

Senator Blackburn

Responses to Questions from Senator Blackburn to Todd Kim, Nominee to be Assistant Attorney General, Environment and Natural Resources Division

1. What is your record on supporting the Second Amendment?

RESPONSE: Throughout my career in public service—as an attorney with the Environment and Natural Resources Division (ENRD), as the Solicitor General for the District of Columbia, and as a Deputy General Counsel with the Department of Energy—I have repeatedly taken an oath to support and defend the Constitution of the United States, including the Second Amendment. If confirmed, I will take the same oath before rejoining the Department of Justice.

2. Have you taken any positions in court that challenge the constitutional right to bear arms? If so, please describe.

RESPONSE: As Solicitor General for the District of Columbia, I represented the District in litigation in which I defended the District’s laws related to firearms. In one such case, *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects “an individual right to keep and bear arms.” 554 U.S. 570, 595 (2008). I was subsequently involved in defending District laws in other, post-*Heller* challenges under the Second Amendment. If confirmed, I will follow Supreme Court precedent, including *Heller*. I will also take an oath, as all Department employees do, to support and defend the United States Constitution, including the Second Amendment.

3. When you served as D.C. Solicitor General, what was D.C.’s argument in support of Massachusetts in *Massachusetts v. EPA*?

RESPONSE: *Massachusetts v. EPA*, 549 U.S. 497 (2007), presented two questions to the Supreme Court: (1) whether the Environmental Protection Agency (EPA) had authority to regulate air pollutants associated with climate change under a certain provision of the Clean Air Act; and (2) whether EPA could decline to issue emissions standards for motor vehicles based on policy considerations that were not enumerated in that same provision of the Clean Air Act. The District of Columbia—along with numerous other governmental entities, as well as some non-governmental organizations—joined the Commonwealth of Massachusetts as petitioners. The briefs filed in the Supreme Court were numerous, complex, and detailed. The core of the petitioners’ arguments was that EPA—in declining to regulate certain chemicals as “air pollutants” under the relevant provision of the Clean Air Act—had based its decision on erroneous legal conclusions.

4. What positions did you take in your oral argument before the Sixth Circuit on interpretations of the Clean Water Act?

RESPONSE: I was one of the attorneys representing the federal appellee in *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004). The *Carabell* case, along with a

companion case, was ultimately resolved by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Carabell*, the Department of Justice defended a decision of the U.S. Army Corps of Engineers that was in turn based on the applicable law and regulations. In that case, as in any other, the Department of Justice was defending the policy judgments of the client federal agency. The role of the Department of Justice is to defend the laws as enacted by Congress and implemented by client federal agencies. The positions of the client federal agencies are reflected in the publicly available briefs.

5. While you were in private practice, what positions did you take on the statements of climate change alarmist Michael Mann?

RESPONSE: To the best of my recollection, I did not take a position on the statements of Michael Mann while in private practice.

6. What will be your recusal policy for political appointees serving in the Environment and Natural Resources Division?

RESPONSE: I believe that government ethics rules are vitally important. If confirmed, I will continue to consult the Department's career ethics officials about recusal issues and make decisions based on the facts, the law, and the applicable rules, policies, and practices. I will expect all ENRD employees to continue to do the same.

7. Will political appointees be allowed to work on Department of Justice matters in which they were previously serving as opposing counsel?

RESPONSE: If confirmed, I will expect all ENRD employees to continue to adhere to government ethics rules, including consulting the Department's career ethics officials about recusal issues. I will do the same. I believe that these rules are vitally important.

Senator Cotton

Responses to Questions from Senator Cotton to Todd Kim, Nominee to be Assistant Attorney General, Environment and Natural Resources Division

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. On what date did you first discuss with the Biden campaign or transition team the possibility that you could be nominated to the position of Assistant Attorney General?

RESPONSE: February 2, 2021.

4. On what date did the Biden campaign or transition team inform you that President Biden would nominate you to the position of Assistant Attorney General?

RESPONSE: March 12, 2021.

5. 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 April 21, 2021. I worked with Department attorneys, conducted research, and answered the questions. I finalized and approved all answers to the questions and authorized their transmission to the Committee on April 26, 2021.

6. Did any other individual 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 that wrote or drafted your answers. If the individuals are government officials, please also identify the department or agency with which they are employed.

RESPONSE: Individuals at the Department of Justice helped draft answers based on my guidance and publicly available information. Working with Department attorneys, I conducted research and answered the questions. I finalized and approved all answers to the questions and authorized their transmission to the Committee on April 26, 2021.

Chairman Durbin

Responses to Questions from Chairman Durbin to Todd Kim, Nominee to be Assistant Attorney General, Environment and Natural Resources Division

1. You spent almost eight years as a career trial attorney in the Environment and Natural Resources Division (ENRD), working for both a Democratic and Republican administration. You then spent more than a decade as the District of Columbia's first Solicitor General. You also spent several years in private practice.
 - a. During your time in those roles, did you only advocate positions on behalf of your clients with which you personally agreed? Or did you advocate for your clients' position regardless of whether you personally agreed with it?

RESPONSE: In each job I have held as a lawyer, I have advocated for my client regardless of whether I personally agreed with the position. When I previously served at the Department of Justice, my client was the United States. When I served as the Solicitor General for the District of Columbia, my client was the District. I also represented many diverse clients while in private practice. In January, I returned to federal government service at the Department of Energy. I take seriously my duty as an attorney to represent the interests of any client with commitment and zeal. If confirmed, I will bring the same approach to the job of Assistant Attorney General.

- b. How did your work at the Justice Department, as D.C. Solicitor General, and in private practice help you prepare to serve as the Assistant Attorney General for ENRD?

RESPONSE: My decades of practice have provided me with a great deal of substantive and managerial experience to prepare me to serve as the Assistant Attorney General for ENRD. As an attorney in ENRD's Appellate Section, I handled litigation in every federal court of appeals and the Supreme Court. This litigation arose from nearly every trial section in ENRD and dealt with nearly all the major statutes that ENRD addresses. In addition to knowledge about the relevant law, I gained familiarity with how ENRD functions, and its role in the Department of Justice and the broader federal government. I also gained a deep appreciation for the skill, dedication, professionalism, and integrity of the ENRD career staff.

As Solicitor General for the District of Columbia for over a decade, I managed a staff of lawyers charged with vital litigation matters involving the District government, and coordinated with other senior government officials. My work as Solicitor General included environmental matters, and even the non-environmental matters involved issues that ENRD regularly faces, such as jurisdictional issues like standing and merits issues like proper interpretation of statutes. The same was true in my three years as a partner in private practice, during which I continued leading teams of lawyers in important litigation matters.

- c. If confirmed to lead ENRD, what will guide your decision-making?

RESPONSE: If confirmed, I would make decisions by consulting with career lawyers and subject-matter experts, as well as client agencies as appropriate, to ensure that every decision I make at ENRD is based on the facts and on the law.

2. You have almost two decades of experience as a government lawyer. During that time, you worked with individuals from across the political spectrum. As a result, 20 environmental law scholars and 66 environmental law attorneys who represent a wide range of viewpoints have endorsed your nomination. In addition, a group of bipartisan former senior officials of ENRD who were appointed by Presidents of both political parties have also supported your nomination.

- a. What are some of the issues you worked on that required you to engage with environmental law experts, advocacy groups, and state officials across the political spectrum?

RESPONSE: While I was at ENRD, my work on a variety of enforcement issues under pollution control laws like the Clean Water Act and Clean Air Act required interaction with individuals across the political spectrum: senior government officials from multiple Administrations, both at the Department of Justice and in client agencies; officials from disparate states; environmental experts; and diverse *amici*. I also defended a variety of agency actions, including some promoting protection of natural resources such as the establishment of a national monument, and some promoting development such as the licensing of a deepwater liquified natural gas facility. I often found myself engaging with corporations, advocacy groups, state or tribal governments, or other interests that might appear as aligned parties or *amici*.

As Solicitor General for the District of Columbia, my responsibilities continued to include working across the political spectrum. For example, I was charged with helping forge multistate litigation coalitions, such as coalitions joining multistate *amicus* briefs in the Supreme Court. I frequently worked with state solicitors general regardless of ideology or political affiliation, on all sorts of issues—for instance, bread-and-butter civil procedure issues such as proper interpretation of 28 U.S.C. § 1367(d)'s tolling of limitations periods, which was under consideration when a coalition of 24 states supported the District of Columbia's position in the Supreme Court.

- b. How has working across the political spectrum prepared you to lead ENRD?

RESPONSE: My work across the political spectrum has reinforced for me how important it is for Department of Justice leadership—including the Assistant Attorney General for ENRD—to respect and promote the rule of law. Enforcement of the law must be carried out without fear or favor, regardless of which political party is in power.

Ranking Member Grassley

Responses to Questions from Ranking Member Grassley to Todd Kim, Nominee to be Assistant Attorney General, Environment and Natural Resources Division

1. President Biden issued a document during his first week in office, announcing “agency actions that heads of the relevant agencies will review in accordance with the Executive Order: ‘Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.’” This list included the “Notice of Availability of the Record of Decision for the Proposed Willow Master Development Plan Project, Alaska,” 85 Fed. Reg. 69351 (November 2, 2020).

The Willow Project was leased by the Clinton administration and pursued under the Obama administration’s management plan. Thus, the Willow Project is not a new plan or commitment of infrastructure. The Department of the Interior has followed all laws and created a robust and scientifically rigorous environmental impact statement, satisfactorily meeting NEPA’s requirements for the Willow Project.

This project is incredibly important for the State of Alaska and the Alaska Native people that will benefit from infrastructure development and revenues from this project. The project is estimated to contain 450 to 800 million barrels of recoverable oil. It will provide more than 2,000 construction jobs and hundreds of long-term jobs. Revenues to the State of Alaska from the project will raise about \$2.3 billion; there will be an additional \$7.6 billion in federal revenues. The project is currently in litigation, impeding this season’s construction and the long-term permitting and development of the project in the future.

- a. Will you commit to defending the robust environmental-impact statement and record of decision for the Willow Project during the existing litigation and future litigation?
- b. Will you commit to defending previous environmental rulemakings and records of decision that have already been developed by non-political career civil servants and have completed the entire permitting process?

RESPONSE: I understand that in late 2020, then-Interior Secretary Bernhardt signed the Willow Master Development Plan Project Record of Decision, allowing for construction and operation of certain infrastructure proposed by ConocoPhillips Alaska, Inc., to produce and transport federal oil and gas resources under leaseholds in the northeast area of the National Petroleum Reserve in Alaska. This decision has been challenged in two different lawsuits, and the Environment and Natural Resources Division (ENRD) is defending the suits. Because I am not currently at the Department of Justice and am not aware of all the relevant facts, I am not in a position to comment on this particular project or litigation. I am similarly not in a position to comment on records of decision for other projects that may be subject to litigation. As a general matter, my decisions on such matters will be based on a careful review of the relevant facts and law and consultation with the relevant lawyers at the Department and any interested client agency.

2. Do you agree with the following statement: “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits”?

RESPONSE: I understand that this quotation appears in the majority Supreme Court opinion in *Michigan v. EPA*, 576 U.S. 743 (2015). If confirmed as Assistant Attorney General, it will be my duty to enforce the Constitution and other federal laws consistent with Supreme Court precedent.

3. In many western States, water conservation and, in particular, water use are important aspects of economic growth. A big part of that is the settlement of tribal claims to water rights. These settlements are preferable to litigation—and they can both create certainty as to water supply on reservations and create partnerships that allow for economic development among non-tribal water users. The Indian Resources Section of the Environment and Natural Resources Division plays a role in these settlements.
 - a. As Assistant Attorney General, will you allow the Indian Resources Section to continue to pursue Indian water-rights settlements?
 - b. As Assistant Attorney General, will you approve them?

RESPONSE: The Indian Resources Section of ENRD asserts federal reserved water rights held for the benefit of tribes and individual Indians in water rights adjudications throughout the western United States. The Executive Branch has a longstanding policy to resolve disputes regarding Indian water rights through negotiated settlements rather than litigation, when possible. In most instances, these settlements require Congressional approval and enactment. If confirmed, I would work with the career lawyers in the Division, as well as with the Department of the Interior, which generally takes the lead in negotiating such settlements, to seek to ensure that this important work continues and that prospective settlements undergo a full and fair review based on the facts and an objective analysis of the law.

4. Do you agree that federal environmental rules under statutes like CERCLA should minimize their preemptive effects on effective state environmental-regulation regimes?

RESPONSE: Assessing the preemptive impact of federal environmental statutes requires an analysis that can vary depending on the precise statute, state environmental regulation, and facts at issue. These issues are frequently litigated. As Assistant Attorney General, I would approach preemption issues the same as I would any other—by fully and fairly reviewing the relevant facts and objectively analyzing the pertinent law in consultation with career lawyers and Department leadership.

5. President Biden has said he wants to change the name of the Environmental and Natural Resources Division to the “Environmental Justice and Natural Resources Division.”¹
 - a. Do you agree with this name change?
 - b. If so, in a future Republican administration, would you agree with a future Republican attorney general changing the name of other Justice Department components to better reflect her ideological priorities—such as the Civil and Natural Rights Division or the Tax Reform Division?

RESPONSE: President Biden has issued an Executive Order directing the Attorney General to consider changing the name of the Environment and Natural Resources Division. As a nominee, I do not want to pre-judge this process, as there can be many factors that go into determining the appropriate name for an office or component. In addition, because I am not in the Department, I do not know the current status of any discussions regarding this matter. If confirmed, I will work with Attorney General Garland, other Department leaders, and the career professionals in ENRD to carefully consider the matter.

6. We discussed the issue of environmental justice on the phone prior to your hearing. During that conversation, you expressed a view that environmental justice is not a particularly new concept. I’m open to that idea, but I want to know more about what the term means.
 - a. How do you define “environmental justice”?
 - b. Do conceptions of environmental justice include, say, the ability of family farmers to earn a living?
 - c. Does environmental justice contemplate the effects of new environmental rules on existing communities that rely on established industry?

RESPONSE: The Environmental Protection Agency has defined the term as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies.” I think about environmental justice in these terms: everyone has an equal right to our most precious natural resources—clean air, safe drinking water, and uncontaminated land. All communities should also have a meaningful say in the environmental decisions that may affect them, including with respect to their livelihoods, their health, and their quality of life. This includes rural communities, including those with family farms, and communities that rely on established industry. President Biden’s Executive Order 14,008, *Tackling the Climate Crisis at Home and Abroad*, recognizes that environmental and economic justice are linked, and makes it the policy of the Administration to both “secure environmental justice and spur economic opportunity for disadvantaged communities.”

¹ Ellen M. Gilmer, *Biden Bolsters DOJ Focus on Environmental Justice, Climate*, Bloomberg Law (Jan. 27, 2021), <https://news.bloomberglaw.com/environment-and-energy/biden-bolsters-doj-focus-on-environmental-justice-climate>.

7. Will you commit to issuing guidance on what environmental justice means before taking any steps to implement it?

RESPONSE: The Department of Justice has an Environmental Justice Strategy and Guidance Concerning Environmental Justice. I will follow the Department's guidance on these matters, including any further guidance developed pursuant to Executive Order 14,008.

8. Supplemental Environmental Projects, or SEPs, are environmental projects that enforcement-target polluters need to undertake in lieu of civil penalties to the government. They're the environmental equivalent of third-party settlement slush funds. The GAO has repeatedly questioned SEPs' legality under the appropriation power. In 2020, the Justice Department's Environment Division also put out the Clark Memo prohibiting SEPs' use. This memo has since been withdrawn.
 - a. Do you agree with the GAO position on SEPs? Please explain why or why not.
 - b. Do you agree with the Clark Memo on SEPs? Please explain why or why not.
 - c. If ENRD returns to the practice of using SEPs, will you commit to responding to the Clark Memo and the GAO's arguments in your own memo justifying their use? I think this would be more consistent with the rule of law than quietly reinstating the practice.

RESPONSE: Because I am not presently at the Department, I am not aware of all the relevant facts related to the legality and use of Supplemental Environmental Projects, and therefore am not in a position to comment. My understanding is that there are several GAO documents from the 1980s and 1990s that may address this issue, and there are also other authorities that may be relevant. I have not had the opportunity to study these authorities in detail. If confirmed, I would approach this matter as I would any other, by working with subject-matter experts at the Department, including career lawyers, in seeking to ensure that the Department undertakes a full and fair review of the facts and an objective analysis of the law. As Assistant Attorney General, I would seek to ensure that the Environment and Natural Resources Division complies with applicable law.

9. In previous Democratic administrations, a lot of stealth regulation has taken place through so-called "sue and settle" arrangements. That's when special-interest groups sue the government on an issue where the groups and the government basically agree, in order to reach a settlement establishing favorable policies going forward. When we discussed this on the phone, you understandably took issue with my characterization of this process as collusive. I'm sure that it has not been formal collusion in most cases, but the fact is that this kind of behavior doesn't need formal collusion to succeed: activists know the substantive policy views of the administration and can reverse-engineer lawsuits to achieve mutually desired goals without formal collusion. And while I am not accusing you of wanting to collude with activist groups, I think the history of sue-and-settle counsels in favor of transparency. Will you, therefore, commit to putting all ENRD settlements online to the extent permitted by law?

RESPONSE: I agree that governmental settlement processes should be transparent to the extent circumstances allow. I am not familiar with all of the applicable requirements, but I know that a Department of Justice regulation restricts confidentiality provisions in settlements, and that another Department of Justice regulation makes many consent decrees subject to public notice and comment. ENRD’s client agencies also have processes for making consent decrees and settlements available on their websites. I look forward to learning more about the transparency of ENRD settlements if confirmed.

10. You received a letter of support from, among others, the Alaska Wilderness League, Clean Water Action, Earthjustice, the Environmental Defense Fund, Friends of the Earth U.S., Lawyers for Good Government, the League of Conservation Voters, and the NRDC. As you well know, these left-wing dark-money organizations are very often the litigation opponents of ENRD. Indeed, they even say that in their letter. As I noted in Vanita Gupta’s hearing, it’s one thing for environmentalist radicals to endorse a policymaker with aligned views; it’s another thing for them to endorse the person who has to face them in court while they challenge lawful federal action. This is like if BP had sent a letter endorsing Jeff Clark. I recognize, of course, that you don’t necessarily pick who sends letters on your behalf, so I don’t want to imply anything untoward about this on your part.
 - a. Are these environmentalist activists correct to suppose that you will align ENRD litigation positions to meet their policy goals?
 - b. What assurances can you give the American people that you will defend lawful government action to the fullest extent you can, even if challenged by environmentalists who support your nomination?

RESPONSE: As I testified at my hearing, the role of Assistant Attorney General for ENRD is an enforcement role rather than a policy role. If confirmed, I will make decisions by studying the facts, the law, and any applicable Department policies and regulations, and consult with career lawyers, subject-matter experts, and client agencies as appropriate. While I am grateful to have the support of individuals from a wide variety of backgrounds and political affiliations—including past Republican and Democratic political appointees who served at ENRD—I have not pre-judged any ENRD position or decision as a nominee and if confirmed will adhere to my ethical duties in defending lawful government action against challenge by any party.

11. Many of the same environmentalists supported Vanita Gupta for Associate Attorney General, complaining that President Trump’s Justice Department “actively applied a restrictive view of standing doctrine.” These environmentalists seemed confident that she would not. They don’t seem to mention it in your case, but I want to ask about it anyway because you’ll be taking orders from Associate Attorney General Gupta.
 - a. Do you support a “less restrictive” standing doctrine?

- b. Do political appointees have the power to confer or deny standing under the Constitution?
- c. Will you instruct the Environment Division to faithfully employ standing doctrine in litigation, including *Lujan v. Defenders of Wildlife*?

RESPONSE: If confirmed, I would apply standing doctrine as it has been defined by the Supreme Court and other federal courts. Those courts decide questions of standing; the Executive Branch cannot confer or deny standing. In litigation, the Department of Justice has an obligation to present standing concerns and other issues of justiciability as part of our broader duty to present legal issues fully, fairly, and candidly to the court.

12. We talked on the phone about litigation-position flips in new administrations. I was happy to hear you say that you favor the faithful application of the APA. But I will note that it seems to be a matter of fact that the Biden Justice Department is failing to defend controversial rules on appeal, the Public Charge Rule being the most notorious example.
- a. Are you aware that President Trump’s Justice Department was defending the Obama WOTUS rule in federal court through the fall of 2018, while they waited for a new rule to be promulgated?
 - b. Was it a mistake for them to do this?

RESPONSE: Because I was not at the Department in the fall of 2018, I am not in a position to comment on the handling of any litigation at that time related to “waters of the United States.” In general, I understand that Department of Justice litigation decisions—including the decision whether to defend agency rulemakings—are based on a careful review of the relevant facts and law and consultation among the relevant lawyers at the Department and any interested client agency.

13. If the Biden administration continues to fail to defend rules it dislikes, in the face of adverse injunctions and in lieu of rulemaking, do you agree that this should be the standard practice in future changes of administration?

RESPONSE: In general, the Department of Justice’s legal defense of regulations issued by another agency is guided by close consultation with the client agency and a careful review of the facts and the law. I believe that approach is appropriate whether or not there has been a change in Administration.

14. In every administration, there is a tension between the career lawyers and their political managers. This was particularly acute during the Trump years because most career Justice Department lawyers are politically liberal. For example, during the litigation over Obamacare, several career lawyers representing the United States chose to withdraw from the case. Agree or disagree with the government’s position, the legal position was not frivolous because the district court substantially agreed with the argument, as did the Fifth Circuit. The lawyers left the case simply because they disagreed with the argument.

To the best of my knowledge, these career lawyers were not punished for their actions.

- a. Do you agree with the decision these career lawyers made to withdraw over a non-frivolous position because they disagreed with it?
- b. Will you support career lawyers who, like the Obamacare lawyers, decline to argue the positions mandated by political officials because they disagree with them?
- c. If you think different standards should apply across administrations, why?

RESPONSE: Because I was not in the Department at the time, I am not familiar with all of the details of the incident you reference and therefore I am not in a position to comment. As a general matter, if I am confirmed, I will expect ENRD career lawyers to continue to make decisions based on applicable Department policies.

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

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

RESPONSE: I believe that membership on the Federalist Society would not be a disqualifying factor for an individual to serve on front-office staff within the Justice Department.

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

RESPONSE: Yes, where such an individual was otherwise determined to be qualified to serve on the ENRD front-office staff.

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

RESPONSE: Yes, where such an individual was otherwise determined to be qualified to serve in a supervisory capacity.

16. *The Hill* reports that some former Trump appointees now hold career positions in the federal government. They reported this because various liberal activist groups are trying to purge these civil servants from the federal payroll. What is your view on removing federal employees who joined the government during the last presidential administration—whether as appointees or career employees—and now hold career positions?

RESPONSE: Decisions with regard to personnel at the Department of Justice should be made consistent with civil service laws and Departmental policies, without regard to any prohibited considerations. If confirmed, I will make personnel decisions within my purview consistent with federal law, including the civil service laws, and with Departmental policies, without regard to any prohibited considerations.

17. Former Attorney General Bill Barr designated former U.S. Attorney John Durham as a special counsel to continue his investigation into the Crossfire Hurricane scandal. While the ENRD Assistant Attorney General is not in charge of these matters, you would be a Senate-confirmed individual, and it will always be possible for you to find yourself supervising something like the Durham investigation perhaps against your personal wishes.

- a. Should the authority to do so fall to you for whatever reason, will you commit to allowing Special Counsel Durham to continue his investigation, unimpeded?
- b. Should the authority to do so fall to you for whatever reason, will you commit to publicly releasing the unredacted version of his report?

RESPONSE: Because I am not at the Department, I do not know the details of Mr. Durham’s investigation. I understand that he has been allowed to continue his investigation, and I have no reason to think that was the wrong decision. As a general matter, I share the commitment to “transparency and to explaining Justice Department decision making” that Attorney General Garland conveyed at his confirmation hearing. Should I undertake any role with regard to Mr. Durham’s investigation, I would seek to understand the nature of the investigation and consult with appropriate Department of Justice staff before making any decisions. Any such decisions would be based on the facts, the law, and any applicable Department policies.

18. You worked on the Justice Department’s 2005 briefing in *DeWaal v. Alston*, where the National Park Service asked visitors to voluntarily refrain from approaching the Rainbow Bridge National Monument because it was sacred to certain Native Americans and because heavy traffic was eroding the Rainbow Bridge site.² Earl DeWaal sued, saying the Park Service had violated the Establishment Clause.³ The Justice Department argued that Mr. DeWaal lacked standing to challenge the Park Service’s request because voluntary compliance created no injury.⁴ The Department also argued that there was no Establishment Clause issue because “Rainbow Bridge is not a governmental display of a religious symbol on property; it is property in its natural state.”⁵ The Supreme Court declined to review Mr. DeWaal’s appeal.⁶ If you face comparable Establishment Clause

² SJQ at 13; see also *Nat’l Arch & Bridge Soc’y v. Alston*, 98 F. App’x 711, 712 (10th Cir. 2004); see also Br. for Respondents, *DeWaal v. Alston*, 125 S. Ct. 1294 (2005), No. 04-367, 2005 WL 26755 at *2.

³ See *id.* at *3.

⁴ *Id.* at *6.

⁵ *Id.* at *7.

⁶ *DeWaal v. Alston*, 125 S. Ct. 1294 (2005).

challenges as the ENRD Assistant Attorney General, will you commit to similarly being attuned to whether the plaintiff has standing and whether an Establishment Clause issue even exists?

RESPONSE: If confirmed, I will consider all of the facts and applicable law in making decisions, including on the issues you raise.

19. After the Ten Commandments display in Colorado’s state capitol was challenged on Establishment Clause grounds in 1989, you wrote a case note for the Harvard Law Review on this issue.⁷ You noted that Establishment Clause jurisprudence was widely viewed “as a grab bag of vague principles capable of justifying any conclusion, whether based on constitutional values or on arbitrary individual biases.”⁸ You added that the Colorado Supreme Court’s decision on the Ten Commandments, which was sharply divided, “fuels such criticism.”⁹ You proposed creating a threshold requirement for Establishment Clause cases, which would require that “state actors take affirmative steps to disclaim endorsement of any arguably religious display on state property.”¹⁰ In cases where the state offered a disclaimer, you wrote, the burden would return to the plaintiff.¹¹ If you face any matters with potential Establishment Clause violations in your role as the ENRD Assistant Attorney General—particularly in any pre-litigation enforcement matters—would you encourage Department attorneys to proactively seek disclaimers that might dispel concerns?

RESPONSE: In the piece you reference, which I authored as a law student, I sought to suggest a potential tool for courts to use in what I perceived to be a complex and interesting legal area. If confirmed, any decision I make, including decisions regarding Establishment Clause issues, will be guided by the facts and the law, in consultation with career lawyers and subject-matter experts at the Department.

⁷ Todd Kim, *Establishment Clause—Religious Displays on Public Property—Colorado Supreme Court Upholds Display of Ten Commandments on Public Property*, 109 Harv. L. Rev. 530 (1995) (discussing *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013 (Colo. 1995) (en banc)).

⁸ *Id.* at 533.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 534.

Senator Hawley

Responses to Questions from Senator Hawley to Todd Kim, Nominee to be Assistant Attorney General, Environment and Natural Resources Division

1. What do you believe the Department of Justice's role should be in enforcing environmental regulations?

RESPONSE: The mission of the Department of Justice includes the enforcement of federal law. The enforcement of federal environmental statutes and regulations is vital to protecting the health of all Americans and our nation's environment. Enforcement is also necessary to ensure a level playing field among businesses regarding compliance with the requirements of federal law. The Environment and Natural Resources Division (ENRD) is assigned responsibility for the enforcement of the nation's civil and criminal environmental laws through actions in court. Because the federal government's resources are finite, ENRD must prioritize its work in consultation with its client agencies.

2. Do you believe the Clean Air Act gives the Department of Justice the authority to prosecute individuals, not just businesses, for carbon emissions?

RESPONSE: The Clean Air Act has provisions that allow civil and criminal enforcement actions against both corporations and individuals, but these provisions apply only to those carbon emissions that are regulated under applicable law. Those provisions also require the federal government to meet the legally applicable burden of proof, show any requisite element of intent, and satisfy other legal requirements.

3. Do you interpret the Clean Water Act's definition of a "water of the United States" to include dry river beds?

RESPONSE: The term "waters of the United States" is currently defined in the Navigable Waters Protection Rule. That rule remains the topic of pending litigation. Because I am not in ENRD, it would be inappropriate for me to comment unless and until I am confirmed by the Senate and can be fully briefed on the relevant facts and laws.

4. If you are confirmed, do you intend to use the federal government's eminent domain power to speed the deployment of renewable resources and clean energy technologies?

RESPONSE: Any exercise of eminent domain requires both statutory authorization and a Congressional appropriation. It is my understanding that Congress has allowed the use of eminent domain in certain contexts involving critical infrastructure, pipelines, and energy transmission, and that the Department applies those provisions of law faithfully based on their terms and what Congress has authorized. If confirmed, my role as the Assistant Attorney General would be to execute, defend, and enforce the laws enacted by Congress as implemented by our client agencies, to the extent that such agency action is consistent with these laws.

5. What limitations on the eminent domain power do you recognize?

RESPONSE: The Constitution permits the federal government to acquire property through eminent domain only when it does so for a public purpose, and when it ensures that the landowner is compensated fairly for those lands. I understand that before ENRD's Land Acquisition Section will initiate a condemnation case, the federal agency that is seeking to acquire land must establish that Congress has granted that agency authority to acquire the property for a public purpose and that Congress has appropriated funding for the acquisition. In addition, the government must ensure that owners receive just compensation for the property that is taken. If confirmed, I will seek to ensure the full execution of these responsibilities.

6. If you are confirmed, will you independently advise or direct that DOJ resources be devoted to support structural reform lawsuits known as "atmospheric trust litigation"?

RESPONSE: I am aware that there have been a number of public trust actions brought against state governments seeking to compel action to address climate change. Those cases have been brought in state court, on a range of state-law theories. I am not familiar with the details of that litigation and do not have a view as to whether the Department of Justice should have a role in those cases. The federal government has also been sued in some cases on a public trust theory, and is defending that litigation. If confirmed, I would continue to defend the actions of all federal agencies of the Executive Branch based on a fair review of the facts as applied to applicable law. As a nominee, I am not in a position to assess all of the facts as they relate to these or any other specific cases.

7. What is your understanding of the essential holding of the Supreme Court's *D.C. v. Heller* decision?

RESPONSE: In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects "an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). The Court also stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. If confirmed, I will take an oath, as all Department employees do, to support and defend the Constitution of the United States, including the Second Amendment.

Senator Lee

Responses to Questions from Senator Lee to Todd Kim, Nominee to be Assistant Attorney General, Environment and Natural Resources Division

1. In 2016, President Obama created a federal monument out of 5,000 miles of land under the ocean. Justice Roberts implied that defining a “monument” as 5,000 miles of land under the ocean would not only be incorrect, but would defy ordinary English. More directly, in *Massachusetts Lobstermen's Ass'n v. Raimondo*, Justice Roberts said that the requirement that parcels of land, which are attached to monuments, should be kept small “has ceased to pose any meaningful restraint.” Do you agree with Justice Roberts that monuments should be confined to the smallest area necessary to protect the monument?

RESPONSE: The Antiquities Act provides the relevant legal standard for designations: “The President may reserve parcels of land as part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b). I believe that every decision about the area of a monument is fact-driven and it is difficult to generalize.

2. President Obama created the Bears Ears National Monument in 2016, by designating over 1.3 million acres in Utah as a national monument under the Antiquities Act. That action immediately stripped Utahans of access to rich natural resources and grazing lands. President Trump thankfully reduced that monument’s size by almost 85%. Do you agree with the reduction of the Bears Ears Monument allowing Utahans greater access to the area’s resources?

RESPONSE: I understand that this issue is the subject of pending litigation. Because I am not in the Environment and Natural Resources Division (ENRD), I cannot comment on this litigation unless and until I am confirmed by the Senate and can be fully briefed on the relevant facts and law.

3. Do you believe that designating 1.3 million acres of land to protect a couple of buttes in Utah and 5,000 square miles of land beneath the ocean to protect invisible, inaccessible underwater canyons is an appropriate use of the Antiquities Act?

RESPONSE: I understand that this issue is the subject of pending litigation. Because I am not in ENRD, I cannot comment on this litigation unless and until I am confirmed by the Senate and can be fully briefed on the relevant facts and law.

4. How would you define the “Waters of the United States?”

RESPONSE: The term “waters of the United States” as used in the Clean Water Act is currently defined in the Navigable Waters Protection Rule. That rule remains the topic of pending litigation. Because I am not in ENRD, I cannot comment unless and until I am confirmed by the Senate and can be fully briefed on the relevant facts and laws.

5. For a long time, the EPA treated things like abandoned sand and gravel pits as “Waters of the United States” and tried to regulate them. The Supreme Court rejected that approach in *Solid Waste Agency v. Corps. Of Engineers*. Do you agree that the EPA cannot—and should not—regulate isolated bodies of water that are entirely within one state?

RESPONSE: In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the Clean Water Act. If confirmed, my duty will be to enforce federal law consistent with Supreme Court precedent.

6. In *Rapanos v. United States*, Justice Scalia pushed to narrow the EPA’s authority to only “relatively permanent, standing or continuously flowing bodies of water.” Do you agree with Justice Scalia’s proposed test?

RESPONSE: In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court issued multiple opinions, none of which commanded a majority of the Court. If confirmed as Assistant Attorney General, I will enforce federal law consistent with Supreme Court precedent, including precedent as to the handling of such fractured decisions.

7. Do you agree with the Biden Administration’s moratorium on new oil and gas leases on federal land and water areas?

RESPONSE: I understand that this issue is the subject of pending litigation. Because I am not in ENRD, I cannot comment on this litigation unless and until I am confirmed by the Senate and can be fully briefed on the relevant facts and law.

8. Do you agree with the Biden Administration’s 60-day suspension of new oil and gas leasing and drilling permits on federal lands unless approved by leadership at the Department of the Interior?

RESPONSE: Processing and approvals of permits for leasing and drilling permits on federal land is within the responsibility of the Secretary of the Interior. If confirmed, it would be my responsibility to handle lawsuits challenging agency actions, including such approvals, within the bounds of the law.

9. Do you agree with the Biden Administration’s cancellation of the Keystone XL Pipeline?

RESPONSE: I understand that this issue is the subject of pending litigation. Because I am not in ENRD, I cannot comment on this litigation unless and until I am confirmed by the Senate and can be fully briefed on the relevant facts and law.

10. Do you pledge to allow for meaningful Congressional oversight of the Division’s activities and to remain available for questions from legislators?

RESPONSE: Yes.