Responses to Supplemental Questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn

1. **Were you ever present at a meeting in which *State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010) was discussed?**

Response:

I attended at least one meeting where the existence of the litigation was briefly mentioned, but none where any substantive discussion of the litigation occurred.

2. **Have you ever been asked your opinion regarding the merits of or the underlying legal issues in *State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010)?**

Response:

No.

3. **Have you ever been asked your opinion regarding any other legal issues that may arise from Pub. L. No. 111-148?**

Response:

No.

4. **Have you ever offered any views or comments regarding either the merits of *State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010) or the strategy that the United States government should employ in defending Pub. L. No. 111-148?**

Response:

No.

5. **Have you read, seen or reviewed any of the papers filed by the United States in *Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010), and, if so, before or after filing? Have you read, seen or reviewed any internal documents or memoranda discussing the case?**

Response:

No.

6. Were any documents filed in *Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010) while you were performing as Solicitor General?

Response:

Yes. I did not participate in *Florida v. U.S. Department of Health and Human Services*, so I do not have any firsthand knowledge of the filings in that case. A search of the federal district court's docket entry shows that many documents were filed during my tenure as Solicitor General, including several by the Justice Department: a notice of appearance filed on April 20, 2010; a motion to extend time filed on May 25, 2010; a motion for leave to file excess pages filed on June 11, 2010; and a motion to dismiss filed on June 16, 2010.

7. Have you ever approved any document (either for filing with the court or for internal Administration use or distribution) with respect to *Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010)?

Response:

No.

8. Have you ever been asked about your opinion regarding the underlying legal or constitutional issues related to any proposed health care legislation, including but not limited to Pub. L. No. 111-148, or the underlying legal or constitutional issues related to potential litigation resulting from such legislation?

Response:

No.

9. Have you ever offered any views or comments regarding the underlying legal or constitutional issues related to any proposed health care legislation, including but not limited to Pub. L. No. 111-148, or the underlying legal or constitutional issues related to potential litigation resulting from such legislation?

Response:

No.

10. If your answer is "yes" to any of questions (1) to (9) or you were otherwise consulted regarding Pub. L. No. 111-148, will you recuse yourself from any related case, should you be confirmed?

Response:

My questionnaire, my confirmation hearing testimony and my response to your first question for the record addressed how I would approach recusal issues. First, I would recuse myself from any case in which I served as counsel of record. Second, I would recuse myself from

any case in which I played a substantial role. This category would include cases in which I approved or denied a recommendation for action in the lower courts and cases in which I reviewed a draft pleading or participated in formulating the government's litigating position. Third, in all other circumstances I would consider recusal on a case-by-case basis. In *Florida v. U.S. Department of Health and Human Services*, I neither served as counsel of record nor played any substantial role, as defined above. Therefore, I would consider recusal on a case-by-case basis, carefully considering any arguments made for recusal and consulting with my colleagues and, if appropriate, with experts on judicial ethics.

11. If you answered "yes" to any of questions (1) to (9), and yet will not recuse yourself from any case related to Pub. L. No. 111-148, please explain why you refuse to, in the words of Justice Marshall, "quell any appearance of impropriety" that may result from your participation in such a case.

Response:

Please see above.

12. What date did you cease performing responsibilities of the Solicitor General?

Response:

I ceased performing the litigation responsibilities of the Solicitor General position on or just after May 10, 2010, the date of my nomination to be Associate Justice of the Supreme Court. I informed the Supreme Court on May 17, 2010 that Neal Katyal, the Principal Deputy Solicitor General, would serve as Acting Solicitor General in all filings from the date of my nomination. Mr. Katyal also assumed responsibility for acting upon all appeal and other litigation recommendations at this time. I have continued to handle some routine administrative matters.

Between March 5, 2010, when I was informed that the President wished to consider me for a possible Supreme Court vacancy, and May 10, 2010, when I was nominated, I handled the work within the Solicitor General's Office in the normal way; that is, I served as counsel of record in all filings in the Supreme Court and acted upon all appeal and other litigation recommendations. During this period, however, I scaled down my participation in more general departmental matters (which was not extensive to begin with). I ceased attending the Attorney General's morning meetings sometime in early-to-mid April. My participation in heath care litigation or legislation, both in this period and previously, is addressed in the questions above. And, to the best of my recollection, I also did not become involved during this time in any other new litigation—either cases filed against the government in the district courts or cases the government filed or was preparing to file in the district courts.

13. What duties are you now performing as Solicitor General?

Response:

Please see above.

Senator Jeff Sessions
Questions for the Record
Elena Kagan

1. Federal law requires that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2006). The same statute requires a justice to recuse himself "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(3). In response to a question from Senator Leahy at your hearing, you testified:

> **"I would recuse myself from any case in which I've been counsel of record at any stage of the proceedings, in which I've signed any kind . . . brief.**
>
> **And I think that there are probably about 10 cases . . . I haven't counted them up particularly, but I think that there are probably about 10 cases that are on the dockets next year in which that's true, in which . . . I've been counsel of record on a petition for certiorari or some other kind of pleading. So that's a flat rule."**

a. Please provide the names of these cases and a detailed explanation of what role you played in each case, including what role you played in the decision to appeal and the development and approval of arguments presented in the brief.

Response:

A list of all cases in which I served as counsel of record for a party or amicus appears in my questionnaire response. To the best of my knowledge, the Court will hear next term the following cases in which I served as counsel of record: *Abbott v. United States*; *Michigan v. Bryant*; *NASA v. Nelson*; *Flores-Villar v. United States*; *United States v. Tohono O'odham Nation*; *Costco v. Omega*; *Staub v. Proctor Hospital*; *Williamson v. Mazda Motor of America, Inc.*; *Sossamon v. Texas*; *Mayo Foundation for Medical Education and Research v. United States*; *Pepper v. United States*. In these cases, I was substantially involved in the preparation of each pleading on which my name appears. And in the subset of these cases in which the government filed a petition for writ of certiorari, I approved the decision to file that petition.

b. During your testimony, you also stated

> **"In addition to [the cases mentioned above], I said to you on the questionnaire that I would recuse myself in any case in which I'd played any kind of substantial role in the process."**

Although you stated that "but I think that that would include any case in which I've officially formally approved something," but did not provide any further guidance on the meaning of a "substantial role in the process."

i. Please explain how you would define the term "substantial role" and provide the types of activities that you envision satisfying that standard.

Response:

I would recuse myself from any case in which I approved or denied a recommendation for action in the lower courts. This category would include cases in which I authorized an appeal, intervention, or the filing of an amicus brief. It would also include cases in which I denied leave to intervene or file an amicus brief. I would also recuse myself from any cases in which I did not take such official action but participated in formulating the government's litigating position or reviewed a draft pleading. In all other circumstances, I would consider recusal on a case-by-case basis.

ii. Please provide a list of the cases in which you have played a "substantial role" as Solicitor General.

Response:

A complete list of all cases in which I approved or denied a recommendation for action in the lower courts was appended to my questionnaire response. I did not maintain a running list of the much smaller group of cases in which I took no such official action, but participated in formulating the government's litigating position or reviewed a draft pleading. If confirmed, I would develop an appropriate process for identifying such cases to ensure my recusal—consulting when necessary with the Justice Department about whether or the extent to which I participated in a case.

iii. Do you consider cases in which you personally reviewed or participated in discussions about the filings of the United States (in any federal court, at any level) to be included in the category of cases in which you "played any kind of substantial role"? Why, or why not?

Response:

If I personally reviewed a draft pleading or participated in discussions to formulate the government's litigating position, then I would recuse myself from a case. In my view, this level of participation in a case would warrant recusal.

iv. Does your understanding of "substantial role" include cases in which you were not the formal decisionmaker, but for which you gave advice to those making the decisions? Why or why not?

Response:

If I gave advice about the government's litigating position or the content of a filing, then I would recuse myself from the case. In my view, this level of participation in a case would warrant recusal.

v. Do you consider cases that might come before you on the Court after you had initially denied permission to appeal or to intervene or to file amicus briefs at some interlocutory point in the case to be included in this category of cases in which you "played any kind of substantial role"? Why, or why not?

Response:

Yes. In my view, this level of participation in a case would warrant recusal.

vi. Please provide a list of cases in which you have "officially approved something" during your time as Solicitor General.

Response:

As noted above, a spreadsheet listing all such decisions is attached to my questionnaire response.

c. Justice Marshall implemented a broad recusal rule "to quell any appearance of impropriety," and Justice Scalia recused himself from a controversial case decided in 2004 after he made public comments regarding the case while it was pending before the Ninth Circuit. If confirmed, will you follow the examples of Justice Marshall and Justice Scalia, recusing yourself, in the words of Justice Marshall, "to quell any appearance of impropriety" that may result from you participating in such a case?

Response:

If confirmed, I will consider carefully the recusal practices of current and past Justices, including Justices Marshall and Scalia, and I will consult with my colleagues in determining whether to recuse myself from any particular case.

2. At your hearing, Senator Cornyn asked you what role you thought a judge's opinion of the evolving norms and traditions of our society had in interpreting the written Constitution. You replied:

"I think that traditions are most often looked to in considering the liberty clause of the 14th Amendment. I think every member of the court thinks

that the liberty clause of the 14th Amendment applies to more than physical restraints. And I think almost every member thinks that it gives some substantive protection and not just procedural protections."

One of the basic American traditions is the opportunity to work hard at an honest vocation and keep the fruits of our labor. It is that tradition of liberty that has given America its reputation as a land of opportunity. Nonetheless, at times, this tradition has not been respected by governments. For example, during Reconstruction, many Southern states enforced laws and policies designed to keep newly freed blacks in a state of constructive servitude by depriving them of economic self-sufficiency. Given these traditions and the history surrounding the Fourteenth Amendment, do you believe economic liberty is a value protected by that Amendment?

Response:

The Supreme Court has interpreted the liberty provision of the Due Process Clause of the Fourteenth Amendment by "examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). That test would be the starting point for any consideration of a due process liberty claim, including one involving economic liberty. I do not think it would be appropriate for me to comment on whether a particular form of liberty is protected by the Due Process Clause, as such an issue might come before the Court in the context of a particular case.

3. In response to a question from Senator Whitehouse, you testified at your hearing that

"I do think congressional fact-finding is very important and that courts should defer to it. It doesn't mean that fact-finding is either necessary or sufficient. Sometimes Congress can make no findings of fact at all and the court should still to defer -- should still defer to -- to Congress. And, on the other hand, sometimes congressional fact-finding can't save a statute. But . . . in very significant measure, the courts should defer to congressional fact-finding."

a. Should a court defer to Congressional fact-finding if a trial court found that Congress had made such factual findings knowing that they were false?

Response:

I am not aware of any Supreme Court precedent suggesting that courts should defer to a knowingly false finding of fact made by Congress. As a practical matter, I think it is highly unlikely that Congress would engage in knowingly false fact-finding.

b. Should a court defer to Congressional fact-finding if a trial court determined that Congress was deliberately indifferent to the truth or falsity of these factual findings?

Response:

In evaluating congressional findings of fact, the Court has looked to the evidence underlying the findings. If there were no evidence underlying the findings—for example because Congress was deliberately indifferent to the truth of the findings—then that would be a factor for the Court to consider in evaluating those findings. As a practical matter, I think it is highly unlikely that Congress would engage in fact-finding with deliberate indifference to the truth of the findings.

c. If a court can evaluate the veracity of Congressional fact-finding, on what basis should a court evaluate the truth or falsity of such factual findings?

Response:

Because the Supreme Court does not have the institutional capacity to engage in fact-finding, it is typically not the role of the Court to evaluate the truth or falsity of the findings. Rather, the role of the Court is to carefully consider congressional findings in the context of evaluating the constitutionality of a statute.

4. At your hearing, you had an exchange with Senator Franken about the Supreme Court's opinion in *Circuit City v. Adams*, 532 U.S. 105 (2001). Senator Franken criticized Justice Kennedy for "ignoring the legislative history" of a provision in the Federal Arbitration Act and asked you to agree that Justice Kennedy's failure to look to the legislative history of the statute was in error. You replied as follows:

> **"I suspect that Justice Kennedy may have meant that he thought that the text was clear and, therefore, the legislative history was not something that should appropriately be explored, but I'm just guessing on that."**

Senator Franken said "I think you're guessing wrong." In fact, you did guess correctly. The full sentence of the *Circuit City* opinion Senator Franken quoted says "[a]s the conclusion we reach today is directed by the text of §1, we need not assess the legislative history of the exclusion provision. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994) ('[W]e do not resort to legislative history to cloud a statutory text that is clear')." Nonetheless, you did indicate that you thought it was proper to look to legislative history. You said:

> **"[W]hen a text is ambiguous, which, you know, frequently happens, then I think that the job of the courts is to use whatever evidence is at hand to understand Congress's intent, and that includes exploration of Congress's purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted, and in what circumstances, and by way of looking at legislative history.**
>
> **Now, I think courts have to be careful about looking at legislative history and make sure that what they're looking to is -- is reliable, but courts should not**

at all exclude signs of congressional intent and should really search hard for congressional intent when the text of the statute itself is unclear."

a. Is it appropriate to rely on legislative history if such legislative history is available from only one house of Congress?

Response:

I am not aware of any Supreme Court precedent suggesting that the Court may not consider legislative history from only one House of Congress. But in considering legislative history as evidence of what Congress meant when it enacted the statute, the breadth of the legislative history is relevant to its value.

b. In looking to legislative history, is it appropriate to look at only committee reports and other formal documents, or is it appropriate to look at floor debates, committee meeting debates, hearing transcripts and other legislative materials?

Response:

Floor debates, committee meeting debates, hearing transcripts, and other legislative materials can be relevant sources of legislative history. But the Court should carefully consider the reliability of such materials as evidence of congressional intent.

c. When looking at committee reports, is the report relevant only to the extent it represents the views of those who voted for the legislation in committee, or must the courts also look to the views of those who did not vote for the bill in committee, but did vote for the bill's final passage?

Response:

A court considering legislative history typically will look to committee reports, but may also look to other materials, including statements of Members of Congress who voted against the legislation in committee but voted in favor of the bill's final passage. The question, with respect to all such materials, is whether they reliably indicate Congress's intent in enacting a statute.

d. In looking at floor debates, is it necessary to compare what a member of Congress said on the floor with his final vote on the legislation to determine its relevance?

Response:

The weight to be given to a particular floor statement depends on the context, including the speaker's other statements and votes.

e. Is it permissible for the courts to assess the veracity of statements in legislative history, or must the courts simply accept these statements as the true intentions of the legislature?

Response:

The weight to be given to a particular statement in the legislative history depends on the context, including other statements in the legislative history that express a contrary view.

f. In his dissent in *Lane v. Pena*, 518 U.S. 187 (1996), Justice Stevens wrote that "a rule that refuses to accept guidance from relevant and reliable legislative history, does not facilitate -- indeed, actually obstructs -- the neutral performance of the Court's task of carrying out the will of Congress."

i. Do you agree with Justice Stevens' statement?

Response:

I am not familiar with the context of Justice Stevens' statement. I believe, as I indicated to Senator Franken, that when the text of a statute is ambiguous, legislative history can be a valuable source of evidence of the meaning that Congress intended to give a particular statutory provision.

ii. Do you think it is a court's task in statutory construction to "carry out the will of Congress," or is it a court's task to interpret the meaning of the text of legislation, leaving it to Congress to clearly express its will in that text?

Response:

The role of a court is to determine Congress's intent in enacting a statute. Where the text of the statute is clear, that is the end of the matter, because that is the best evidence of Congress's intent. Where the text is ambiguous, it is the job of the court to determine what Congress meant by looking to other legal sources, such as the statute's structure, title, context, and legislative history.

g. Justice Scalia critiqued the practice of looking to legislative history in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993), saying:

> **"The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . .' But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole,* was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."**

Do you agree that, given the diversity of viewpoints represented in the United States Congress, the legislative history of a statute could be a source of confusion?

Response:

In some cases, the legislative history of a statute may indeed be confusing. For that reason, among others, when the text of a statute is clear, the text should govern.

5. In response to a question from Chairman Leahy, you stated that ours is a Constitution

> **"that has all kinds of provisions in it, so there are some that are very specific provisions. It just says what you are supposed to do and how things are supposed to work. . . . But there are a range of other kinds of provisions in the Constitution of a much more general kind, and those provisions were meant to be interpreted over time, to be applied to new situations and new factual contexts. . . . And I think that they laid down--sometimes they laid down very specific rules. Sometimes they laid down broad principles."**

a. Would you classify the Second Amendment as a "very specific provision" or a "broad principle" in the Constitution?

Response:

I do not believe, and I did not mean to suggest in my hearing testimony, that all constitutional provisions fall into one of two categories—"very specific provisions" or "broad principles." Rather, I meant that different constitutional provisions contain language at different levels of generality, which present different interpretive issues. The issue in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), was whether the Second Amendment conferred an individual right to bear arms or merely a collective right associated with militias. The Court considered both the language and the history of the Second Amendment in deciding that it conferred an individual right.

b. In the course of your discussion with Senator Leahy you also mentioned the Fourth Amendment. In view of your contention that the Constitution includes very specific provisions and broad principles, could you explain, briefly, the "broad principle" for which this Amendment stands?

Response:

The Fourth Amendment, most fundamentally, protects against "unreasonable searches and seizures." That provision raises the question, explored in numerous cases, of what searches are "unreasonable."

c. Do you think the Sixth Amendment is "a very specific provision" of the Constitution or a "broad principle"? Please explain your answer.

Response:

The Sixth Amendment guarantees several rights of criminal procedure, including the right to a speedy trial, the right to a jury trial in the venue where the crime was committed, the right to confrontation, and the right to the assistance of counsel. Each of these provisions presents interpretive issues, but of a narrower scope than some other constitutional provisions raise.

d. Do you think the Eighth Amendment is "a very specific provision" of the Constitution, or a "broad principle"? Please explain your answer.

Response:

The Eighth Amendment protects against "cruel and unusual punishment" and "excessive" bail and fines. The principal interpretive issues raised by this Amendment concern which punishments are "cruel and unusual" and which bail and fines are "excessive."

e. Do you think the Tenth Amendment is "a very specific provision" of the Constitution, or a "broad principle"? Please explain your answer.

Response:

The Tenth Amendment reserves to the States or to the people the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." The principal question the Court has considered with respect to this Amendment is whether it provides protections to the States and to the people beyond what follows from a system of enumerated and limited federal powers.

i. Do you think the purpose of the Tenth Amendment was intended to give further textual protections to federalism, apart from the broader structure set up by the Constitution?

Response:

As Justice Story explained, the Tenth Amendment is an "affirmation" of the "necessary rule of interpreting the constitution" that all powers "not conferred" on the federal government are "withheld, and belong[] to state authorities." *United States v. Darby*, 312 U.S. 100, 124 (1941). In *New York v. United States*, the Court noted that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." 505 U.S. 144, 155 (1992).

ii. If you believe the Tenth Amendment is a "broad principle," do you think the "broad principle" was ultimately intended to protect the liberty of individuals, or the power of governments?

Response:

The Court has explained that the Tenth Amendment was intended to protect the powers reserved to the states, and thereby to safeguard individual liberty: "The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted).

6. At your hearing, several Senators repeatedly referred to *Ledbetter v. Goodyear Tire*, 550 U.S. 618 (2007). For example, one Senator said that, in the *Ledbetter* case "the Court on gender discrimination took the test, which I find incredible to believe, that Lilly Ledbetter was supposed to know about her discrimination even though it was impossible to discover it and she was barred by Statute of Limitations." In *Ledbetter*, the Supreme Court held that because the plaintiff filed her claim too late, the statute did not permit recovery. The clear language of the statute in question stated: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." The statute did not include an exception for pay discrimination cases where the actual discrimination had occurred years earlier. In dissent, Justice Ginsburg said that this case was a huge setback for women's rights, and that the Court should not read the 180-day period to apply to these facts. For the majority, Justice Alito admitted the result did not make sense, but it was up to the legislature, and not the court to rewrite bad statutes. Shortly after President Obama was elected, Congress enacted the Lilly Ledbetter Fair Pay Act, which remedied this statutory flaw.

a. If you believe that the clear text of a statute calls for an unjust result, could you conceive of a circumstance where it would be appropriate for a judge to interpret the statute in a manner that is "more just" but inconsistent with congressional intent? Or, is it more appropriate for judges to interpret the statute honestly, point out the unjust result and wait for Congress to remedy the statute?

Response:

The role of the Court in all cases of statutory interpretation is to interpret the statute in the manner consistent with congressional intent. I do not think it would be appropriate for me to say whether a particular decision conformed to this principle.

b. When is it appropriate for the Court to wait for Congress to remedy statutes?

Response:

Considerations of stare decisis have "special force" in the context of statutory interpretation, since Congress can amend the statute if it desires a contrary result. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

7. At your hearing, Senator Franken discussed *Citizens United v. FEC*, 558 U.S. 50 (2010), stating: "I'm more worried about how this decision is going to affect our communities and our ability to run those communities without a permission slip from big business." If you are confirmed, would you consider how a decision "is going to affect our communities" in determining what is required under the Constitution?

Response:

The Court's interpretation of the Constitution should be guided by legal sources: the text, structure, and history of the relevant constitutional provision, and the Court's precedents interpreting the provision. In interpreting the First Amendment, the Court may consider the effect of the statute or regulation on the ability of those affected by it to engage in free speech, as well as the way in which the statute or regulation advances countervailing state interests.

8. In response to a question from Senator Feinstein alluding to *Heller* and *McDonald*, you said that "there are various reasons for why you might overturn a precedent. If the precedent . . . proves unworkable over time or if the doctrinal foundations of the precedent are eroded, or if the factual circumstances that were critical to why the precedent -- to the original decision, if those change."

a. Please explain the standard the Court has, or in your view should, apply in determining whether a precedent has become "unworkable."

Response:

My response to Senator Feinstein was a general one, referring to all precedents, not to any cases in particular. The Court has explained that a precedent is unworkable if, over time, it has "defied consistent application by the lower courts," *Payne v. Tennessee*, 501 U.S. 808, 830 (1991)—that is, if the precedent has led to inconsistent outcomes and has proved incapable of being applied in a principled manner.

b. Please explain how the "doctrinal foundations" of the *Heller* opinion could become "eroded," given that the doctrinal foundations are the text and original meaning of the Second Amendment.

Response:

Heller is a precedent of the Court entitled to full stare decisis effect. As noted above, my response to Senator Feinstein concerning the doctrine of stare decisis was a general one; I did not suggest any way in which the doctrinal foundations of the *Heller* decision could become eroded. In general, this aspect of the doctrine of stare decisis refers to the erosion of prior decisions of the Court.

c. Please explain how the "doctrinal foundations" of the *McDonald* opinion could become eroded, given that the basis of the decision was that the Right to Keep and Bear Arms is a fundamental right.

Response:

Please see above.

d. Please provide an example of factual circumstances critical to the *Heller* and *McDonald* opinions that could change so that these decisions should be overruled, rather than merely distinguished.

Response:

As noted above, my response to Senator Feinstein was a general one; I did not suggest that factual circumstances critical to *Heller* or *McDonald* could change. If that claim were to come before the Court, I would fairly consider the briefs and arguments on both sides, but would do so against the strong background presumption of stare decisis.

e. Do you believe the *meaning* of the Right to Keep and Bear Arms could change with "factual circumstances," rather than simply the *effect* of that right in a particular context?

Response:

The Court applies the Second Amendment, as it applies any other constitutional provision, to new factual circumstances over time, as the Court decides the cases that come before it. This process does not change the constitutional provisions or the essential rights they confer, but may affect the way those rights apply in particular contexts.

9. In *District of Columbia v. Heller*, Justice Scalia wrote that the Court's decision did not bring the constitutionality of regulations on guns in "sensitive places" into question. Logically, if there are sensitive places, there must be non-sensitive places where the Right to Keep and Bear Arms cannot be denied. What standard should

the Court apply to distinguish between a non-sensitive places where gun restrictions are not proper and a sensitive place where such restrictions are permissible?

Response:

In *Heller*, the Court stated that the home is a location "where the need for defense of self, family, and property is most acute." 128 S. Ct. at 2817. By contrast, the Court noted that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* In future cases, the Court may be asked to decide whether other locations subject to gun regulations are more like the home, "where the need for defense of self, family, and property is most acute," or more like schools and government buildings.

10. At your hearing, Senator Leahy said:

> **"Two years ago, in *District of Columbia v. Heller*, the Supreme Court held the Second Amendment guarantees to Americans the individual right to keep and bear arms. I am a gun owner, as are many people in Vermont, and I agreed with the *Heller* decision. And just yesterday in *McDonald v. the City of Chicago*, the Court decided the Second amendment right established in Heller is a fundamental right that applies to the States as well as the Federal Government. . . . Is there any doubt after the Court's decision in *Heller* and *McDonald* that the Second Amendment to the Constitution secures a fundamental right for an individual to own a firearm, use it for self-defense in their home?"**

You replied: "[t]here is no doubt, Senator Leahy. That is binding precedent entitled to all the respect of binding precedent in any case. So that is settled law." However, you also testified, in response to a question from Senator Feingold: "I suspect that going forward the Supreme Court will need to decide what level of constitutional scrutiny to apply to gun regulations. . . It's clearly a decision that will come before the Court." Do you agree that, generally speaking, the Supreme Court applies the strict scrutiny test to regulations when there is a real and appreciable impact on, or a significant interference with, the exercise of a fundamental right?

Response:

Generally speaking, the Court uses different levels of scrutiny in applying different constitutional rights, depending on the particular right at issue and the context in which the right is asserted. For example, some restrictions on the freedom of speech—such as those that discriminate on the basis of viewpoint—are evaluated under strict scrutiny, while others—such as those that regulate the time, place, and manner of speech—are evaluated under more permissive levels of scrutiny. Similarly, government classifications based on race are evaluated under strict scrutiny, while government classifications based on gender are evaluated under intermediate scrutiny. The level of scrutiny that the courts should apply to particular gun regulations under the Second Amendment is an issue that is being litigated in the federal courts and is likely to come before the Supreme Court in the future.

11. During your hearing, you repeatedly referred to "settled law" and respecting precedent. As a law clerk for Justice Marshall, however, you expressed your desire to overturn precedent on a number of occasions. You wrote a memorandum to Justice Marshall recommending that he vote to deny a certiorari petition in *Pughsley v. O'Leary*, 484 U.S. 837 (1987) (cert. denied). The petitioner had sought to have his conviction overturned, claiming that his lawyer was constitutionally ineffective for not challenging the multiple identifications by the victim. The standard under which his claim of ineffective assistance of counsel was to be judged, of course, was set forth by the Supreme Court in the 1984 case of *Strickland v. Washington*, 466 U.S. 668 (1984), which remains the standard today, more than 25 years later. You wrote to Justice Marshall, however, "I'd like to reverse Strickland too, but something tells me this court won't buy the idea."

a. Why did you want to reverse *Strickland v. Washington*?

Response:

Justice Marshall strongly disagreed with *Strickland*. He dissented in that case because he believed that the test set forth in *Strickland* did not adequately protect the Sixth Amendment right to counsel, and he continued to object to the way the decision was applied. This memo indicates that I then agreed with his well-known views. *Strickland* is settled law, entitled to stare decisis effect.

b. What did you mean by "this court"?

Response:

I meant the Supreme Court.

c. Why did you think the Court as a whole would disagree with your preference to absolve defendants of any responsibility for showing prejudice?

Response:

Strickland v. Washington was a precedent of the Court, and no litigant had presented a strong argument for its reversal. *Strickland* continues to be settled law today.

12. This case was not the only case in which you ignored *stare decisis*. In *Hayes v. Dixon*, 484 U.S. 824 (1987) (cert. denied), a state court upheld, against an Equal Protection challenge, a statute requiring that paternity be established by acknowledgement or adjudication during a man's lifetime in order for the illegitimate child to inherit by intestate succession. In your memorandum to Justice Marshall, you acknowledged that "the Court upheld a near-identical" statute in *Lalli v. Lalli*, 439 U.S. 259 (1979), but wrote that "[t]he reversal of *Lalli*, which was a terrible decision, may not be a lost cause." You explained that the decision was "very close" and that "the personnel of the Court has changed considerably since then." Ultimately, you advised Justice Marshall not to try to discard the precedent

just yet: "But I'm not sure that reversing prior decisions is a great idea right now. . . . Even assuming that you wish to try to overturn *Lalli*, I think you should wait for a case in which the [petitioner] has clearly gotten screwed."

a. When would reversing prior decisions be a "great idea"?

Response:

As I testified at my confirmation hearings, the Court has explained that mere disagreement with a prior decision is not enough to justify overruling the decision. Instead, the Court considers whether the decision has proved unworkable over time, whether the decision's doctrinal foundations have eroded, or whether the factual circumstances that were critical to the original decision have changed.

b. Why did you want to "wait for a case" where the petitioner had "gotten screwed"?

Response:

This memo, like others I wrote during my clerkship, reflected Justice Marshall's strongly-held views about the law. Here, I was expressing the point, in the colloquial and informal language we used in certiorari memos to Justice Marshall, that if he were inclined to consider revisiting *Lalli*, he should wait for a case with a more compelling set of facts for his point of view.

13. In his opening statement, Senator Schumer recited the Supreme Court's holding in *Lochner v. New York*, 198 U.S. 45 (1905), where the Court held that the Due Process Clause of the Fourteenth Amendment was violated by a New York statute that set a maximum number of hours bakers could work in a week. Senator Schumer then went on to argue that the Supreme Court's opinion earlier this year in *Citizens United v. FEC* represented a return to the *Lochner* era. In *Citizens United*, the Supreme Court held that individuals who band together in corporate form to express a political message cannot be banned from doing so in the months preceding an election. You argued that case in front of the Supreme Court, so you have taken a public position on the case that you swore was founded in the facts and law. Do you think the *Citizens United* decision represents a return to the *Lochner* era?

Response:

I argued *Citizens United* before the Supreme Court on behalf of the United States, and as an advocate in that case I was convinced of the strength of the government's arguments. Those arguments are best expressed in the government's supplemental briefs in the case. The Court ruled against the government, and that decision is a precedent of the Court. If confirmed, I would give *Citizens United* full stare decisis effect. I would evaluate arguments in any future case on this issue as an independent, impartial judge, not as an advocate for the government.

14. In his opening statement, Senator Cardin said that he had "been troubled by the increasing number of 5-4 decisions over the last five years in which a divided Supreme Court reversed decades of progress and precedent with rulings that side with powerful corporate interests, rather than protecting individual rights." Senator Cardin went on to say that in a "5-4 split decision, *Gross v. FBL Financial*, the court made it easier for corporate America to discriminate against aging baby boomer workers." In *Gross*, the Court merely held that a person suing his employer on a claim of age discrimination was required to prove that age discrimination was the cause-in-fact of his adverse employment action. Do you think this decision was an activist decision that "reversed decades of progress"?

Response:

I do not think it would be appropriate for me to comment on the correctness of a precedent of the Court.

15. In a memorandum you wrote to Justice Marshall concerning the case of *Citizens for Better Education v. Goose County Consol. Independent School District*, 484 U.S. 804 (1987) (dismissing appeal for want of substantial federal question), you endorsed a school rezoning plan that explicitly took race and ethnicity into account. The plan did so even though there was no history of segregation in the schools at issue.

a. You called this rezoning plan "amazingly sensible," "fair-minded[]," and "good sense." Please explain how your belief that the rezoning plan was "amazingly sensible" is relevant to the constitutional analysis.

Response:

It has been over 20 years since I reviewed the pleadings and factual record in this case. My recollection is that when I said the plan was "amazingly sensible," I meant that it was narrowly tailored to achieve the district's goals.

b. In 2007, the Supreme Court struck down a nearly identical plan in the case of *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). Based upon your comments in your memorandum to Justice Marshall, is it fair to assume that you believe the *Seattle* case was wrongly decided? Please explain why or why not.

Response:

I do not recall the facts of *Citizens for Better Education* well enough to comment on whether the court of appeals' decision in that case was consistent with *Parents Involved*. *Parents Involved* is settled law, entitled to stare decisis effect. I do not believe it would be appropriate for me to comment on the correctness of *Parents Involved*.

16. In a memorandum you wrote to Justice Marshall concerning the case of *Bowen v. Kendrick*, 487 U.S. 589 (1988), you endorsed a district court ruling that opined that religious organizations engage in "indoctrination" in their pregnancy prevention

efforts. You wrote, "I think the [district court] got the case right," and observed, "when the government funding is to be used for projects so close to the central concerns of religion, all religious organizations should be off limits." During your confirmation hearings for Solicitor General, you disavowed your comments in this case, stating that your memorandum was "the dumbest thing I ever read" and "deeply mistaken."

a. Was this the only memorandum you wrote for Justice Marshall that you believe is "deeply mistaken"?

Response:

I wrote more than 500 certiorari memos for Justice Marshall over the course of the term I clerked for him, more than two decades ago. I am sure that more than one was mistaken.

b. If this was not the only memorandum you wrote that was "deeply mistaken," what other memoranda that you wrote are now, in your view, deeply mistaken?

Response:

I have not reviewed the full set of memoranda. Of those I have seen, the memo about *Bowen v. Kendrick* seems the "dumbest."

17. In the case of *Schmidt v. Ohio,* 484 U.S. 942 (1987) (cert. denied), Christian parents had decided to educate their daughter at home, but did not seek the permission of the school district superintendent as required by an Ohio statute. They were convicted of violating the statute. The state supreme court rejected the parents' argument that the statute violated their First Amendment right to religious freedom, and they petitioned the Supreme Court for review. 505 N.E.2d 627 (Ohio 1987) (syllabus of court). The state court described the parents as "'born-again Christians,' [who] believe that it is their undelegable duty as parents to educate Sara themselves. [They] undertook to teach Sara at home with assistance from a correspondence curriculum they obtained from Winchester Christian Academy, a private, non-chartered school located in Columbus." *Id.* In your memorandum to Justice Marshall concerning the case, you described the parents quite differently, calling them "self-described born-again Christians who adhere to a literal interpretation of the Bible and have little sympathy with the secular world." What did you mean when you described the parents as having "little sympathy with the secular world"?

Response:

I would have to read the parents' petition to know precisely what I meant by this phrase. The lower court decision indicates that the parents refused all contact with administrators of the public school system. As that decision noted, the parents believed "that their religious beliefs not only required them to educate" their daughter "themselves, but also forbade them from

seeking" the school superintendent's "permission to do so." *State v. Schmidt*, 505 N.E.2d 627, 627 (Ohio 1987).

18. In a memorandum you wrote to Justice Marshall concerning the case of *Miner v. New York Dept. of Correctional Services*, 488 U.S. 941 (1988) (cert. denied), you endorsed the use of the Full Faith and Credit Clause to impose one state's definition of marriage on another state. In *Miner*, a prisoner in New York entered into a sham marriage in Kansas via proxy, so that he could take advantage of rights to conjugal visits. The prisoner had been convicted of committing a murder-for-hire by stabbing a woman 21 times for $1,000, which he wanted so that he could buy a new motorcycle. *People v. Safian*, 396 N.Y.S.2d 432, 433-35 (N.Y.A.D. 1977). The marriage was illegal under New York law, but the prisoner argued that the Full Faith and Credit Clause required New York to recognize the sham marriage as valid.

a. Nowhere in your memorandum did you mention the circumstances concerning the prisoner's heinous crime. Why did you think that this information was not relevant to Justice Marshall's consideration of these cases?

Response:

In this memo, I advised Justice Marshall to request a response from the State so that the Court could make its decision on certiorari on the basis of full briefing. I do not now recall whether or how the circumstances of the petitioner's crime were relevant to the Full Faith and Credit issue in the case (i.e., whether New York needed to recognize a marriage considered valid in Kansas, or whether the public policy exception allowed New York not to do so). But I presumably thought at the time that the decision to ask the State to file a brief opposing certiorari did not depend on the circumstances of the petitioner's crime.

b. In your tribute to Justice Marshall, you wrote that his stories "served another function as well: they reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories – stories of people's lives as shaped by law, stories of people's lives as might be changed by law." You also noted that "Justice Marshall had little use for law as abstraction, divorced from social reality . . . his stories kept us focused on law as a source of human well-being." With this in mind, why did you deem the stories of the victims of heinous crimes unimportant, especially when you deemed the underlying stories in other cases to be very important and devoted great attention to them?

Response:

Where the circumstances of a crime were important to the legal issue in the case, and where I was advising Justice Marshall to vote for or against certiorari (as opposed to

recommending that he ask the State to submit a brief), I brought those circumstances to Justice Marshall's attention.

c. In your memorandum, you wrote that the prisoner's argument was "arguably correct."

i. Was that your own assessment of the prisoner's argument, or the argument you believed Justice Marshall would want you to make to him?

Response:

My assessment of the prisoner's claim was based on my review of his petition. The State had not filed a responsive pleading, and I advised Justice Marshall to request such a pleading, so that the Court could evaluate the opposing argument.

ii. Why did you believe it was "arguably correct" for one state to be able to force its definition of marriage on the people of another state?

Response:

I do not recall the exact argument made by the petitioner in this case. I apparently thought the argument raised sufficient issues to ask for the State to file a response.

19. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court upheld a Customs Service drug testing program for employees whose jobs involved drug interdiction, carrying a firearm, or access to classified information. You wrote that the issue presented by the case – whether the government must demonstrate individualized suspicion in order to administer an employee a drug test – was important for the Court to decide. Nonetheless, you advised Justice Marshall to "think twice" before voting to grant certiorari. You wrote, "I think the facts of this case may militate against a decent result. Customs officials are almost necessarily involved in enforcing drug smuggling laws. This involvement may lead a majority of the Court to find that the Customs Service's drug-testing program is perfectly reasonable. It might be wise to wait for a case in which the government is testing employees who have no involvement with the enforcement of narcotics laws."

a. What result would not have been "decent"?

Response:

Based on Justice Marshall's view of the law, I thought he would believe that the Fourth Amendment required probable cause to perform a drug test. And in fact, Justice Marshall dissented in *Von Raab* on this ground the following year. 489 U.S. 656, 679 (1989).

b. Was the Court's decision – that government employees responsible for enforcing drug smuggling laws could be subjected to drug tests – not a "decent" result?

Response:

Please see above.

c. You advocated waiting for a weak drug-testing case before deciding this issue. Is it "wise," as you suggested to Justice Marshall in this memorandum, for the Court to choose cases in order to implement policy preferences?

Response:

I gave Justice Marshall this advice based on my understanding of his view of the law and his criteria for evaluating petitions for certiorari.

20. In a 1988 memorandum to Justice Marshall concerning *Vacanti v. United States*, 488 U.S. 821 (cert. denied), you wrote that you were "a bit shocked" that the federal government publishes a newsletter soliciting child pornographers to send items through the mails. Your successor clerk added by handwritten note a crucial fact – that the petitioner had been swapping and collecting child pornography for a decade prior to his arrest.

a. Given that predisposition is key to the government's argument that a criminal was not entrapped, why did you consider it unimportant for Justice Marshall to know this child pornographer's decade-long history?

Response:

I advised in this case that Justice Marshall request a response from the government to the petition for certiorari. My co-clerk wrote his note after that response had been received. I suspect that the government's response called attention to the petitioner's criminal history in a way that the petition, which was the only pleading I reviewed, did not.

b. How do you expect investigators to discover and apprehend child pornographers like the petitioner in that case, who had been operating in secret and without detection for a decade?

Response:

My memo did not criticize the use of sting operations to catch child pornographers. I merely expressed surprise at the particular facts of the operation at issue in this case, which involved the government's regular publication of a newsletter soliciting and offering child pornography.

21. In *Burr v. New York*, 485 U.S. 989 (1988) (cert. denied), the petitioner's friend appeared at a police station and told police that the petitioner murdered the victim, removed his clothes, and threw the body in a manhole. Some of the informant's information was verified when the police observed a body in the sewer and found the clothing and a knife nearby. In a full statement by the friend, he described in horrific detail a very violent murder and the murderer's statement to him that he

was going to Texas. After midnight that night, the police arrested the petitioner in his apartment. The New York courts concluded that there were sufficient exigent circumstances to justify a warrantless arrest. You disagreed, writing, "According to the state courts, police officers discovered late at night (on a Saturday) that [petitioner] had committed a homicide and that [petitioner] was preparing to flee to Texas. I'm not sure if these circumstances qualify as sufficiently 'exigent' to justify a warrantless arrest, but the case is fact-specific and this Court would almost certainly affirm the state court judgment."

a. What other circumstances would have been required in this case for you to find "exigent circumstances"?

Response:

I do not recall the details of this case. It may have been that I thought the government had not presented sufficient evidence that the defendant's departure for Texas was imminent.

b. In a handwritten note after reviewing the Government's response, you added, "I continue to believe that they [the facts] did not [support the arrest], but I cannot see anything good coming out of review of this case by this Court." When you wrote, "I continue to believe," you clearly were not "channeling" Justice Marshall. What did you fear that "this Court" would have done in reviewing the case?

Response:

When I said that "I continue[d] to believe that" the facts did not support the arrest, I was expressing my assessment of the case based on Justice Marshall's view of the law relating to warrantless arrests. When I said that "I cannot see anything good coming out of review of this case by this Court," I was making a prediction about the outcome of the case if the Court were to grant certiorari, again based on Justice Marshall's view of the law.

22. In *Boles v. Foltz*, 484 U.S. 857 (1987) (cert. denied), the defendant indicated at his arraignment on larceny charges that he wanted a lawyer before proceeding, and the judge ceased the proceeding. Four days later, after officers read the defendant his *Miranda* rights and he signed a waiver, the police interrogated him about the larceny and a recent murder. The defendant confessed to the murder, and on review, the Sixth Circuit rejected the defendant's argument that police interrogation was prohibited by his request for counsel at the arraignment, instead finding that his ambiguous statement was a request for counsel only at the hearing. In a memorandum to Justice Marshall, you wrote, "I think that the admission of this statement is outrageous. This Court should hold that [petitioner] invoked his right to counsel so as to preclude police officers from initiating interrogation. I worry, however, that the Court might reach the opposite result so that all ambiguous statements in the future will be construed in favor of the police."

Last month in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), in holding that a criminal suspect must unambiguously invoke the right to remain silent, the Supreme Court reiterated that a suspect must invoke the *Miranda* right to counsel "unambiguously" and if a statement is "ambiguous or equivocal," the police are not required to end the interrogation or clarify the suspect's intentions. *Id.* at 2259-60. Based on your "worry" that "ambiguous statements . . . will be construed in favor of the police," do you think the *Thompkins* decision is "outrageous?"

Response:

I served as counsel of record for the federal government in *Berghuis v. Thompkins*, and in my judgment, the arguments made in the government's brief were well supported by the law. I do not think it would be appropriate for me to comment any further on the correctness of a Supreme Court decision.

23. In *Patterson v. United States*, 485 U.S. 922 (1988) (cert. denied), the petitioner was arrested in Mexico for using counterfeit money. After Mexican authorities interrogated him and while the petitioner was still in Mexican custody, a Secret Service agent interviewed him. Based on the interview, the agent executed a search warrant on a printing shop in San Diego, recovering counterfeiting equipment and $1.5 million in counterfeit bills. The trial court suppressed the petitioner's un-*Mirandized* statements, but denied the petitioner's motion to suppress the physical evidence obtained pursuant to the search warrant, and the Ninth Circuit affirmed. The petitioner's statement, which was "concededly voluntary, was properly used to establish probable cause" for the search warrant. In a memorandum to Justice Marshall, you wrote: "I think this holding does great disservice to the *Miranda* rule, but the Court's recent decisions – most notably *Oregon v. Elstad* [470 U.S. 298] (1985) – provide support for it. It seems to me likely that this Court would use this case to curtail even further the scope and meaningfulness of *Miranda* protections."

a. What was the "disservice" you thought was done to *Miranda*?

Response:

My recollection of this case is that I thought Justice Marshall would have viewed the admission of evidence derived from statements obtained in violation of *Miranda* to undermine the *Miranda* rule.

b. *Oregon v. Elstad* held that unwarned admissions must be suppressed, but subsequent knowing and voluntary statements need not be. Justice O'Conner wrote that the holding "in no way retreat[ed] from the bright-line rule of *Miranda*." You suggest in your memorandum that *Elstad* "curtail[ed]" *Miranda*. How so?

Response:

In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court held that the failure of law enforcement officers to administer *Miranda* warnings to a defendant in custody did not

taint subsequent admissions made by the defendant after he was fully advised of and had waived his *Miranda* rights. Justice Marshall joined Justice Brennan's dissent, which argued that the Court's decision "extends a potentially crippling blow to *Miranda*" by declining to extend the "fruit of the poisonous tree" doctrine to *Miranda* violations. *Id.* at 319 (Brennan, J., dissenting). The dissent explained, "[i]f violations of constitutional rights may not be remedied through the well-established rules respecting derivative evidence, as the Court has held today, there is a critical danger that the rights will be rendered nothing more than a mere 'form of words.'" *Id.* at 320. This was Justice Marshall's view of the law, and my certiorari memorandum to him on the *Patterson* case was written through the prism of that view.

c. What did you fear the Court would do to "curtail" the "scope and meaningfulness" of *Miranda*?

Response:

My recollection is that I predicted the Court was likely to decide that physical evidence discovered from executing a search warrant supported by statements obtained in violation of *Miranda* was admissible evidence. Based on Justice Marshall's dissent in *Elstad*, I understood that he would view such a decision as curtailing the scope and meaningfulness of *Miranda*.

24. In *Tompkins v. Texas*, 490 U.S. 754 (1989) (aff'd *per curiam* by an equally divided Court), you wrote a note to Justice Marshall where you observed: "The best chance of getting the Texas death penalty statute declared unconstitutional lies in limiting the grant on this case . . . ." Why did you believe the Texas death penalty statute was unconstitutional?

Response:

Justice Marshall believed the Texas death penalty statute was unconstitutional, and this memorandum offered advice based on my understanding of his view of the law.

25. In *Lingar v. Missouri*, 484 U.S. 872 (1987) (cert. denied), the Supreme Court declined to review a death sentence where the petitioner argued that (1) the jury's venireman should have been stricken for cause, and (2) evidence of his homosexuality was improperly admitted into evidence at the penalty phase of trial. You wrote a memorandum recommending the vacating of the sentence below and remanding for further proceedings. You observed on the venireman issue: "This would not be a good question to review; it is fact-bound, and we would lose given that the juror ultimately stated unequivocally that he could comply with the law." Who is the "we" you were referring to?

Response:

My recollection is that the phrase "we would lose" was shorthand for advising Justice Marshall that his view of the law was unlikely to prevail in this case.

26. In a memorandum you wrote to Justice Marshall concerning the case of *Benevento v. United States*, 486 U.S. 1043 (1988) (cert. denied), you observed, "[T]here is no good reason to place an exclusionary-rule issue before this Court, which will doubtlessly only do something horrible with it." What was the "horrible" outcome concerning the exclusionary rule you feared would be reached by a majority of the Supreme Court?

Response:

Justice Marshall's views on the exclusionary rule were different from those of a majority of the Court, as expressed for example in the dissent he joined in *Oregon v. Elstad*. My recollection is that this sentence was meant to suggest to him that, if the Court granted certiorari in this case, it would likely decide the case in a manner that was inconsistent with his views on the exclusionary rule.

27. In *United States v. Kozminski*, 487 U.S. 931 (1988), the petitioners were convicted of holding two mentally retarded farm workers in involuntary servitude and of conspiring to deprive them of constitutional right to be free from involuntary servitude. You wrote a memorandum recommending the granting of certiorari, because "[t]here is a circuit split on this issue." You also agreed with the Solicitor General's call for an expansive reading of involuntary servitude, noting that the Solicitor General was "for once on the side of the angels . . . ." Please give some examples of cases in which the Solicitor General at that time, Charles Fried, was not "on the side of the angels."

Response:

I do not recollect specific examples. As a general matter, Justice Marshall's views on criminal procedure issues tended not to be aligned with the positions taken by the federal government.

28. You have described Justice Marshall as your "hero" and his "vision of the Court and the Constitution" ("to safeguard the interests of people who had no other champion") as "a thing of glory." Justice Marshall, along with Justice Brennan, believed that the death penalty was unconstitutional under any circumstances. In their concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972), they wrote that they would have held that any use of the death penalty is *per se* a violation of the Eighth Amendment.

a. Do you agree that the death penalty is *per se* unconstitutional?

Response:

The Supreme Court has long held that the death penalty is not per se unconstitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). *Gregg* is a precedent of the Court entitled to full stare decisis effect.

b. If not, do you agree that it is settled law that the death penalty is constitutional?

Response:

Yes.

c. Are there any express references to capital punishment in the Constitution?

Response:

Yes. The Fifth Amendment states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury." The Fourteenth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law."

d. Where applicable, does the plain text of the Constitution control questions of application of the Bill of Rights?

Response:

Yes.

e. Do you agree that Justices Brennan and Marshall engaged in judicial activism when they ignored the text of the Constitution and centuries of Supreme Court precedent to try to outlaw capital punishment?

Response:

I do not think it would be appropriate for me to criticize the views or opinions of particular Justices, especially one for whom I worked and to whom I owe a great debt. The Supreme Court has held that the death penalty is not per se unconstitutional, and that holding is settled law.

29. In response to questions from Senator Kyl, you acknowledged that "the Solicitor General's office does, from time to time … have some communications with members of the White House with respect to particular cases."

a. In how many cases during your time as Solicitor General have you or your office had communications with the White House about particular cases?

Response:

I do not think it would be appropriate for me to comment on internal Executive Branch deliberations about cases, including communications with the White House.

b. You refused to answer whether such communications occurred with respect to two cases identified by Senator Kyl – *Chamber of Commerce v. Candelaria* and *Lopez-Rodriguez v. Holder*. The decisions about which Senator Kyl inquired have already been made – you decided to urge the Court to grant *certiorari* in *Candelaria* and you decided not to seek further review in *Lopez-Rodriguez v. Holder*. Senator Kyl's question did not seek any information protected by a "deliberative process" privilege, and he did not ask you to divulge to the Committee any of the content of the discussions that may or may not have occurred with respect to these cases. His question was limited to the basic fact of whether your office had communications with the White House with respect to these two cases.

When asked by Senator Grassley about your role in the Justice Department's filings in *Smelt v. United States*, you volunteered that you and members of your office "reviewed some briefs" and "participated in some discussions" with others in the Department of Justice without divulging any of the content of those consultations. As your answer to Senator Grassley shows, the mere fact that consultations outside the Office of the Solicitor General took place in a specific case is not privileged.

With the narrow parameters of the question in mind, please answer whether you or your office had communications with the White House with respect to *Chamber of Commerce v. Candelaria* or *Lopez-Rodriguez v. Holder*.

Response:

In response to a question from Senator Grassley about the Justice Department's litigation strategy in *Smelt v. United States*, I stated that I was not the "decision-maker" in this case, because the case was in district court, "and the Solicitor General's decision-making responsibilities take over in the appellate" courts. I also noted that "members of my office and I reviewed some briefs and participated in some discussions," but "I can't reveal any kind of internal deliberations of the Department of Justice." That another Justice Department component had primary responsibility for a case at the district court level is not confidential information. And I have thought it appropriate in the context of the Senate's consideration of my nomination to provide information about my own participation in various matters. The information Senator Kyl requested is different. Communications between the Office of the Solicitor General and other Executive Branch entities, including administrative agencies and the White House, are part of the government's confidential deliberative process in developing litigation positions and strategy. Therefore, I do not believe it would be appropriate for me to discuss such communications.

c. Please answer the following questions regarding you and your office's involvement in District Court litigation. If you decline to answer any of the following questions, please explain the legal basis for your refusal. Please also explain how any such refusal to answer these questions is consistent with your willingness to discuss with Senator Grassley your role in *Smelt*.

i. **At what point in time did you and members of your office "review[] briefs" and "participate[] in some discussions" in relation to the *Smelt v. United States* litigation?**

Response:

I reviewed some briefs in the *Smelt* case and participated in discussions about the case shortly before the briefs were filed. My participation in the case was sufficiently substantial that I would recuse myself if I were confirmed and this case were to come before the Court.

ii. How did the *Smelt* litigation in District Court first come to your attention as Solicitor General?

Response:

I do not recall exactly how the *Smelt* litigation first came to my attention. The case was handled by lawyers in the Civil Division, operating under the supervision of the Office of the Associate Attorney General, the Office of the Deputy Attorney General, and the Office of the Attorney General. I was one of a number of other people in the Department consulted by those offices about the litigation.

iii. Did you or your office have communications with anyone in the White House regarding the Federal government's position in *Smelt* or regarding the arguments the Federal Government would or would not pursue in *Smelt*?

Response:

I do not believe it would be appropriate for me to discuss internal Executive Branch deliberations about a particular case.

iv. Did you or your office "review[] briefs" and/or "participate[] in some discussions" in relation to the case of *Gill v. Office of Personnel Management*, currently pending in the U.S. District Court for the District of Massachusetts? If so, how did the *Gill* litigation come to your attention as Solicitor General?

Response:

Yes. I believe that discussions about *Gill* overlapped with discussions about *Smelt*.

v. Did you or your office have communications with anyone in the White House regarding the Federal government's position in *Gill* or regarding the arguments the Federal Government would or would not pursue in *Gill*?

Response:

I do not believe it would be appropriate for me to discuss internal Executive Branch deliberations about a particular case.

d. During your tenure as Solicitor General, in how many cases still before the District Courts of the United States have you reviewed briefs or participated in discussions about legal strategy? Please identify such cases.

Response:

The primary function of the Office of the Solicitor General is to represent the United States before the Supreme Court and to oversee the representation of the federal government in the courts of appeals. In the normal course, the Office does not participate in district court litigation. In some circumstances, however, the Solicitor General or a lawyer in the Office may be consulted on a district court case that raises significant legal issues. Because these consultations are usually informal, the Office does not keep records of them. In addition to the cases referenced in other parts of this question, I recall participating in discussions about legal strategy in a number of cases involving the detainees at Guantanamo Bay and other national security matters.

e. From the time of your confirmation as Solicitor General, in how many cases before the District Courts of the United States have you or your office organized, hosted, or otherwise participated in meetings or discussions about the United States' discovery responses or motions regarding discovery? Please identify such cases.

Response:

As noted above, the Office of the Solicitor General does not participate in district court litigation in the normal course. Because participation in district court litigation by lawyers in the Office is usually informal, the Office does not keep records of such participation. Other than the single meeting referenced below, I do not recall personally participating in any such meetings.

i. Did you organize, host, or otherwise participate in meetings to discuss the United States' responses to discovery requests or to motions or orders to compel discovery in the case of *Log Cabin Republicans v. United States*?

Response:

To the best of my recollection, I participated in one such meeting.

ii. Did anyone else in your office participate in such meetings regarding this litigation?

Response:

Yes. Two career attorneys from the Office also attended the meeting.

30. In *Christian Legal Society v. Martinez,* the Supreme Court considered a case in which Hastings College of Law refused to allow a Christian organization to register as an official campus student group. Christian Legal Society wanted to exclude students from officer and voting membership positions who did not agree with the faith principles of the organization, and Hastings said that exclusion violated the school's nondiscrimination policy. The brief for Christian Legal Society argues that "[t]he First Amendment does not allow governmental institutions to deny this associational freedom to religious groups, while protecting the rights of everyone else." For this proposition, it cites your article, *The Changing Faces of First Amendment Neutrality*, quoting you as saying that viewpoint-based "selective subsidization" is "more troublesome than a complete absence of public funding," and warrants a "strong presumption of unconstitutionality . . . rebuttable only upon a showing of great need and near-perfect fit."

a. Do you agree that if Hastings has denied an associational freedom to a religious student group that it has granted to other groups, such a denial would be presumptively unconstitutional?

Response:

I do not think it would be appropriate for me to comment on a recent decision of the Supreme Court. As a general matter, I continue to believe that the First Amendment generally prohibits the government from subsidizing some points of view but not others; the example I gave in the article was a law providing for public funding of all speech endorsing incumbent city officials in reelection campaigns.

b. Christian Legal Society argues in the case that its right to free exercise of religion prevents the school from forcing it to accept students as voting members who do not agree with its religious tenets. While in the Clinton Administration, you wrote a memorandum urging the Supreme Court to reverse a case in which the California Supreme Court ruled against a landlord's rights to refuse to rent to unmarried couples on the basis of her religious beliefs. You said in that context that the plurality's opinion was "quite outrageous—almost as if a court were to hold that a state law does not impose a substantial burden because the complainant is free to move to another state." You agreed with the landlord's right to exclude on the basis of religious beliefs without having to forfeit the ability to do business in the state in which a nondiscrimination law applied. Would you also agree that Christian Legal Society should have the right to exclude students from leadership on the basis of religious belief without having to forfeit the ability to operate as an officially recognized student organization on campus?

Response:

I do not believe it would be appropriate for me to comment on the correctness of a particular Supreme Court decision.

31. Please describe with particularity the process by which these questions were answered.

Response:

Responses to these questions were drafted by legal staff of the White House based on my guidance. I edited these draft responses, and gave final approval to all answers.

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

Response:

Yes.

Senator Grassley's Written Questions for Elena Kagan, to be an Associate Justice, United States Supreme Court

CONSTITUTIONALITY OF THE FALSE CLAIMS ACT

In 2000, the Court decided *Vermont Agency of Natural Resources v. United States*, holding that *qui tam* relators filing claims on behalf of the Government under the False Claims Act have Article 3 standing to sue on behalf of the United States or a State (or state agency) because of the Government's injury in fact. However, some continue to question whether *qui tam* statutes are constitutional under Article 2 because they interfere with the Executive Branch's ability to prosecute cases.

- **Are you familiar with these arguments?**

Response:

I am familiar with these arguments, although to the best of my recollection I have never written or spoken in my personal capacity on the constitutionality of the False Claims Act.

- **Do you agree with the Court's reasoning that a *qui tam* relator has Article 3 standing because of the United States' injury in fact? Why or why not?**

Response:

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a qui tam relator filing a claim under the False Claims Act has standing under "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," because the Act "can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id.* at 773. The Court concluded that "the United States' injury in fact suffices to confer standing on" the relator. *Id.* at 774. None of the Justices disagreed with that conclusion. *Vermont Agency of Natural Resources* is a precedent of the Court entitled to stare decisis effect.

- **Do you have an opinion on the arguments that the *qui tam* provisions are unconstitutional because they impede the Executive Branch? If so, what is your opinion and why?**

Response:

In its many cases involving the qui tam provisions of the False Claims Act, the Supreme Court has never suggested that these provisions are unconstitutional because they impermissibly interfere with the President's Article II powers. If a claim of this kind is ever brought to the Court, I would fairly consider all the briefs and arguments presented.

- **The Framers of the Constitution, in the First Congress, enacted several *qui tam* statutes. What deference do you give this fact when assessing the constitutionality of *qui tam* statutes in the present day?**

Response:

The practice of the First Congress is relevant to interpreting the Constitution. The enactment of qui tam statutes by the Framers of the Constitution would suggest that the Framers did not think that qui tam statutes were unconstitutional.

BACKGROUND AND INVOLVEMENT WITH FALSE CLAIMS ACT

It appears you have only been involved with one False Claims Act case in your brief tenure as Solicitor General, *Graham County Soil and Water Conservation District et al. v. United States ex rel. Wilson*.

- **Are you familiar with the False Claims Act?**

Response:

My familiarity with the False Claims Act is based mostly on my representation of the United States as Solicitor General. In that capacity, I have served as counsel of record in two Supreme Court cases concerning the False Claims Act: *Graham County Soil and Water Conservation District v. United States ex rel. Wilson* and *United States ex rel. Eisenstein v. City of New York*. I have also authorized filings in the following lower-court cases concerning the Act: *United States ex rel. Daniel Kirk v. Schindler Elevator Corp.* (2d Cir.); *United States ex rel. Jolene Lemmon v. Envirocare of Utah* (10th Cir.); *United States ex rel. Mark Radcliffe v. Purdue Pharma, L.P.* (4th Cir.); *United States v. Caremark* (W.D. Tex.); *United States ex rel. Roger L. Sanders v. Allison Engine Co.* (S.D. Ohio); *United States ex rel. Terri Dugan v. ADT Security Systems, Inc.* (4th Cir.); *United States ex rel. Dimitri Yannacopoulos v. General Dynamics and Lockheed Martin Corp.* (7th Cir.); *United States ex rel. Bahrani v. Conagra, Inc.* (10th Cir.); *United States ex rel. Sadek R. Ebeid, M.D. v. Theresa A. Lungwitz* (9th Cir.); *United States ex rel. Jerre Frazier v. IASIS Healthcare Corp.* (9th Cir.); *United States ex rel. Mary Cafasso v. General Dynamics C4 Systems, Inc.* (9th Cir.).

- **Have you ever written or spoken publicly about the False Claims Act?**

Response:

Other than in the briefs listed above, to the best of my recollection I have not written or spoken publicly about the False Claims Act.

- **What about the issue of the constitutionality of the *qui tam* or any other provisions of the False Claims Act? If so, please explain the circumstances and context and**

whether you wrote anything on the subject or provided anyone with your views on the subject.

Response:

To the best of my recollection, I have not written or spoken about the constitutionality of any provision of the False Claims Act.

- **Have you ever written about the constitutionality of *qui tam* provisions in any other federal law? If so, please explain the circumstances and the context and whether you wrote anything on the subject or provided anyone with your views on the subject.**

Response:

As Solicitor General, I have authorized filings in the following lower-court cases defending the constitutionality of the qui tam provision contained in 35 U.S.C. § 292(b): *Brule Research Associates Team, LLC v. A.O. Smith Corp.* (E.D. Wisc.); *Raymond E. Stauffer v. Brooks Brothers, Inc.* (S.D.N.Y.); *Public Patent Found., Inc. v. Glaxosmithkline Consumer Healthcare, L.P.* (S.D.N.Y.); and *Public Patent Found,, Inc. v. McNeil-PPC* (S.D.N.Y. and 2d Cir.). To the best of my recollection, I have not otherwise written or spoken about the constitutionality of any qui tam provision in any federal law.

- **Do you feel you have any bias against the False Claims Act that would impact on your ability to fairly decide a case involving the statute? If so, please explain.**

Response:

No.

WHISTLEBLOWER PROTECTIONS

Do you believe that the Legislative Branch has the constitutional authority to provide meaningful whistleblower protections for Executive Branch employees?

Response:

Congress has the constitutional authority to enact legislation providing meaningful whistleblower protections for Executive Branch employees, so long as the legislation is based on an enumerated power granted by Article I and does not violate any other constitutional provision.

Do you believe that Congress has the constitutional authority to restrict how the Executive Branch uses taxpayer dollars?

Response:

Congress has the power to appropriate taxpayer funds. Pursuant to that power, Congress may place limits on how the Executive Branch spends taxpayer funds, provided those limits do not violate any other constitutional provision.

Specifically, does Congress have the authority to limit appropriated funds from paying the salary of any Executive Branch employee that "prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct…communication or contact with any Member…of Congress?" If not, why not?

Response:

If a challenge to such a statutory provision were to come before the Supreme Court, I would fairly consider all the briefs and arguments presented.

WHISTLEBLOWERS AND THE FIRST AMENDMENT

In 2006, the Supreme Court issued a 5-4 decision in *Garcetti v. Ceballos*, which held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. This decision creates a different set of First Amendment rights for public employees and private employees. I'm concerned that the decision has created an incentive for public employees to go outside their chain of command and report wrong doing to the media or some other outside channel because an employer could retaliate against them for speaking up inside the government agency.

- **Do you agree with the Court that public employees that speak up pursuant to their employment responsibilities they should not be entitled to First Amendment protections?**

Response:

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties. *Garcetti* is a precedent of the Court entitled to stare decisis effect.

- **Do you believe that there should be two standards for First Amendment speech for public employees and private employees?**

Response:

In *Garcetti*, the Supreme Court recognized that "public employees do not surrender all their First Amendment rights by reason of their employment." Instead, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." 547 U.S. at 417. The Court's decisions in this area, including *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), establish the general proposition that a public employee is protected by the First Amendment from discipline based on speech made in the employee's private capacity, but is not protected from discipline based on speech made pursuant to the employee's official duties. The First Amendment does not apply to the actions of private employers. *Pickering*, *Connick*, and *Garcetti* are precedents of the Court entitled to stare decisis effect.

- **Do you agree with the Court that the limitation on First Amendment speech by Government employees acting pursuant to their employment responsibilities is necessary for providing "public services efficiently"?**

Response:

In *Garcetti*, the Court explained that its decisions "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." 547 U.S. at 420. The Court concluded that the plaintiff was not entitled to First Amendment protection for speech made pursuant to his duties as a prosecutor, on the ground that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. *Garcetti* is a precedent of the Court entitled to stare decisis effect.

- **Under *Garcetti*, the Court created a system where there are now two types of First Amendment analysis for Government employees. First, if they speak pursuant to their employment responsibilities to report wrongdoing, they are afforded no First Amendment protection. However, if they speak as a citizen, presumably to the media or some other outside source to relay the concerns, the possibility of First Amendment protection arises, subject to the Court's precedent in *Pickering v. Board of Ed. Of Township High School Dist. 205* and *Connick v. Myers*. Do you agree that this two-step approach creates an incentive for a public employee to report wrongdoing outside of the chain of command? If not, why not?**

Response:

The Ninth Circuit's decision in *Garcetti* noted this concern, stating, "To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason." *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004). The Supreme Court rejected this argument, reasoning that if "a government employer is troubled by" this state of affairs, "it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." 547 U.S. at 424. As noted above, *Garcetti* is a precedent of the Court entitled to stare decisis effect.

ADHERENCE TO FEDERAL SENTENCING GUIDELINES

The Federal Sentencing Commission and the Federal Sentencing Guidelines have faced a number of challenges that have come before the Supreme Court. The Supreme Court upheld the constitutionality of the Sentencing Commission in 1989.

In 2005, the Supreme Court held that the mandatory nature of the Federal Sentencing Guidelines violated defendant's sixth amendment right to a jury trial. As a result, the Court held that the guidelines are not to be considered mandatory and are instead merely advisory.

The Court has continued to find problems with the Sentencing Guidelines and recently stated in *Nelson v. United States*, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."

- **Do you agree with the Supreme Court that the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness? Why or why not?**

Response:

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that a mandatory Federal Sentencing Guidelines System violates the Sixth Amendment. The Court further held that the proper remedy was to sever the provision of the federal sentencing statute making the Guidelines mandatory and directing appellate courts to apply a de novo standard of review to departures from the Guidelines. As a result, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are reasonable. In *Rita v. United States*, 551 U.S. 338 (2007), the Court held that when a district judge imposes a sentence within the Guidelines range, the appellate court may presume that the sentence is reasonable. This presumption, said the Court, "reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the

Commission carried out that task." *Id.* at 347. As *Rita* made clear, this presumption applies to appellate review only; "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* at 351. Instead, the sentencing court should "make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007). In *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam), the Supreme Court summarily reversed a Fourth Circuit decision upholding a sentence imposed by a district judge who justified the sentence on the ground that "the Guidelines are considered presumptively reasonable." The *Nelson* Court reaffirmed the conclusion in *Rita* that "the Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." *Id.* at 892. *Rita* and *Nelson* are precedents of the Court entitled to stare decisis effect.

- **If the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness, in your view, is the Sentencing Commission necessary? Should we instead, just commission universities or academics to do statistical analysis of judicial sentences?**

Response:

In *Rita*, the Supreme Court described the Sentencing Commission's role as follows: "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly. . . . The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." 551 U.S. at 350. Whether the Sentencing Commission is still necessary is a policy judgment for Congress. Presumably, Congress will make that judgment based on its view of how the Commission is carrying out its remaining duties and what alternative mechanisms are available to do this work.

- **Do you believe that decisions by the Sentencing Commission to amend the Guidelines and impose them retroactively are healthy for the Courts? Why or why not?**

Response:

I am aware that the Sentencing Commission has on occasion decided to give retroactive effect to amendments to the Federal Sentencing Guidelines pursuant to its authority under 28 U.S.C. § 994(u). A federal district court then has the authority to modify a sentence based on the Commission's decision under 18 U.S.C. § 3582 (c)(2). The Court has recognized that retroactivity decisions fall within the discretion of the Commission. *Dillon v. United States*,

2010 WL 2400109, at *7 (June 17, 2010). Whether such decisions are healthy for the courts is a policy question for the Commission and ultimately for Congress.

TAXATION AND THE TAKINGS CLAUSE

The Fifth Amendment to the Constitution states that "private property [shall not] be taken for public use, without just compensation." What are your thoughts on what extent this may limit Congress' taxing power?

Response:

The Supreme Court has long recognized the power of the government to tax its citizens. *E.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice John Marshall noted that the "security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." *Id.* at 428. The Court has never held that the Fifth Amendment limits Congress's taxing power. Rather, the Court has said that a tax is generally not a constitutional "taking." *County of Mobile v. Kimball*, 102 U.S. 691 (1880).

Obviously, a tax always, in some sense, constitutes a "taking," but couldn't there be a situation where the tax was so onerous, and the benefit received by the taxpayer from the onerous tax was little-to-none, that such a tax would constitute a constitutionally-prohibited "takings"? Saul Levmore, dean of the University of Chicago Law School, has argued that expenditures from tax revenues must provide roughly commensurate reciprocal benefit to avoid a takings claim.[1] Do you agree? Please explain your answer.

Response:

The Supreme Court's precedents in this area have not recognized a Fifth Amendment limitation on Congress's taxing power. I am aware that some academics have urged the Court to do so, but I have never studied this scholarship. If a claim of this kind is ever brought to the Supreme Court, I will fairly consider all the briefs and arguments presented.

Professor Calvin Massey of the University of California Hastings College of the Law has written that "Surely an income tax of 100 percent imposed on a single individual – for example, Bill Gates – would violate the Takings Clause. If that is so, then the problem becomes a matter of degree."[2] Do you agree? If not, please explain. If you do agree, how would you think the line could be articulated between taxes that violate the takings clause, and taxes that do not?

[1] *See* Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 292 (1990).

[2] *See* Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 Harv. J. L. & Pub. Pol'y 85, 104 (1996).

Response:

Please see above.

16th AMENDMENT

Under Article I, Section 9 and the 16th Amendment, a direct tax must be apportioned according to the populations of the states, unless it's an income tax. If a tax purported to be an "income tax," but in fact were more akin to a property tax, and assuming it were not apportioned according to the populations of the states, then it would be unconstitutional. Do you agree? Please explain your answer.

Response:

The Supreme Court has explained that the Sixteenth Amendment "shall not be extended by loose construction . . . . Congress cannot by any definition [of income] it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). *Eisner* thus suggests that the Constitution does place limits on Congress's power to define a particular tax as an income tax rather than a property tax.

Generally, the income tax applies to the increase in value of an asset, recognized at the time of sale of the asset. That is, generally the income tax applies to the amount a taxpayer receives that exceeds his basis in the asset. However, Congress might decide to impose a tax on the entire amount the taxpayer receives upon sale of an asset – regardless of his basis. Would such a "gross proceeds" tax still be an income tax? Doesn't the very term "income" or "incomes" suggest profit or increase in wealth? Is the concept of basis constitutionally required?[3]

Response:

The income tax today generally applies to the increase in value of an asset, recognized at the time of sale. Any change to this system would require new federal legislation. If a constitutional challenge to such legislation were to come before the Court, I would fairly consider all the briefs and arguments presented.

[3] *See generally* Deborah A. Geier, Murphy *and the Evolution of 'Basis'*, 113 Tax Notes 576 (Nov. 6, 2006).

Senator Kyl
Questions for Elena Kagan

1. **You wrote an article in which you called Justice Marshall's "vision" a "thing of glory." During your testimony, you said that you were simply praising Justice Marshall's "vision" that "the courts are open to all people and will listen respectfully and with attention to all claims."**

   In the same paragraph of the article where you call Justice Marshall's "vision" a "thing of glory," you note that "some recent Justices have sniped at that vision."

   a. **Please identify which Justices had "sniped" at Justice Marshall's "vision" that "the courts are open to all people and will listen respectfully and with attention to all claims."**

   Response:

   The essay does not cite any particular Supreme Court Justice and I do not remember whether I had one in mind. It is likely that this was a catchall reference to people who criticized or mischaracterized Justice Marshall's view that the Supreme Court served in significant part to provide a fair forum for people who could not gain access to any other part of our governmental system.

   b. **If other Justices had not, in fact, "sniped" at the notion that the "the courts are open to all people and will listen respectfully and with attention to all claims," but had instead "sniped" at something else, please take this opportunity to correct your testimony and explain what you actually meant in your article when you referred to Justice Marshall's "vision."**

   Response:

   Please see above.

2. **As we discussed during the hearing, you approved a brief filed in *Chamber of Commerce v. Candelaria*. That brief was signed by the top two political appointees in the DOJ Civil Rights Division and two career lawyers in the Civil Rights Division Appellate Section. The brief was not signed by any lawyers from DHS (which operates the E-Verify program) or by any career attorneys from the DOJ Civil Division (the division with jurisdiction over immigration matters).**

   a. **The Arizona law at issue did not criminalize any behavior by employees (legal or illegal)—it was targeted exclusively at employers. In addition, the Arizona law did not in any way disturb existing Federal laws prohibiting national origin discrimination. Why was the Civil Rights Division so heavily involved in the process?**

Response:

On May 28, 2010, the United States filed an amicus curiae brief in *Chamber of Commerce v. Candelaria*. The brief was signed by lawyers from the Solicitor General's Office, the Civil Division, and the Civil Rights Division—that is, by all the components of the Justice Department that participated in the drafting of the brief. I do not believe it would be appropriate for me to comment on the internal deliberations of the Justice Department regarding this brief, including the extent of the Civil Rights Division's involvement in the case. I will note, however, that the federal legislation at issue in the case was designed to strike a balance between "ensuring that employers do not undermine enforcement of immigration laws by hiring unauthorized workers, while also ensuring that employers not discriminate against racial and ethnic minorities legally in the country." Br. for the United States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, No. 09-115, at 9. Indeed, another provision of the statute at issue in the case, 8 U.S.C. § 1324b, creates a civil rights remedy for victims of employment discrimination based on citizenship, immigration status, or national origin.

b. Why was DHS not represented on the brief?

Response:

Because the brief was filed after the President nominated me to the Supreme Court and I ceased doing sustained work as Solicitor General, I have no knowledge of discussions (if any) relating to whether names of DHS attorneys should appear on the brief.

c. Without divulging the substance of any deliberations, was Secretary Napolitano at any time asked about her views on the brief? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

As in all cases handled by the Office of the Solicitor General, all relevant agencies and Justice Department components were consulted in formulating the United States' position. As your question notes, DHS has substantial responsibility for the enforcement of federal immigration laws and, particularly, for operation of the E-Verify program. I do not believe it would be appropriate for me to comment further on any specific internal deliberations of the Executive Branch regarding this case. My response to Senator Coburn concerned whether I personally had participated in a particular matter, not whether I had consulted with particular government officials.

d. Without divulging the substance of any deliberations, were other officials at DHS asked about their views on the brief? (I would note that you answered

a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

Please see above.

3. **Although the Solicitor General's brief in *Candelaria* did not ask the Supreme Court to review the part of the Arizona law that requires all employers to participate in the E-Verify program, the brief spends considerable time criticizing this provision of state law and suggests that Congress also intended to preempt it. This section of the brief (Section B), however, fails to acknowledge that Congress has legislated in this area repeatedly—by reauthorizing the E-Verify program—after the Arizona law had been enacted. Thus, Congress was fully aware that states, like Arizona, were requiring employers to use E-Verify, yet it chose not to amend the law when it was reauthorized. This seems like a critical fact, one that undercuts your argument that Congress meant to preclude E-Verify requirements like Arizona's.**

   a. **Doesn't an advocate have a duty to bring relevant information or legal authority to a court's attention, even if it is adverse to her case?**[1]

   Response:

   Yes.

   b. **Isn't this duty of candor heightened when the advocate is the Solicitor General or someone from her office?**

   Response:

   The Solicitor General has a heightened duty of candor to the Supreme Court.

   c. **Why didn't your office raise these reauthorizations in its discussion of the E-Verify requirements?**

   Response:

   The brief specifically noted that, "Since 1996, Congress has on four occasions extended the program's term and scope," Br. for United States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, No. 09-115, at 3 (filed May 28, 2010). Further, Section B of the brief argued that the Court should not review the Ninth Circuit's decision upholding the provision of the Arizona law regarding E-Verify precisely because E-Verify is "a still-evolving federal program whose nature and

[1] Rule 3.3, Model Rules of Professional Conduct ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

scope have changed in numerous respects since its creation and which may change again in the near future." *Id.* at 20. The brief gave the Court a full and candid presentation of the relevant considerations to the petition for certiorari.

4. In *Lopez-Rodriguez v. Holder*, the Ninth Circuit held that the Exclusionary Rule applied to civil immigration proceedings. As five dissenting Ninth Circuit judges noted in a strongly worded dissent to denial of *en banc* review, this decision squarely conflicted with the controlling Supreme Court case which held that the Exclusionary Rule should not apply to immigration proceedings. It also created a circuit split with two other circuit courts of appeals.

5. This case presented an attractive opportunity to seek *certiorari*. The case created a split among the courts of appeals. It involved significant constitutional issues. There was a strong dissent, which was sure to catch the attention of the Justices. And the effect on the government's interest is very significant—the decision means that ordinary deportation hearings (which are civil, not criminal) can now be bogged down by long legal fights over the admissibility of clear evidence that a person is illegally here and should be deported.

a. Can you explain why you chose to not appeal this case when there were numerous factors supporting a successful grant of *certiorari*?

Response:

I do not believe it would be appropriate for me to comment on the internal deliberations of the Justice Department concerning whether to file a petition for certiorari in a particular case. In deciding whether to file a petition for certiorari in any case, one of the factors the government considers is whether the factual record and circumstances of the case increase or decrease the likelihood that the government will prevail on the legal issue in which the government has an interest. In *Lopez-Rodriguez*, for example, the Ninth Circuit's published opinion noted that the INS agents who conducted the search at issue were unavailable to testify before the Immigration Judge, and the IJ therefore fully credited the alien's description of the search. The opinion also placed some weight on the fact that the search at issue was a search of a home, which courts often view as central to the protections of the Fourth Amendment. Moreover, the circuit split noted in your question did not concern whether the exclusionary rule applies at all to civil immigration proceedings—all three circuits to consider the question have held that it does apply in egregious circumstances—but rather the standard that courts should use in deciding whether conduct counts as egregious such that the exclusionary rule should apply. *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1105 (9th Cir. 2009) (Bea, J., dissenting from denial of rehearing en banc) ("The Ninth Circuit is not alone in reading the *Mendoza* dicta as permitting the application of the exclusionary rule in cases of egregious Fourth Amendment violations. The First and Second Circuits have done so as well.")

b. During the hearing, I asked whether you at any point spoke with individuals at the White House—including staff in the Executive Office of the President—about the *Rodriquez* case. You declined to answer. Please take this opportunity to respond to my question.

Response:

I do not believe it would be appropriate for me to comment on the internal deliberations of the Executive Branch.

c. Did you at any point speak with an outside group— such as an advocacy or interest group—about the *Rodriquez* case?

Response:

No.

6. On April 1, 2009, the *Washington Post* reported that the Office of Legal Council at the Department of Justice issued a legal opinion that the DC voting rights legislation being considered by Congress was unconstitutional.[2]
The story further states that, upon getting this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General's office. According to the story, lawyers in the Solicitor General's office "told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment."

The story says that the Solicitor General's office was asked for the legal opinion before you were confirmed on March 19, 2009. But it does not say when the Solicitor General's office gave the Attorney General an answer to his question.

a. When did the Solicitor General's office inform the Attorney General of its legal opinion of the DC voting rights legislation?

Response:

All aspects of this event occurred before I became Solicitor General.

b. Without divulging the substance of any advice given, were you at any time asked to express an opinion on the DC voting rights legislation? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

[2] Carrie Johnson, *A Spit At Justice On D.C. Vote Bill: Holder Overrode Ruling That Measure Is Unconstitutional*, Wash. Post (Apr. 1, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html.

Response:

No.

c. Do you believe it was appropriate for the office of the Solicitor General to render an advisory opinion about a pending bill that was not even yet a law?

Response:

I was not yet Solicitor General when this matter occurred, and do not know the circumstances well enough to render an opinion. The Attorney General did not ask the Office of the Solicitor General for any opinion of this kind while I served as Solicitor General.

7. It has been reported that "a senior administration official [has said] that the federal government will . . . formally challenge . . . Arizona's immigration law [SB1070] when Justice Department lawyers are finished building the case."[3] More specifically, the Secretary of State said that the Justice Department "will be bringing a lawsuit" against the law. We also know that the Justice Department began considering such a challenge to SB1070 almost as soon as it became law on April 23, 2010.[4] This was more than two weeks before your nomination to Supreme Court.

a. Without divulging the substance of any advice given, were you at any time asked to express an opinion on SB1070? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

No.

8. Do you think that *Brandenburg v. Ohio* was correctly decided? Specifically, do you think that a call for violence falls outside the protections of the First Amendment only if it is likely to result in "imminent" violence?

Response:

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), the Court reversed the defendant's conviction under a statute that made it a crime to "advocate . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a

[3] Brian Montopoli, *Senior Official: Obama Administration Will Challenge Arizona Immigration Law*, CBS News (June 18, 2010), http://www.cbsnews.com/8301-503544_162-20008171-503544.html.

[4] *Holder: U.S. May Challenge Arizona Immigration Law*, Fox News (Apr. 27, 2010), http://www.foxnews.com/us/2010/04/27/lawsuits-set-fly-arizona-officials-defend-new-immigration-law/.

means of accomplishing industrial or political reform" and to "voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45. The Court explained that its precedents had established the proposition that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. *Brandenburg* is a precedent of the Court entitled to *stare decisis* effect.

9. Assume that a religious authority, like Sheikh Abdul Rahman (the Blind Sheikh) or Mufti Usmani, issues a fatwa calling for all Shariah adherent Muslims to either engage in violent jihad against the infidels of the West or to provide material support in the form of charity. In your view, can this "speech" be prosecuted, or is it protected under the First Amendment?

Response:

Whether any particular expression could be the basis for a criminal prosecution consistent with the First Amendment depends on the content and context of the expression, and the scope of the criminal statute. This Term, the Supreme Court upheld as against a First Amendment challenge the application of the federal criminal "material support" statute to expressive activity that facilitated the lawful, nonviolent purposes of terrorist organizations. *Holder v. Humanitarian Law Project*, 2010 WL 2471055 (2010). I argued this case on behalf of the United States before the Supreme Court.

10. In a recent *Washington Post* editorial, George Will suggested some questions that I would like you to answer.

a. Can you name a human endeavor that Congress could not regulate through the Commerce Clause, if it made some pretense that the endeavor has an effect on the national economy?

Response:

In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Court recognized that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds." *Morrison*, 529 U.S. at 608. In particular, the Court stressed that the activities regulated by the statutes at issue in *Lopez* and *Morrison* were not economic in nature. Under *Lopez* and *Morrison*, therefore, Congress could not regulate non-economic activity based on a mere "pretense that the endeavor has an effect on the national economy."

b. If courts reflexively defer to that congressional pretense, in what sense do we have limited government?

Response:

Lopez and *Morrison* make clear that the courts should not "reflexively defer" to "congressional pretense." Instead, courts must evaluate the nature of the activity that Congress seeks to regulate and the link between that activity and interstate commerce. In performing that evaluation, courts should be deferential to congressional fact-finding.

11. Again, I would like you to answer another question posed by George Will. In Federalist 45, James Madison said: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."

a. Does the doctrine of enumerated powers impose <u>any</u> limits on the federal government?

Response:

Yes. As the Supreme Court recognized just this past Term, "the Federal Government is acknowledged by all to be one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (internal quotation marks and citations omitted).

b. Can you cite some things that, <u>because of that doctrine</u>, the federal government has no constitutional power to do?

Response:

As noted above, *Lopez* and *Morrison* make clear that Congress does not have the constitutional authority under the Commerce Clause to regulate non-economic activity with no substantial effect on interstate commerce. Similarly, the Court has imposed limits on congressional action taken pursuant to Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*, the Court held that Congress's enumerated power under Section 5 is limited to enacting legislation that enforces constitutional rights previously recognized by the Court, and does not include the power to determine what is a constitutional violation. 521 U.S. 507, 519 (1997).

Senator Lindsey Graham
Elena Kagan Questions for the Record

1. **As Solicitor General, you chose not to file a brief on behalf of the United States in the landmark case *McDonald v. Chicago*. Why did the government decide not to file a brief in this case?**

Response:

It has long been the practice of the Office of the Solicitor General not to file an amicus brief in cases concerning the application of a constitutional provision to the states (so-called incorporation cases). Although incorporation cases raise important issues of constitutional interpretation, and may matter greatly to individual citizens, those issues do not implicate the responsibilities and obligations of the federal government under the Constitution. Incorporation cases therefore do not fall within the category of cases in which the Office of the Solicitor General files amicus briefs: those where the federal government itself has a clear and specific interest in the resolution of the case. *McDonald v. City of Chicago* was an incorporation case. The issue in *McDonald* was whether the Second Amendment individual right to bear arms recognized in *District of Columbia v. Heller* also applies to the states. The application of the Second Amendment individual right to bear arms to the federal government was settled by *Heller*, and the decision not to file an amicus brief in *McDonald* was consistent with the longstanding practice of the Office of the Solicitor General.

2. **Justice Kennedy's opinion in *Boumediene* set out a multi-factor test for determining whether habeas corpus rights extend to detainees held at Guantanamo Bay. Is this multi-factor test relevant to whether other constitutional rights extend to detainees held at Guantanamo or other areas abroad? How would you analyze whether other constitutional rights extend to detainees held at Guantanamo or other areas abroad?**

Response:

In *Boumediene v. Bush*, the Supreme Court held, among other things, that foreign nationals apprehended abroad and detained at Guantanamo Bay have the constitutional privilege of habeas corpus. The Court based its conclusion on the following factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 128 S. Ct. 2229, 2259 (2008). Some or all of these factors may be relevant in deciding whether and to what extent other constitutional provisions apply to detainees held at Guantanamo or other areas abroad, depending on the particular constitutional provision at issue. In considering whether other constitutional rights apply abroad, the Court has looked to the text, structure, and history of the particular constitutional

provision. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-68 (1990) (looking to text and Framer's intent to conclude that the Fourth Amendment does not apply to a search of a nonresident alien located outside the United States by United States agents). The Court has also found relevant the citizenship status of the claimant, *id.*, and the status of the territory, *see, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). The practical consequences of applying the particular constitutional right abroad might also be relevant to the Court's analysis. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1 (1957) (Harlan, J., concurring in the judgment) (looking to the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" in concluding that the constitutional right to a trial by jury applied to spouses of American soldiers tried before military courts on military bases in England and Japan).

3. How would you analyze whether enemy belligerents held in the United States are entitled to a particular constitutional right by virtue of their presence in the United States? For example, if non-citizen military detainees were transferred from abroad to a domestic prison, how would you determine whether their presence in the United States entitled them to particular constitutional rights?

Response:

The Supreme Court has never considered whether non-citizen military detainees transferred from a location abroad to a domestic prison are entitled to greater constitutional protections by virtue of their presence in the United States. Whether and to what extent a particular constitutional provision applies to an enemy belligerent held in the United States likely would depend on the facts of the case, as well as the text, structure, and history of the constitutional provision at issue. In such a case, the detainees might argue that constitutional provisions typically apply with greater force in the United States than they do abroad. But the United States presumably would argue that the mere transfer of detainees from a prison abroad to a domestic prison should not affect their constitutional status given that the detainees have no substantial connection with this country.

4. How would you determine whether the Authorization for Use of Military Force authorizes the detention of citizen or non-citizen enemy belligerents captured in the United States? How would you analyze whether the President's power under Article II of the Constitution authorizes the

detention of citizen or non-citizen enemy belligerents captured in the United States?

Response:

Whether the Authorization for Use of Military Force authorizes the detention of citizen or non-citizen enemy belligerents captured in the United States is a question of statutory interpretation. In considering whether Congress meant to confer such authority on the President when it enacted the AUMF, the Court would look to the text of the statute as the best evidence of Congress's intended meaning. If the text is ambiguous, the Court would look to the structure and legislative history of the statute. In a prior case interpreting the AUMF, a plurality of the Court also looked to principles of the law of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004). In *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), the Fourth Circuit held that the AUMF authorizes the President to detain a non-citizen legal resident as an enemy combatant. The Supreme Court granted certiorari, 129 S.Ct. 680 (2008), but vacated and remanded the case after the detainee was transferred from military to civilian custody, 129 S. Ct. 1545 (2009). Whether the President has the authority under Article II of the Constitution to detain a citizen or non-citizen enemy belligerent captured in the United States is a question of executive power that the Court likely would analyze under the framework set forth in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

5. How would you analyze whether particular questioning falls within the public safety exception to *Miranda*, as established by *Quarles*?

Response:

In *New York v. Quarles*, 467 U.S. 649, 657 (1984), the Supreme Court held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." The Court concluded that "overriding considerations of public safety" justified a police officer's decision to ask an arrestee questions about the location of an abandoned weapon before providing him with *Miranda* warnings. In analyzing whether particular questioning falls within the public safety exception, the Court likely would consider the gravity and immediacy of the public safety threat and whether the questions were directed to addressing that threat. The Court might also consider whether *Quarles* should apply differently in terrorism cases than in ordinary criminal cases because of the distinctive public safety needs involved in the former.

Senator John Cornyn
Questions for the Record
Elena Kagan, Nominee, Supreme Court of the United States

1) **In *Confirmation Messes, Old and New,* 62 U. Chi. L. Rev. 919, 932 (1995), you wrote that "many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value."**

   a. Please explain in greater detail what you meant in this statement.

   Response:

   I was referring to constitutional values, by which I mean the fundamental principles articulated and embodied in our Constitution. In some cases, constitutional values point in different directions, and judges must exercise prudence and judgment in resolving the tension between them. In doing so, judges must always look to legal sources—the text, structure, and history of the Constitution, as well as the Supreme Court's precedents—not to their own personal values, political beliefs, or policy views.

   b. Please give examples of Supreme Court cases that, in your view, were decided primarily based on conceptions of value.

   Response:

   One recent example of what I meant by this statement is *Holder v. Humanitarian Law Project*, a case I argued on behalf of the United States in the Supreme Court and discussed during my confirmation hearings. That case involved a First Amendment challenge to the federal material support statute as applied to support for non-violent activities of terrorist organizations. The Court upheld application of the statute to the particular activities at issue in the case. In so holding, the Court noted and considered significant constitutional values relating both to national security and to free speech. The dissent evaluated and weighed these constitutional values differently.

   c. What are your own "conceptions of value"?

   Response:

   The constitutional values that I would consider in analyzing a particular case would depend on the constitutional provision at issue, the legal arguments made, and the facts presented. In considering such constitutional values, I would look always to legal sources, never to my own personal values, political beliefs, or policy views.

   d. Under what circumstances should Justices decide cases on their conceptions of value instead of their technical legal ability?

Response:

In some cases, there are significant constitutional values on both sides pushing in different directions. In analyzing such cases, judges must exercise prudence and judgment. In doing so, judges should look always to legal sources, and not to their own personal values, political beliefs, or policy views.

2) During your confirmation hearing, you said that, as society changes, courts should interpret the Constitution in light of its timeless principles. Please specify the timeless principles you have in mind.

Response:

The timeless principles I was referring to are those embodied in the Constitution. They include, for example, the principle that the government shall not engage in unreasonable searches and seizures and that the government shall not deny to any person the equal protection of the laws.

a. Other than *Brown v. Board of Educ.*, 347 U.S. 483 (1954), can you give examples of the cases in which the Supreme Court, in your view, properly reinterpreted the Constitution in light of its timeless principles?

Response:

Another example of appropriate interpretation of the Equal Protection Clause relates to gender discrimination. When the Fourteenth Amendment was ratified, no one thought it protected women against any form of discrimination. Current law on this subject, which provides heightened protection against discrimination on the basis of sex, resulted from the Court's application of the timeless principle articulated in the Equal Protection Clause to new cases that came before it.

b. Was *Roe v. Wade*, 410 U.S. 113 (1973), an example of the Supreme Court properly reinterpreting the Constitution in light of its timeless principles?

Response:

In *Roe v. Wade*, the Court applied the liberty provision of the Due Process Clause of the Fourteenth Amendment, which has been held to provide substantive protection to certain matters related to family and reproduction. I do not believe it would be appropriate for me to comment on the merits of *Roe v. Wade* other than to say that it is settled law entitled to precedential weight. The application of *Roe* to future cases, and even its continued validity, are issues likely to come before the Court in the future.

3) An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the

disadvantaged." I believe that pro bono service is crucial to upholding the ideal of "equal justice under law," and that, as the ABA notes in comments to its model ethics rules, "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

During your confirmation hearing, Sen. Cardin praised your record of pro bono service at length. He pointed to your efforts as Dean of Harvard Law School to expand loan forgiveness and public interest fellowship programs for Harvard students. And, as you note in your questionnaire, at least since 2003, you "have served on the boards of numerous non-profit organizations, including several specifically devoted to ensuring the availability of legal services for indigent persons."

I applaud your efforts to expand pro bono opportunities for Harvard students and your board service. But I am concerned that, based on your responses to this Committee in your questionnaire, it appears that you have never personally represented or otherwise assisted an indigent client on a pro bono basis. Further, it appears that until you joined the Board of the Skadden Fellowship Foundation in 2003, you had never, in your first 17 years as a lawyer, performed any service with an organization whose programming was "designed primarily to address the needs of persons of limited means." ABA Model Rule 6.1(a)(2). The ABA's model ethics rules state that a lawyer should perform 50 hours of pro bono work each year, a "substantial majority" of which should be in service to persons of limited means or programs that are "designed primarily to address the needs of persons of limited means."

a. Did you omit any pro bono service from your questionnaire?

Response:

I am not aware of any pro bono service omitted from my questionnaire response except that I may have done some pro bono work at Williams and Connolly that I do not now recall.

b. If not, please explain your decision to never personally represent an indigent client on a pro bono basis.

Response:

My general practice as a government lawyer and academic was not to represent individual clients (whether for pay or pro bono). I therefore undertook other efforts to promote pro bono service. As Dean of Harvard Law School, one of my highest priorities was expanding the pro bono service opportunities available to students. In particular, I oversaw a significant expansion on the Law School's clinical programs, which provide needed representation to indigent clients, in areas ranging from housing and employment to child advocacy to gender violence. In addition, I have served on the boards of several organizations devoted to increasing public interest and pro bono opportunities for

lawyers. I have tried to make a difference in this sphere by devoting substantial time and energy to these activities.

4) *Missouri v. Holland*, 252 U.S. 416, 432 (1920), held that "[i]f a treaty is valid there can be no dispute about the validity of a statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.

a. In your view, can Congress and the President expand or evade the scope of Congress's Article I powers by entering into a treaty requiring an enforcing law that would otherwise be unconstitutional?

Response:

Missouri v. Holland held that Congress may enact a statute implementing a treaty pursuant to its authority under the Necessary and Proper Clause, even if Congress does not otherwise have Article I authority to do so, provided the statute does not violate a constitutional prohibition.

b. Could Congress and the President enact a law enforcing a treaty to accomplish the aims ruled unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison*, 529 U.S. 598 (2000)?

Response:

This question concerns whether and how the holding of *Missouri v. Holland* would apply to a particular hypothetical statute. If such a question came before the Court, I would consider all the briefs and arguments presented.

c. Assuming *arguendo* that Supreme Court might strike down the individual mandate provision of the Patient Protection and Affordable Care Act of 2010, could Congress and the President re-enact the individual mandate by agreeing to a treaty that required the United States to have an individual mandate to purchase health insurance?

Response:

This question concerns whether and how the holding of *Missouri v. Holland* would apply to a particular hypothetical statute arising from a particular hypothetical set of circumstances. If such a question came before the Court, I would consider all the briefs and arguments presented.

5) Professor Harold Hongju Koh has written about the difference between nationalists and transnationalists, whom, he says, "hold sharply divergent attitudes toward transnational law":

Generally speaking, the transnationalists tend to emphasize the interdependence between the United States and the rest of the world, while the nationalists tend instead to focus more on preserving American autonomy. The transnationalists believe in and promote the blending of international and domestic law; while nationalists continue to maintain a rigid separation of domestic from foreign law. The transnationalists view domestic courts as having a critical role to play in domesticating international law into U.S. law, while nationalists argue instead that only the political branches can internalize international law. The transnationalists believe that U.S. courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that U.S. courts should limit their attention to the development of a national system. Finally, the transnationalists urge that the power of the executive branch should be constrained by judicial review and the concept of international comity, while the nationalists tend to believe that federal courts should give extraordinarily broad deference to executive power in foreign affairs. . . .

Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn St. Int'l L. Rev. 745, 749-50 (2006); *see also* Harold Hongju Koh, *International Law is Part of Our Law*, 98 Am. J. Int'l L. 43 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996).

a. As described by Professor Koh, are you a transnationalist or a nationalist? Have you ever previously expressed your position on this question? What did you say?

Response:

I would not characterize myself using Professor Koh's categories, which I do not find particularly helpful in thinking about the issues involving foreign or international law that are likely to come before the Court. I have never used these terms for any purpose.

b. Do you believe that domestic courts have "a critical role to play in domesticating international law into U.S. law" and "should use their interpretive powers to promote the development of a global legal system"?

Response:

I believe that the role of domestic courts is to decide the cases that come before them based on the law. In some rare circumstances, United States law may require a court to look to foreign or international law to resolve the parties' claims. I do not believe, however, that courts should view their role as domesticating international law into U.S. law or as using their interpretive powers to promote the development of a global legal system.

6) Professor Koh has said that there can be no "law free" zones, no "extra-legal" spaces, no realm within which judges should not have the final word, no matter to which

branch the Constitution allocates the decisionmaking responsibility. According to Professor Koh, the question "[h]ow far do our human rights and constitutional obligations extend?" has been "brought into sharp relief by Abu Ghraib and the debates over extraterritorial torture, the mistreatment of detainees at Guantanamo, and the denial of habeas corpus and full trial rights to suspected enemy combatants." Professor Koh has stated that there is "no reason why constitutional due process should be limited at our 'physical borders.'"

a. To what extent do you believe that Article III courts should scrutinize the President's handling of foreign terrorists captured on the battlefield? Have you ever expressed an opinion on this matter? If so, please provide details.

Response:

In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court held, among other things, that foreign nationals apprehended abroad and detained at Guantanamo Bay have the constitutional privilege of habeas corpus. The Supreme Court has not addressed whether and to what extent other constitutional provisions apply to foreign nationals captured on the battlefield, or the federal courts' jurisdiction to hear claims brought by such foreign nationals. If these issues came before the Court, I would consider all the briefs and arguments presented.

In November 2005, I co-signed a letter from a number of law school deans to Senator Leahy regarding proposed legislation that would have stripped the federal courts of jurisdiction to hear certain claims brought by Guantanamo detainees. The Court in *Boumediene* decided one issue raised in that letter: the availability of habeas relief for detainees at Guantanamo. Congress itself dealt with the other principal issue raised in the letter by amending the legislation to provide for Article III review of military commission adjudications.

During my Senate Judiciary Committee hearing prior to my confirmation as Solicitor General, I discussed certain of these issues with Senator Graham.

As Solicitor General, I served as counsel of record in a case concerning application of the Suspension Clause to foreign nationals held at Bagram Air Force Base in Afghanistan, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). I served as counsel of record in that appellate court case (which is highly unusual) because of the significance of the government's interests in the litigation. I do not recall any other occasions on which I expressed an opinion on these issues.

b. Justice Lewis Powell, Jr., in *INS v.Chadha*, 462 U.S. 919 (1983), noted that "the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." What is your view of the Separation of Powers and how it functions in the context of the War on Terror?

Response:

The Court has applied the doctrine of separation of powers to government action in wartime using the tripartite framework set forth in Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In the first category, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. In the second category, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. In this category, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* In the third category, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38. It is the function of the federal courts to police the boundaries of presidential and congressional authority in this area using Justice Jackson's framework.

7) Do you have any personal objections to the death penalty?

Response:

No.

8) In a recent book, *Keeping Faith with the Constitution* (2009), Professors Goodwin Liu, Pamela Karlan, and Christopher Schroeder review and analyze the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. __ (2008). Describing Justice Scalia's majority opinion as an "interest-balancing" approach, they write that "the Court interpreted the constitutional principle to have the 'capacity of adaptation to a changing world.'" They then note that "[e]volving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court."

a. Do you believe that "evolving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court"?

Response:

I do not believe that any member of the Court referred to "evolving social norms" in considering *Heller*, nor do I think that phrase would have been helpful to the analysis. There is no doubt, however, that the Second Amendment will have to be applied to new facts and circumstances not present at the time of ratification. One example comes from the decision in *Heller* itself. There, the Court specifically rejected the argument "that only those arms in existence in the 18th century are protected by the Second

Amendment," reasoning that "[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 128 S. Ct. 2783, 2791-92 (2008).

b. Are there any "evolving social norms" that you presently think should "change the ambit of the Second Amendment's protection"?

Response:

Please see above.

9) Do you believe the Sentencing Guidelines ranges recommended for criminals convicted of child sex and pornography offenses are too harsh?

Response:

The appropriateness of the recommended sentencing ranges for particular federal crimes is a policy question for the Sentencing Commission and ultimately for Congress. As Solicitor General, I have approved appeals in a number of cases on the ground that the sentences imposed by district courts (including sentences for child sex and pornography offenses) were too low.

10) The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

a. Should the Eighth Amendment's prohibition on cruel and unusual punishment be evaluated based on contemporary understanding of what criminal sanctions are cruel and unusual?

Response:

The Supreme Court has repeatedly stated that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

b. If your answer to (a) is yes, what factors or sources of law is it appropriate for a court to consider in discerning such a contemporary understanding?

Response:

In determining whether a particular criminal sanction violates the Eighth Amendment, the Court considers two factors. First, the Court considers "the existence of objective indicia of consensus against" the sanction, including in particular the practices of the States. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). Second, the Court applies its "own judgment . . . on the question of the acceptability of the" sanction. *Id.* at 2658 (citation omitted).

c. In your view, what constitutes an "unusual" punishment for purposes of the Eighth Amendment?

Response:

Among other things, the Court has invalidated as "cruel and unusual punishment" the application of the death penalty to defendants under age 18, *Roper v. Simmons*, 543 U.S. 551 (2005); the application of the death penalty to the mentally retarded, *Atkins v. Virginia*, 536 U.S. 304 (2002); the application of the death penalty to a defendant convicted of rape, *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); and most recently the imposition of a sentence of life without parole to a juvenile convicted of a non-homicide crime, *Graham v. Florida*, 130 S. Ct. 2011 (2010). In these cases, the Court has not distinguished between "cruel" punishments and "unusual" punishments; it has simply invalidated the punishment at issue as "cruel and unusual."

11) Do you believe that this country's death penalty jurisprudence can continue to "evolve"?

Response:

The Supreme Court has repeatedly stated that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

a. If so, what kind of objective measures would you use to make that determination? Can you give us some examples of death penalty topics which might reflect "progress of a maturing society" in the future?

Response:

In determining whether a particular criminal sanction violates the Eighth Amendment, the Court considers two factors. First, the Court considers "the existence of objective indicia of consensus against" the sanction. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). In considering this factor, the Court has focused on the sentencing practices of the States and the federal government. Second, the Court applies its "own judgment . . . on the question of the acceptability of the" sanction. *Id.* at 2658 (citation omitted). In this aspect of the inquiry, the Court has tended to focus on whether a given punishment would serve such purposes as deterrence and retribution. I am unable to speculate on any Eighth Amendment claims that may come before the Court in the future.

b. What is your view about the relevance of the laws of other countries in developing our Eighth Amendment jurisprudence?

Response:

In considering whether a particular punishment violates the Eighth Amendment, the Court has most recently said, "[t]he judgments of other nations and the international

community are not dispositive as to the meaning of the Eighth Amendment. But the climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual." *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010). As I understand this statement, the practices of other countries are *not* reviewed in determining whether "objective indicia of consensus against" the sanction exist. For purposes of that question, the practices of the States and the federal government are what matters. The Court has instead referenced the practices of other nations to confirm the Court's independent evaluation about the acceptability of the sanction (the second factor considered in the Court's current test). My understanding of the Court's opinions is that such practices have never formed the basis for the Court's independent conclusions; in any event, I do not think these practices should do so.

12) Do you think that international law and norms, specifically the treaties and other international laws the United States has signed, have any role to play in interpreting our own constitutional standards, for example in connection with exempting minors from the death penalty or prohibiting torture?

Response:

The Court has at times referenced treaties and other international law as confirming the Court's independent evaluation about the acceptability of a sanction under the Eighth Amendment. As noted above, my understanding of the Court's opinions is that international law has not formed the basis for the Court's independent conclusions; in any event, I do not think it should do so. In some limited circumstances, international law may have a role to play in interpreting provisions directly relating to international matters. For example, in interpreting the constitutional provisions referencing "ambassadors," the Court might consider the definition of "ambassadors" in international treaties.

13) Please explain specifically what rights are protected under what you have called the "liberty clause" in light of current Supreme Court precedent. Do you find any constitutional weakness in the arguments recognizing any of those rights?

Response:

The Supreme Court has repeatedly stated that the liberty component of the Due Process Clause guarantees a constitutional right to privacy—protection against certain governmental actions interfering with decisions involving family and reproduction. The Court has held that this right to privacy protects, among other things, the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right for a married couple to purchase contraceptives, *Griswold v. Connecticut*; 381 U.S. 479 (1965) and the right to terminate a pregnancy under certain circumstances, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). I do not think it would be appropriate for me to criticize the reasoning or conclusion of the Court's decisions in these cases.

14) In any given generation, does the Supreme Court have the authority to look at current American society, culture and mores to determine that there are new needs or freedoms that should be considered fundamental rights, or that there are new groups that may in certain circumstances be considered suspect classes? Does the Court have the authority to look at current American society and decide that rights once held fundamental are no longer fundamental?

Response:

All constitutional rights must be grounded in the text of the Constitution. Some constitutional provisions are written in broad language, and the Court has applied that broad language to new factual situations in the cases that come before it. When it decides such cases, the Court looks to legal sources—the text, structure, and history of the constitutional provision and the Court's precedents interpreting it—to determine how to apply the constitutional language to the facts at issue. For some constitutional questions, most notably involving the liberty provision of the Due Process Clause of the Fourteenth Amendment, the Court also looks to the Nation's traditions as they have been passed from generation to generation. This way of deciding cases, which most Supreme Court Justices have used, may lead to developments in the law over time. For example, the Court held in *Katz v. United States*, 389 U.S. 347 (1967), that the Fourth Amendment conferred a right to be free from a warrantless wiretap, even though prior cases had required a trespass on physical property to establish a constitutional violation.

15) Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court, that you believe can or should be identified in the future?

Response:

All constitutional rights must be grounded in the text of the Constitution. Some constitutional provisions are written in broad language, and the Court has applied that broad language to new factual situations in the cases that come before it. I do not think it would be appropriate for me to comment on hypothetical future cases.

16) Do you believe that the duty of the Supreme Court is to interpret the words of the Constitution only according to the meaning they had when the Constitution was adopted, when that meaning is ascertainable?

Response:

In interpreting certain constitutional provisions, the Court has found the original understanding of the provision to be dispositive. In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), for example, all nine Justices appeared to agree that the original understanding should govern the question whether the Second Amendment confers an individual right to bear arms. For other constitutional provisions, the Court's precedents have more frequently guided its approach. The First Amendment is a good example. The Framers of the Constitution did not understand the First Amendment as extending to libelous speech. The Court's precedents, however, have applied the First Amendment to bar many defamation actions. *E.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964). In general, as I stated at my hearing, I favor an approach to constitutional

interpretation that looks to a variety of legal sources—but only to legal sources—to determine how to apply the provisions of the Constitution to cases coming before the Court.

17) In his book, *Active Liberty*, Justice Breyer states that, "since law is connected to life, judges, in applying a text in light of its purpose, should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'"

Do you agree with Justice Breyer?

Response:

I am not sure exactly what Justice Breyer meant by that sentence or what range of cases he was discussing. I do believe that, in some constitutional cases, the Court may appropriately consider the practical circumstances surrounding its decision. The Court's interpretation of the Fourth Amendment is a good example. In deciding whether a particular search is unreasonable, the Court has often considered how its holding would affect the law enforcement practices of police. And in the realm of statutory interpretation, the Court often looks to the practical effects of interpreting a statute in a given manner to determine whether that interpretation is consistent with Congress's intent in enacting the statute.

18) The majority and dissenting opinions in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) took very different approaches to statutory interpretation. The majority stressed the importance of interpreting the word "discrimination" in Title IX "broadly." The dissenters, in contrast, wrote that Congress had not included causes of action for retaliation "unambiguously" in Title IX.

a. Putting aside how you would have voted in that case, which general approach to statutory interpretation- the majority or the dissent- is closer to your reading of statutes?

Response:

My approach to statutory interpretation would begin with the text. Where the text is clear, that is the end of the matter. Where the text is ambiguous, other sources may be relevant in determining the meaning that Congress intended to ascribe to a particular provision, including the structure of the statute, the legal context in which the statute was enacted, and the history of the provisions in question. In general, statutory provisions should be read neither broadly nor narrowly; they should be read reasonably, in order best to determine Congress's intent.

19) In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress could, consistent with the Eleventh Amendment, override state sovereign immunity through its enforcement power under Section 5 of the Fourteenth Amendment. Is *Fitzpatrick* consistent with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)? Please compare the decisions.

Response:

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against the States to enforce legislation enacted pursuant to the Indian Commerce Clause. In so holding, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had held that Congress could authorize suits against the states to enforce legislation enacted pursuant to the Commerce Clause. *Fitpatrick v. Bitzer*, 427 U.S. 445 (1976), concerned a different constitutional provision: Section 5 of the Fourteenth Amendment. In *Fitzpatrick*, the Court held that Congress could authorize suits against the states to enforce legislation enacted pursuant to Section Five. The two decisions are not inconsistent. As the Court in *Seminole Tribe* explained, *Fitzpatrick* "held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." 517 U.S. at 59. The Court reasoned that "*Fitzpatrick* was based upon a rationale wholly inapplicable to" Congress's Article I powers, namely "that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 65.

20) Since you graduated from law school, what in your view are the most significant cases the Supreme Court has decided and why do you consider them the most significant?

Response:

Some of the most significant cases decided by the Supreme Court since I graduated from law school are:

Grutter v. Bollinger, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003): In these cases, the Court considered the constitutionality of two higher education admissions policies that took account of race. The Court upheld the University of Michigan Law School's policy, which considered race as one of several factors in the evaluation of applications, as a narrowly tailored means of advancing the compelling state interest in achieving the educational benefits that flow from a diverse student body. The Court struck down the University of Michigan's undergraduate admissions program, which assigned applicants a numerical score based on a variety of factors and added an automatic bonus to the scores of minority applicants, as a flat racial preference system in violation of the Fourteenth Amendment.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and *Washington v. Glucksberg*, 521 U.S. 702 (1997): In these cases, the Court considered the constitutionality of abortion restrictions and a physician-assisted suicide ban under the Due Process Clause of the Fourteenth Amendment. *Casey* reaffirmed the central holding of *Roe v. Wade* that the Due Process Clause protects a woman's right to choose an abortion, while establishing a new, viability-based framework for evaluating the constitutionality of abortion restrictions. In *Glucksberg*, the Court held that the Due Process Clause does not protect the right to assistance in committing suicide. In so holding, the Court explained that the Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in

this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. at 720.

United States v. Lopez, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005): In these cases, the Court considered the constitutionality of laws enacted pursuant to Congress's authority under the Commerce Clause. In *Lopez*, the Court invalidated a federal statute that made it a crime for a person to possess a firearm in a place that he knows or has reason to know is a school zone. In *Morrison*, the Court invalidated a provision of the Violence Against Women Act that gave victims of gender-motivated violence a cause of action against the perpetrator. In *Raich*, the Court upheld a federal ban on the possession of marijuana grown at home for personal medical purposes. These cases are significant for their discussions of the limits on Congress's Commerce Clause power. In particular, *Lopez* and *Morrison* set limits on Congress's ability to regulate non-economic activity under the Commerce Clause.

21) If you were forced to pick one Justice in the last 100 years whose judicial philosophy has been most influential on the Court, who would it be?

Response:

Oliver Wendell Holmes. His opinions critiquing *Lochner v. New York*, 198 U.S. 45 (1905), and similar cases set forth the basic rationale for judicial deference to legislative policy decisions. In addition, his and Justice Brandeis's opinions on free speech issues are the foundation for the Court's First Amendment jurisprudence.

22) Please name the most poorly reasoned Supreme Court case, in your view, of the last fifty years.

Response:

I do not think it would be appropriate for me to grade recent decisions of the Supreme Court, as the status of those cases as precedent and their application to new factual circumstances are issues that may come before the Court. One relatively recent decision (although not in the last 50 years) that was poorly reasoned and that is unlikely to come before the Court again is *Korematsu v. United States*, 323 U.S. 214 (1944).

23) If a decision is older, does it deserve more respect than a more recent decision?

Response:

All else equal, an older precedent may well deserve more respect. In considering whether to overrule a prior precedent, one of the factors the Court considers is whether the precedent "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992). The longer a decision has been on the books, the more likely it is to be subject to reliance and to have been specifically reaffirmed by subsequent decisions. These are not the only factors informing the stare decisis inquiry. The Court would also consider whether the rule has proven unworkable, whether related principles of law have left

the rule behind, or whether the facts have so changed as to have robbed the rule of significant application or justification.

24) You spoke a bit at your hearing about justiciability. Where is the line between political questions and questions that are appropriate for a court to decide?

Response:

The Court has described the category of non-justiciable political questions as follows: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question." *Baker v. Carr*, 369 U.S. 186, 216 (1962). Of these, the factors that have been the most significant in the Court's political question cases are a "textually demonstrable commitment" of an issue to another branch and the lack of judicially manageable standards for deciding a challenge. In applying these and the other factors listed, the Court has attempted to determine when the political branches are best left to themselves to resolve conflicts between them.

25) What assurances can you give this Committee, the Senate, and the American people about your independence from the President and the White House?

Response:

I believe that, at every stage of my career, I have demonstrated the ability to perform my duties in an appropriate manner, in accordance with all applicable professional standards. For example, the Office of the Solicitor General has a long tradition of exercising independent legal judgment, and I believe I have upheld that tradition during my tenure. As I testified at my confirmation hearings, I believe deeply that an independent judiciary is fundamental to the rule of law. If confirmed, I would at all times exercise my independent judgment in considering the cases that come before the Court.

26) As a general matter, what level of deference should the courts pay to Congressional findings? If courts should exercise more than rational basis review, how closely should courts examine witness testimony and documentary evidence from the Congressional record?

Response:

The Court should be deferential to congressional findings of fact. The Court is institutionally incapable of collecting its own data, taking witness testimony, or producing investigative reports. Accordingly, the Court should give substantial regard to findings of fact made by Congress in the course of enacting a statute. Of course, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of legislation. *United States v. Morrison*, 529 U.S. 598,

614 (2000). If it were, Congress could insulate any and all statutes from constitutional review. But for reasons relating both to institutional competence and to institutional legitimacy, the courts should take very seriously congressional efforts to develop a record supporting a piece of legislation.

27) Article IV, Section 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Notwithstanding the Full Faith and Credit Clause, many states have established a so-called "public policy exception" which permits such states not to recognize "public acts, records, and judicial proceedings" of other states when contrary to such states' public policy.

a. In your view, do public policy exceptions violate the Full Faith and Credit Clause?

Response:

The Supreme Court has stated that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

b. Do you believe public policy exceptions may violate any other constitutional provision, and if so, which provision or provisions?

Response:

All state action must comply with federal constitutional requirements. But I am not aware of any Supreme Court decision suggesting that the use of a public policy exception violates any constitutional provision.

Written Questions of Senator Tom Coburn, M.D.
Solicitor General Elena Kagan
Nominee, U.S. Supreme Court
U.S. Senate Committee on the Judiciary
July 2, 2010

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1. **You were dean of Harvard Law School when Professor Mark Tushnet was hired. Like you, Professor Tushnet also clerked for Justice Thurgood Marshall, and when he received an endowed chair position at Harvard, you introduced him and called him as "one of the world's leading law scholars, particularly one of the world's leading constitutional law scholars" and praised his "contributions to the world of scholarship."**

   In a 1981 law review article entitled "The Dilemmas of Liberal Constitutionalism, Professor Tushnet asserted that, if he were a judge, he "would decide what decision in a case was most likely to advance the cause of socialism."

   a. Is this one of Professor Tushnet's "contributions to the world of scholarship?"

   Response:

   My introduction for Professor Tushnet was not intended to suggest my agreement with any particular aspect of his scholarship or any particular article. It was intended to recognize his general standing in the sphere of constitutional law scholarship.

   b. How would you characterize such an approach to the law?

   Response:

   If Professor Tushnet meant that a judge should decide cases based on her own policy views about the best result, then I would characterize that approach as contrary to the rule of law.

   c. Would you endorse it? Why or why not?

   Response:

   No. Judges should decide cases based on legal sources, not on policy or political views.

2. **As an undergraduate, you wrote a thesis entitled: "To The Final Conflict: Socialism in New York City, 1900-1933," and so I assume you are familiar with the tenets and beliefs of socialists. Please explain what the limits of government are in a socialist state.**

   a. What is the role of government in a socialist state?

Response:

Other than writing an undergraduate thesis on a single aspect of the history of the American Socialist Party, I have not explored in any significant way the tenets or beliefs of socialists. My general view is that the role of government in a socialist state is more extensive than in a state based on free markets.

b. Can you explain what a socialist's views on the role of corporations under the Constitution would be?

Response:

Please see above. The role of a judge in interpreting the Constitution is to analyze cases based on legal sources, not political beliefs.

3. **According to Harvard Law's website, the Critical Legal Studies movement seeks to demonstrate the indeterminacy of legal doctrine and show how any given set of legal principles can be used to yield contradictory results. Proponents of this movement are convinced that law and politics cannot be separated; they focus on the ways that law contributed to illegitimate social hierarchies and claim that neutral language and institutions, operated through law, mask relationships of power and control. They also adapt ideas drawn from Marxist and socialist theories to demonstrate how economic power relationships influence legal practices and consciousness.**

a. Do you agree with the views of the Critical Legal Studies movement?

Response:

No.

b. If not, with which of their views do you disagree?

Response:

I do not agree with any of the ways of understanding law and the legal system that are described above.

4. **According to Harvard Law's website, "Legal Realists call into question three related ideals cherished by most Americans: the notion that, in the United States, the people select the rules by which they are governed; the conviction that the institution of judicial review reinforces rather than undermines representative democracy; and the faith that ours is a government of laws, not of men." Realists suggest that judges often come to a decision first, then work backward to locate legal rules and construct legal arguments in support of the decision. Urging greater candor, the Realists wanted this process to occur openly, the better to evaluate judges' decisions. Do you ascribe to that theory?**

Response:

No.

5. **Professor Tushnet has recommended reconsidering the 1883 Civil Rights cases in which the Supreme Court held that the 14th Amendment prohibited only the abridgement of individual rights by the *state*, rather than by private individuals and institutions. The Supreme Court has stated: "It is state action of a particular character that is prohibited. … The wrongful act of an individual is simply a private wrong and if not sanctioned in some way by the state, or not done under state authority, the [individual's] rights remain in full force." Professor Tushnet stated: "The state-action doctrine contributes nothing but obfuscation to constitutional analysis. It works as a bogeyman because it appeals to a vague libertarian sense that Americans have about the proper relation between them and their government. It seems to suggest that there is a domain of freedom into which the Constitution doesn't reach. We would be well rid of the doctrine."**

    a. **Do you agree with Professor Tushnet's desire to be rid of the state action doctrine? Why or why not?**

    Response:

    No. The state-action doctrine has been repeatedly reaffirmed by the Supreme Court, and the decisions adopting and applying the state action doctrine are entitled to stare decisis effect. These decisions, indeed, function as a basic postulate of our constitutional system.

6. **Last year, the Oklahoma Legislature passed a resolution that provides for a public referendum on whether to make English the official language of the state. The resolution, which will appear on the election ballot in November, makes English the official language of the State of Oklahoma, and requires all official actions be conducted in English. In the past, states such as Missouri and Arizona have passed official English referendums via statewide ballot by 86% and 74%, respectively.**

    During your time in the Clinton Administration, you advised the president that the administration should stay out of a case, *Arizonans for Official English v. Arizona*, in which the Ninth Circuit struck down an Arizona constitutional amendment mandating that state officials use only English in documents and state business. You stated "all in all, it seems that the best course here is to do nothing. From a political standpoint, we don't want to highlight this issue. From a legal standpoint, we don't want to defend the Ninth Circuit's decision." From these comments, I assume you believe the Ninth Circuit made the wrong decision.

    a. **Why do you believe the court's decision was something the federal government should not defend?**

Response:

My comments were meant to indicate that the filing of an amicus brief defending the Ninth Circuit's decision would not advance President Clinton's legal views or policy objectives.

b. If adopted, Oklahoma will become the 31st state to declare English as its official language. Do you believe states have the right under the 10th Amendment to declare English as their official language? Why or why not?

Response:

If Oklahoma adopts this resolution and a challenge to it comes before the Court, I would fairly consider all the briefs and arguments presented.

7. In response to a question from Senator Feinstein asking whether you believe the Constitution requires that the health of the mother be protected in any statute restricting access to abortion, you responded that "with respect to abortion generally, putting that [partial birth abortion] procedure aside, I think that the continuing holdings of the Court are that the woman's life and the woman's health must be protected in any abortion regulation."

a. Please explain what you meant by "any abortion regulation."

Response:

I meant to refer to statutes or regulations that restrict a woman's access to an abortion generally, rather than restricting the procedure specified in the Federal Partial-Birth Abortion Ban Act. My statement was meant to conform to the Court's statement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 878 (plurality opinion) (citation omitted). The Court has reaffirmed this principle in recent decisions. *See, e.g.*, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327 (2006) ("New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'") (citing *Casey*); *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (noting that "[t]he prohibition in the [Federal Partial-Birth Abortion] Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks,'" but "whether the Act creates significant health risks for women has been a contested factual question" with respect to the procedure at issue in that case) (citing *Casey*).

b. Do you believe there must be a health exception included in abortion funding restrictions?

Response:

The Supreme Court has held that there is no constitutional right to abortion funding and has not subjected abortion funding regulations to heightened constitutional scrutiny. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). My statement to Senator Feinstein, which was intended to reflect my understanding of the prevailing law, was not meant to suggest that abortion funding regulations must contain a life or health exception.

c. Do you believe there must be a health exception included in parental involvement laws?

Response:

The Supreme Court has held that a parental involvement statute is constitutional provided it contains a provision to protect the health of the minor in medical emergencies. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). My statement to Senator Feinstein was meant to be consistent with this holding.

d. Do you believe there must be a health exception included in informed consent laws?

Response:

As noted above, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed the holding of *Roe v. Wade* that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," *id.* at 878 (plurality opinion) (citation omitted), and the Court has reaffirmed this principle in recent decisions. But the Court has not considered how this principle would apply to an informed consent statute that did not contain an exception for a medical emergency. (The informed consent statute upheld in *Casey* did contain such an exception. *Id.* at 881.) My statement to Senator Feinstein was not intended to state any view on this question.

8. I believe each profession has an obligation to serve the less fortunate. I take that belief personally and apply it in my career as a physician. While I am not a lawyer, I do know the legal profession encourages and actively promotes, as does my medical profession, *pro bono* services. In fact, Rule 6.1 of the ABA Model Rules of Professional Conduct, which governs the behavior of attorneys, states "[e]very lawyer has a *professional responsibility* to provide legal services to those unable to pay. A lawyer should aspire to render *at least* 50 hours of pro bono public legal services per year." It goes on to note the various ways that responsibility should be fulfilled, stating the lawyer should provide those services to "persons of limited means or charitable, religious, civic, community, governmental and educational

organizations in matters that are designed primarily to address the needs of persons of limited means."

Comment 1 of Rule 6.1 reinforces the importance of *pro bono* services when it states, "[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay…" Comment 9 goes even further by stating, "[b]ecause the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer."

Based on the Model Rules and your comments in the committee-required questionnaire for your nomination as solicitor general, which merely notes Harvard Law School's institution of a tuition-free third year and loan forgiveness for students engaged in public service, I am concerned by your personal lack of *pro bono* legal services.

a. **In your Supreme Court questionnaire, you note that you have "served on the boards of numerous non-profit organizations" and "promoted public service and pro bono work" while Dean at Harvard. But, you "did not engage in any individual representation of clients." In fact, your *pro bono* work appears to be far less than prior Supreme Court nominees, despite some of those nominees' restrictions on providing these services due to their careers as judges. Both Chief Justice John Roberts and Harriet Miers listed extensive *pro bono* activities, including representing indigent clients, in their questionnaires. Even Justices Sotomayor and Alito, who had spent most of their careers as judges and were prohibited from representing clients in *pro bono* work, had more meaningful volunteer work for the underprivileged and indigent.**

    i. **Since graduating from law school, have you ever volunteered your time for *pro bono* legal services that would qualify you to fulfill the yearly requirements of Rule 6.1 of the Model Rules of Professional Conduct? Why or why not?**

    Response:

    My pro bono work as a lawyer is listed in my questionnaire response except that I may have done some pro bono work at Williams and Connolly that I do not now recall. My general practice as both a government lawyer and an academic was not to represent individual clients (whether for pay or pro bono). I do not know whether my efforts to expand pro bono opportunities as Dean of Harvard Law School or my service on the boards of several organizations devoted to representation of needy persons falls within Rule 6.1.

    ii. **Please list the cases or clients you have participated in or in which you have represented a client *pro bono*.**

Response:

Please see above.

b. While I realize the legal profession does not institute disciplinary measures for those who do not provide at least 50 hours of *pro bono* services, Rule 6.1 and its commentary very clearly states the provision of these services is a "professional responsibility" and the "individual ethical commitment of each lawyer." Do you believe you have failed in your responsibilities and ethical commitments to the legal profession by choosing not to provide *pro bono* services? Why or why not?

Response:

No. As noted above, my general practice as a government lawyer and academic was not to represent individual clients (whether for pay or pro bono). I therefore undertook other efforts to promote pro bono service. As Dean of Harvard Law School one of my highest priorities was expanding the pro bono service opportunities available to students. In particular, I oversaw a significant expansion on the Law School's clinical programs, which provide needed representation to indigent clients, in areas ranging from housing and employment to child advocacy to gender violence. In addition, I have served on the boards of several organizations devoted to increasing public interest and pro bono opportunities for lawyers. I have tried to make a difference in this sphere by devoting substantial time and energy to these activities.

9. Please identify specifically all legislation and executive orders on which you or someone under your supervision were consulted by anyone in the current administration, including any Executive Branch Agency or the Office of the President, while you were serving as the Solicitor General.

Response:

The primary function of the Office of the Solicitor General is to represent the United States before the Supreme Court and to oversee the representation of the federal government in the courts of appeals. In the normal course, the Office does not review draft legislation or executive orders. In some circumstances, a lawyer in the Office may be consulted on such matters—as when a draft legislative provision concerns Supreme Court review or some other topic within the lawyer's expertise. For example, I recall that I was consulted, along with several other lawyers in the Office, about a draft executive order regarding preemption and a draft statutory provision concerning Supreme Court review of cases arising under financial regulatory reform legislation. These consultations are usually informal and are often performed as a courtesy to Justice Department colleagues in other divisions that have primary responsibility over the matters. Because these consultations are usually informal, the Office does not keep records of them.

10. Please identify specifically all cases, motions, policies, regulations, and other matters in which you or someone under your supervision were consulted by an Executive

Branch Agency or the Office of the President while you were serving as the Solicitor General.

Response:

Lawyers in the Solicitor General's Office frequently consult with lawyers in executive agencies. These contacts ensure that all relevant agencies participate in formulating the position taken by the United States before the Supreme Court in a particular case. They occur on a daily basis, and the Office does not keep records of them. Contacts with the Office of the President are governed by Justice Department policy and are more limited. The Office also does not keep records of these contacts. I do not believe that it would be appropriate for me to disclose the executive branch entities consulted in a particular case, or to describe the content of the communications.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

July 6, 2010

Lilly Ledbetter
1206 Mountain Street, NE
Jacksonville, Alabama 36265

Ms. Ledbetter,

Thank you for your testimony before the U.S. Senate Judiciary Committee on the nomination of Elena Kagan to the Supreme Court. Your story and your courageous battle for justice demonstrates the real world impact of recent Supreme Court decisions which have distorted the very laws Congress designed to protect American workers.

After you concluded your testimony before Judiciary Committee, Ed Whelan testified and made a crude allegation. Mr. Whelan declared that you "had waited more than five years after [you] learned of the discrimination to file [your] EEOC charge." Another witness invited to testify by the Ranking Member, Mr. Robert Alt, testified that your case has been "been singled out for special condemnation" to tell the "story of a conservative activist, pro corporatist Roberts Court" but he cautioned that "it's just a story, and a fictional one at that."

For the record, please respond to these charges, specifically, the allegation that you "waited more than five years after" having learned of the discrimination against you to file your suit and whether your story is "a fictional one".

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

July 19, 2010

Dear Senator Leahy,

Thank you for your letter giving me the chance to respond to some allegations that were made against me by two of the witnesses who testified after me at the hearings on Elena Kagan's nomination to the Supreme Court. I thought the hearings were supposed to be about Solicitor General Kagan's qualifications for the Court. If I'd known that Professor Alt and Mr. Wheelan were going to use the hearings to attack me personally, I would have stayed around so they could do it to my face. I appreciate the chance to set the record straight.

Both gentlemen said that I conceded in my deposition that I knew about the violation of my legal rights five years before I complained to the EEOC. That's a very misleading statement. It is true, as I've testified in Congress before, that for some time I had suspected that I was getting paid less than the men. I knew, for example, that my pay was below the midpoint in the salary range. But in a part of the deposition that maybe the witnesses didn't read, I also explained that when I told my manager I thought I was getting paid less than my peers, he told me I was being misled by the men exaggerating their pay. The truth is, I didn't have any solid evidence, only suspicions. But that's no basis for bringing a claim of discrimination right away.

Instead of running to the EEOC without any hard evidence, I did what I think most people would do (and what most employers would want their workers to do) – I asked my bosses what I could do to get my pay up. It was only when that didn't work, and when I finally got that anonymous note in my mailbox showing me exactly how enormous the difference in pay was, that I had enough evidence that I thought I was justified in going to the EEOC.

It's also worth pointing out that at the trial, Goodyear never asked me about when I first knew of the discrimination. Had they done that, I could have explained things more fully and let the jury decide. But Goodyear didn't ask about it because under its theory, it didn't matter. Under Goodyear's theory, even if I had filed my charge five years earlier – like Professor Alt and Mr. Whelan apparently think I should have – it still would have been about ten years too late. Goodyear argued that I was supposed to file the charge 180 days after each pay decision was made. The Supreme Court agreed with them, and these witnesses seem to think the Court got it right. So I don't know why they are talking about what I knew years and years after the deadline supposedly passed.

Now Mr. Whelan says that the Supreme Court's decision isn't so bad because it left open the possibility that a "discovery rule" might apply to make their nonsensical rule a little more reasonable. But from what I understand, it is not at all clear that the Court would have recognized that kind of rule in the future. As you know, I'm not a lawyer. But I'm told that the question came up in another case, *National Railroad Passenger Corporation v. Morgan*. And in that case, Justices Kennedy and Scalia specifically refused to sign on to a part of an opinion

written by Justice O'Connor that recognized a discovery rule for Title VII. I also understand that in another case, *TRW v. Andrews*, Justice Scalia and Justice Thomas called the discovery rule "a bad wine of recent vintage." So that's three of the five Justices in the majority in my case who don't seem anxious to apply a discovery rule in cases like mine.

Finally, I'm not sure that this "discovery rule" would be much better anyway. As I understand it, the lower courts that have applied a discovery rule to Title VII claims say that the time starts running from when you first discover what the employer *did* – for example, laying someone off, denying a promotion, or in my case, denying a pay raise – not from the time you discover that the reason for the action was illegal discrimination. That's no help at all. I obviously knew right away when I was denied a raise. The problem is knowing that the decision is based on illegal discrimination. And figuring that out takes time. You can't just assume the first time you get a small raise, or are told what your starting salary is, that you're being discriminated against. But when you keep getting smaller raises, and figure out how exactly much less you are getting paid than others, the evidence starts to add up. That's what the Supreme Court didn't understand. And telling me that it's all right because someday the Court might adopt this useless discovery rule doesn't make it any better.

Sincerely,

Lilly Ledbetter