.

7. Please describe your particular involvement in the *Castillo v. E.I. Du Pont de Nemours & Co., Inc.* case in Florida. Did your participation in that matter influence your personal views on pesticide usage in any way?

RESPONSE: I was one of the members of Kirkland & Ellis's appellate team on this case for DuPont. Other firms represented DuPont at trial and Kirkland entered the case only on appeal, which DuPont ultimately lost. I was thus not involved in developing the facts — only in reviewing the trial record and helping to brief legal arguments. DuPont eventually ceased production of the pesticide at issue citing high legal costs — i.e., the costs of tort judgments and legal expenses. Hence, this case could be viewed as an example of the tort system helping to solve for negative externalities.

8. If pressed to “back off” by President Trump or AG Sessions or EPA Administrator Scott Pruitt, what assurances can you give that you will resist that pressure and uphold your duty to enforce our environmental laws?

RESPONSE: If I am fortunate enough to be confirmed, I will faithfully enforce all federal laws, including the environmental and natural resources laws of the United States, in accordance with my assigned duties as Assistant Attorney General for ENRD.

9. On a 2014 panel with Scott Pruitt, you said that the science behind climate change is “contestable”? Is that still your belief? What is the basis for that assertion? Do you accept that ocean acidification is directly connected to human-caused carbon dioxide emissions?

RESPONSE: That statement was not intended to be a normative statement of my own assessment of the science. It focused on the positive (not normative) point that various interested parties would contest the science in agency and court forums. That has been and continues to be true. I have, to my recollection, never had the occasion to study any scientific materials dealing directly with ocean acidification, but I am aware that it is an environmental issue of concern.

10. Whether or not you agree this question is “relevant” to your potential role as AAG of ENRD, do you believe that human activities are primary contributor to climate change? Do you believe that carbon dioxide is a primary contributor to climate change?

RESPONSE: I am generally aware that EPA or other agencies may issue rulemaking or adjudicatory decisions that may, in part, be based on climate science. Because it is possible that the federal policymaking agencies may make decisions bearing on these issues which I may be called on to defend, expressing personal views could risk prejudicing the outcome of any such potential rulemaking or other regulatory decision subject to judicial review.

11. Whether or not you agree this question is “relevant” to your potential role as AAG of ENRD, do you believe that carbon dioxide emissions are a negative externality of burning fossil fuel?

RESPONSE: After *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), it is clear as a matter of current law that EPA under the Clean Air Act’s mobile source program for new cars and the National Highway Traffic Safety Administration under the Energy Policy and Conservation Act of 1975 (and its amending statutes) are able to regulate fossil fuel carbon dioxide emissions as negative externalities from the respective federal programs they administer, as set out in those two cases.

12. In an October 1999 volume of the Federalist Society newsletter, you wrote that the EPA had “refused to consider” the scientific evidence of beneficial effects of ground-level ozone (smog) in its rulemaking. Please explain what scientific studies in particular you were referring to in this statement. What level of study did you undertake in examining this scientific research before coming to the conclusion that the EPA had “refused to consider” the relevant evidence?

RESPONSE: The case the article refers to is *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, modified on reh'g, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part, on irrelevant grounds, sub nom. Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

Numerous aspects of EPA decisions in the underlying rulemakings were challenged. One of the challenges brought by my clients in that case related to the “risk-risk” nature of ozone as a pollutant — “risk-risk” being a term referring to the fact that sometimes a regulation designed to reduce risk can create new risks of its own and that agencies must consider and weigh against other risks. It was not disputed that ground-level ozone causes adverse health impacts, especially on lung function. (I do not anticipate future litigation over the basic fact that ozone causes decrements in lung function and so can freely answer this question.) The argument advanced in the case was that ground-level ozone, just like stratospheric ozone, absorbs UV-B radiation and thus protects against skin cancer, cataracts, and immuno-suppression. See authorities for that position collected in the margin.¹ Additionally, the U.S. Department of Energy estimated the anticipated health effects of a 0.5 percent decrease in total column ozone — specifically, concluding that it would result in (1) thousands of extra cases of non-melanoma skin cancer per year; (2) thousands of new cataract cases per year; and (3) other unquantified adverse health effects.²

The D.C. Circuit summarized the legal dispute as follows: “Petitioners presented evidence that according to them shows the health benefits of tropospheric ozone as a shield from the harmful effects of the sun’s ultraviolet rays—including cataracts and both melanoma and nonmelanoma skin cancers. In estimating the effects of ozone concentrations, EPA explicitly disregarded these alleged benefits.” *American Trucking*, 175 F.3d at 1051. The Court unanimously held this to be legal error and remanded to the agency for reconsideration of the ozone standard. EPA, acting through Solicitor General Seth Waxman, sought review of other aspects of the *American Trucking* decision (some of which were reversed and others of which were allowed to stand). But the Solicitor General did not seek to have the Supreme Court review the D.C. Circuit’s ruling on consideration of the risk-risk issues presented by regulating ground-level ozone in the manner chosen by EPA.

In preparation for writing the article you note, I would have consulted the D.C. Circuit’s decision, the relevant parts of the briefing in the case and the relevant parts

¹ See, e.g., Paul J. Crutzen, *Ultraviolet on the Increase*, 356 Nature 104 (1992) (“[O]zone in the troposphere, an industrial pollutant, is (molecule for molecule) a stronger absorber of ultraviolet than ozone in the stratosphere”); Ignacio Galindo *et al.*, *Ultraviolet Irradiance Over Mexico City*, 45 J. Air & Waste Mgmt. Ass’n 886 (1995); G. Seckmeyer & R.L. McKenzie, *Increased Ultraviolet Radiation in New Zealand (45° S) Relative to Germany (48° N)*, 359 Nature 135 (1992); John E. Frederick *et al.*, *Empirical Studies of Tropospheric Transmission in the Ultraviolet: Broadband Measurements*, 32 J. Applied Meteorology 1883 (1993); see also EPA, Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Ozone, (1997).

² See Statement of Dr. Marvin Frazier, U.S. Department of Energy, Clean Air Scientific Advisory Committee, CASAC Ozone Review Panel, Public Meeting, 203-06 (Mar. 21, 1995). A peer-reviewed science paper by OMB staff members reached similar conclusions. See Randall Lutter & Christopher Wolz, *UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard*, 31 Env’tl. Sci. & Tech. 142A (1997).

of the administrative record, along with EPA's response to the arguments presented to it at the rulemaking stage and some related secondary sources. I have not had the need, since the D.C. Circuit's decision, to consult follow-on literature in this area.

13. As head of ENRD, what discretion will you have about whether to bring an affirmative case? Is it within your discretion to decline to enforce laws of Congress?

RESPONSE: In general, the United States has discretion to bring civil or criminal actions under the various environment and natural resources laws. Over time, the Department of Justice has developed a body of protocols that govern when it is appropriate to bring an action; and I pledge to adhere to them and to faithfully enforce the environment and natural resources laws, should I be confirmed.

14. List the five most important affirmative cases brought by ENRD during the Obama Administration and explain why you believe they were important cases.

RESPONSE: ENRD brings many important enforcement actions on behalf of the United States. Cases of particular importance filed during the Obama Administration include:

- (1) *Deepwater Horizon* oil spill litigation, which involved a disaster that harmed a wide range of federal, state, local and individual interests and where the Division closely coordinated with state and local officials and a host of federal client agencies.**
- (2) Volkswagen AG enforcement litigation, which was settled to the benefit of many U.S. consumers who had purchased vehicles affected by Volkswagen's conduct.**
- (3) Fox River Superfund cleanup litigation, which involves the cleanup of a 40-mile stretch of the Fox River and more than 1,000 square miles of Green Bay contaminated with polychlorinated biphenyls that were discharged into the river beginning in the 1950s.**
- (4) Fraudulent Renewable Identification Number (RIN) prosecutions, which punish individuals who use fraud and deceitful measures to take advantage of federal tax credits, and help ensure a level playing field for companies that follow the rules.**
- (5) Wildlife trafficking prosecutions, including multiple prosecutions of those engaged in the illegal killing of rhinoceros and the illegal trafficking of endangered rhinoceros horns. As President Trump's February 9, 2017 Executive Order on transnational criminal organizations recognizes, international trafficking, including wildlife trafficking, is a threat to our security and must be stopped.**

15. List any affirmative cases brought by ENRD during the Obama Administration that you would not have filed had you been head of ENRD and explain why.

RESPONSE: I am not aware of any such enforcement actions that I disagree with. Also, the federal government may inherently be privy to salient facts about any given

action that I am not aware of and would want to first evaluate.

16. You have spoken and written about the importance of weighing the business costs of compliance with environmental regulations. As AAG of ENRD, would you be permitted to take such cost considerations into account when deciding whether to bring a case?

RESPONSE: Some environmental statutes require or permit agencies to consider the costs of compliance when developing environmental regulations. Thus, client agencies may consider costs in developing regulations if Congress has permitted them to do so. My decision to authorize a civil or criminal enforcement action, if I am fortunate enough to be confirmed, will be guided by whether the facts demonstrate that a statute or regulation has been violated, as well as by other well-established principles that govern when it is appropriate to bring an enforcement action.

17. In enforcing our nation's environmental laws, how would you interpret Attorney General Sessions's recent guidance to "pursue the most serious, readily provable offense" and harshest sentences? Do you commit to prosecuting the most serious, readily provable environmental offenses you can identify? Are there any defendants, or classes of defendants, where you believe this guidance should not apply?

RESPONSE: I will follow Attorney General Sessions' May 10, 2017 Memorandum, which affirms that prosecutors should generally "charge and pursue the most serious, readily provable offense." That Memorandum notes that there may be "circumstances in which good judgment would lead a prosecutor to conclude that a strict application" of this policy is not warranted, and that decisions to vary from the policy must be approved by a U.S. Attorney, Assistant Attorney General, or his designee. If such "unusual facts" arise, I will consider them on a case-by-case basis.

18. In the spring of 2009, you co-taught a course at George Mason University Law School (now the Antonin Scalia Law School) on environmental law. In the syllabus to that course, you laid out planned discussion topics, including challenging the students' views on whether sustainability can be identified with the historical preservationist philosophy of Gifford Pinchot and Theodore Roosevelt, questioning whether industrial facilities can benefit poor neighborhoods, and asking if a "heavy punitive enforcement regime" is necessary to regulate the environment or whether what you called an "informational approach" would be more effective at doing so. You also highlighted the Nixon Administration's role in introducing "major modern environmental laws."
- a. What is an "informational approach" to environmental enforcement, and would such a method be more effective, in your view, than a punitive enforcement regime?

RESPONSE: The paradigmatic informational regime for protecting environmental values is the National Environmental Policy Act (NEPA). Its central idea is to give individuals and entities potentially affected by major federal action the opportunity to secure information about what environmental consequences—pro and con—will flow from a given project that is either a federal project directly or a private project authorized, for instance, by federal permit.

Citizens can then exercise participatory democracy using that information to raise questions about a project or try to block it or express non-opposition. Similarly, once environmental impacts are identified, Congress and other policymakers can decide whether to impose new permitting conditions or other more serious regulatory responses to any given major federal action.

- b. What was your purpose in highlighting the Nixon Administration's impact on environmental issues for your students? What did you expect students to leave the course having learned about the history of environmental enforcement? What is your own view of the Nixon Administration's contributions to our nation's environmental regulations?

RESPONSE: The NEPA statute was signed into law by President Nixon. Some have called NEPA "the environmental magna carta." President Nixon also created the EPA and signed the landmark Clean Air Act Amendments of 1970 among other accomplishments in the environmental area. Environmental scholars have remarked on these points before. See, e.g., Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 Minn. L. Rev. 999, 1002 (2003). Protection of the environment is thus, and always has been, a bipartisan project. If fortunate enough to be confirmed, I intend to continue that tradition.

- c. You identify President Roosevelt and Pennsylvania Governor Pinchot as representatives of the "historical preservationist" approach. What does that viewpoint represent, in your view, and do you support it?

RESPONSE: In 1887, President Roosevelt founded one of the Nation's oldest conservation organizations, the Boone and Crockett Club, which Pinchot joined 10 years later. The Club recognized the value of not overharvesting wild game. In that way, they are forerunners of the modern sustainability movement. In short, the conservationist approach is to *use* natural resources for human benefit but not *abuse* such resources by ensuring that they are available to future generations and not degraded. Congress, by statute, protects natural resources in various ways. For instance, fewer activities can lawfully take place in wilderness areas than in national forests. As a matter of current law and federal policy, I would follow and enforce the currently governing laws protecting natural resources according to their terms.

- d. Under what circumstances would you have expected the students to find that industrial facilities would benefit a poor neighborhood by being situated nearby, rather than "in remote suburban areas"?

RESPONSE: Industrial facilities can bring jobs, which can be scarce in poorer neighborhoods. In addition, the costs of traveling to places of employment located far from one's residence can become prohibitive (or, worse yet, the residents of inner-city neighborhoods may simply fail to learn of job opportunities not near them). Public transportation also tends to be better developed in urban areas than in suburban areas, meaning that often car ownership is required to reach job

locations in the suburbs.

19. You submitted a memorandum to the Solicitor General in the consequential case *Kelo v. City of New London*, 545 U.S. 469 (2005). What is your understanding of current federal eminent domain power? What position did you recommend the Solicitor General take, regardless of whether that position was adopted (as the Solicitor General ultimately declined to file an amicus brief)?

RESPONSE: The federal eminent domain power is broad but can be limited by statute or by budgetary constraints imposed by Congress, which has the power of the purse. It would not be appropriate for me to share privileged advice I gave to the Solicitor General. Additionally, other follow-on cases to *Kelo* may emerge and so I cannot risk potentially prejudicing the outcome of any potential rulemaking or other regulatory decision subject to judicial review or of being cited against any future position that the Solicitor General may opt to take in the Supreme Court or authorize to be taken in lower appellate courts.

20. What is your managerial experience? If you received any written evaluations of your performance as a manager, please indicate the dates on which those were received, who provided them, what ratings you were given, and list any areas identified as needing improvement and steps you took to address those concerns.

RESPONSE: During my tenure with ENRD, I supervised the Appellate Section and the Indian Resources Section. This included directing the work of approximately 50 lawyers and required supervising innumerable cases during my time at the Department. I received annual performance appraisals from my supervisor, Assistant Attorney General Tom Sansonetti, and was rated as "outstanding" in each appraisal.

In private practice, I have supervised teams of multiple lawyers at a time on various matters, usually ones of great significance. Nearly 100 of my colleagues from Kirkland & Ellis, who intimately know my work, signed a letter of support sent to the Committee. Among them, I count 22 lawyers (most now partners in their own right) whom I supervised on various projects in the total of 16 years I have worked at Kirkland & Ellis. I think this letter is a testament to the successes I had and skill I displayed managing fellow lawyers and teams in complex litigation.

21. Has a complaint of any sort been filed against you by someone you have supervised because of an action taken (or not taken) by you as a supervisor? If so, please list the date of the complaint, the allegations made in the complaint, and its resolution.

RESPONSE: I am not aware of any complaints that have been filed against me by someone that have I have supervised.

QUESTIONS FROM SENATOR DURBIN

1. You say in your questionnaire that you have been a member of the Federalist Society since 1992 and that you have been the Chair of the Federalist Society's Environmental Law and Property Rights Practice Group for the past seven years. Why did you join the Federalist Society?

RESPONSE: I joined the Federalist Society because I believe it brings together people with a variety of viewpoints. It provides a forum in which to discuss these different views regarding important issues of law and policy.

2. Do you agree with the views espoused by the Federalist Society?

RESPONSE: My understanding is that the Federalist Society does not espouse views of its own. Rather, as noted above, I believe the Federalist Society is an important forum in which speakers and members from across the political and legal spectrums can participate in its programs and share their views. Member speakers and non-member speakers alike frequently disagree on legal and/or policy issues. I enjoy watching and reflecting on debates, going back to high school and college days.

3.
 - a. What is the purpose of the Federalist Society's Environmental Law and Property Rights Practice Group?

RESPONSE: My understanding is that its purpose is to increase the knowledge of members and the general public on topics in environmental law, natural resources law, and property rights.

3.
 - b. Why did you join this Practice Group?

RESPONSE: A fair amount of my work has been as an appellate litigation generalist. But because several of my early cases as a private law firm associate were in the environmental area and, especially after my 2001-2005 period of service in the Justice Department's Environment & Natural Resources Division, it was an area I became expert in. So I was asked to become the chair of this Federalist Society practice group based on this litigation experience. I also participate in ABA programs in the environmental law and administrative law areas as an outgrowth of the same expertise.

3.
 - c. What have you done as Chair of this Practice Group?

RESPONSE: I typically lead the monthly practice group calls when work for clients or other commitments does not interfere. I help to organize events, such as at the National Press Club and the annual convention. I have written articles in the practice group's areas of focus, and I have helped arrange or introduce teleforum calls and related meetings where one or more speakers present their ideas.

4.

- a. Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?

RESPONSE: I am not in a position to comment because I am not aware of the context or basis for the remarks.

- b. Do you believe that the President's announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?

RESPONSE: Please see my response to Question 4a.

- c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?

RESPONSE: The independence and the integrity of the federal judiciary are paramount values embodied in the text and structure of Article III of the Constitution. I cherish that independence as a vital part of the separation of powers. The selection and confirmation processes are committed to the President and the Senate. Each may consult with a wide variety of private or governmental individuals or organizations in making their respective decisions as the President or Senators see fit. Please also see my response to Question 4a.

5. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree or disagree with this statement? Please explain your answer.

RESPONSE: I am not in a position to speak on behalf of all law schools. As a general matter, I think it is important for law schools to provide a forum in which to discuss a variety of viewpoints. It is also an important trait for lawyers and academics alike to be able to keep an open mind to the potential for arguments from any source to persuade.

6. Please list all years in which you attended the Federalist Society's annual national convention.

RESPONSE: I do not have a full record of my attendance to the Federalist Society's annual conventions. I attended portions of the 2016 convention, and I spoke at the 2006 and 2010 conventions. To the best of my recollection, I would estimate that from around 1999 to present I have attended some portion of approximately 60% of the annual conventions.

7. In 2014, you moderated a panel that was hosted by the Federalist Society about regulating carbon emissions. One of the panelists said “climate change is a very real problem. The science is strong.” You then said “I do think the science is contestable.” Why do you think the science around climate change is contestable?

RESPONSE: That statement was intended to be a statement focused on the positive (not normative) point that various interested parties would contest the science in agency and court forums.

8. Do you agree with President Trump’s 2014 statement that “Global warming is an expensive hoax”?

RESPONSE: I am not in a position to comment because I am not aware of the basis for that remark. However, I am generally aware that EPA or other agencies may issue rulemaking or adjudicatory decisions that may in part be based on climate science. Because it is possible that the federal policymaking agencies may make decisions bearing on these issues which I may be called on to defend, expressing personal views could risk prejudicing the outcome of any such potential rulemaking or other regulatory decision subject to judicial review.

9. Do you believe that human activity is changing our climate?

RESPONSE: Please see my responses to Question 8 and Question 10.

10. Do you believe that there is a public interest in addressing climate change?

RESPONSE: That is a question that is for the policymaking agencies to address as they see fit in regulatory decisions and/or for Congress to address in new legislation based on the administrative or legislative records that they may act to develop. EPA has determined that greenhouse gas emissions from new motor vehicles endanger the public health and welfare. As a matter of current law, in the *Coalition for Responsible Regulation* case (called *Utility Air Regulatory Group (UARG)* in the Supreme Court), the EPA endangerment rule was upheld by the D.C. Circuit, including after denial of an en banc petition, and the Supreme Court did not accept review of challenges to the endangerment rule. If I am confirmed, I would treat the endangerment rule as binding law.

11. In a March 13 letter to EPA Administrator Pruitt, the American Meteorological Society said:

In reality, the world’s seven billion people are causing climate to change and our emissions of carbon dioxide and other greenhouse gases are the primary cause. This is a conclusion based on the comprehensive assessment of scientific evidence. It is based on multiple independent lines of evidence that have been affirmed by thousands of independent scientists and numerous scientific institutions around the world.

Is the American Meteorological Society wrong?

RESPONSE: Please see my response to Question 8 and Question 10.

12. On June 8, Jeffrey Wood, the Acting Assistant Attorney General for the Environment and Natural Resources Division (ENRD), testified before the House Judiciary Committee that the Division “expect[s] to be actively involved in another top priority for the Trump Administration: the construction of a wall along the southern border of the United States.” Mr. Wood testified that ENRD was seeking to hire twenty new Division attorneys “to support the acquisition of land necessary for the construction of the border wall.” Mr. Wood said:

Historically, the U.S. Army Corps of Engineers and U.S. Customs and Border Protection have attempted to purchase property rights directly for much of the previously needed fence construction—and are often successful in buying the needed land outright. If that negotiation fails, ENRD may file a case to acquire the land needed.

If you are confirmed as the head of ENRD, do you expect ENRD to file lawsuits to take property away from American landowners in order to build President Trump’s border wall?

RESPONSE: Any decision as to when and how to proceed with construction of a border wall would be made by the Department of Justice’s client agencies, including the Department of Homeland Security, and would require applicable congressional authorization. I believe that the Department of Justice’s client agencies have generally worked to negotiate to purchase any property needed for their operations, and have proceeded through eminent domain only where negotiation is not successful. The decision as to whether to invoke eminent domain would be made by those client agencies, who would then send a referral to the Department of Justice.

13. Do you appreciate that Americans who live on the border might be concerned about losing their property in service of President Trump’s border wall, which Texas Republican Congressman Will Hurd has described as “the most expensive and least effective way to secure the border”?

RESPONSE: Safeguarding private property rights is important. The decision as to whether and how to construct a border wall is a policy decision that would be made by Congress, the President, and the Department’s client agencies. The function of the Department of Justice is not to make policy but to represent its client agencies in court.

14. You say in your questionnaire that while you were working in the Justice Department, you wrote a privileged legal memo to the Solicitor General on what position the United States should take in the *Kelo v. City of New London* Supreme Court case. In your view, was the *Kelo* case rightly decided?

RESPONSE: That question necessarily implicates the privileged advice I sent to the

Solicitor General. Additionally, other follow-on cases to *Kelo* may emerge and so I cannot risk potentially prejudicing the outcome of any potential rulemaking or other regulatory decision subject to judicial review or the risk of being cited against any future position that the Solicitor General may opt to take in the Supreme Court or authorize to be taken in lower appellate courts.

15. In his June 8th testimony, Jeffrey Wood said that ENRD plans to focus on expediting environmental approvals for infrastructure projects. If you are confirmed, will you ensure that the Division will still enforce federal environmental requirements, including those under the National Environmental Policy Act, before expediting any environmental approvals?

RESPONSE: The Division's primary role is to defend litigation challenging the environmental decisions of its client agencies, including those relating to infrastructure projects. This includes defending agencies' compliance with the National Environmental Policy Act and other environmental statutes.

16. You have an extensive career of advocating on behalf of litigants who have sued the EPA over environmental laws - the same laws that you would be tasked with enforcing and defending if you are confirmed. This creates both the appearance and reality of conflicts of interest that would require you to recuse yourself from many matters. Will you commit to recuse yourself from cases that involve EPA's authority to regulate greenhouse gas emissions?

RESPONSE: If I am fortunate enough to be confirmed as Assistant Attorney General, I also will be subject to the Standards of Conduct for Executive Branch Employees, other federal ethics laws and rules, Department of Justice policies, and the Ethics Pledge for political appointees created by the President through Executive Order. If I am fortunate enough to be confirmed, I intend to seek the advice of career attorneys in ENRD, as well as attorneys in the Departmental Ethics Office and the Department's Professional Responsibility Advisory Office, in applying particular rules and policies to my actions as Assistant Attorney General.