

Senator Chuck Grassley
Questions for the Record
Donald Verrilli, Solicitor General of the United States

1. As you said at your hearing, you were recused from the internal discussions regarding the Administration's decision to abandon its defense of the Defense of Marriage Act. Because you were recused, no privilege applies. You also acknowledged your duty to vigorously defend statutes duly enacted by the Congress, except under two very narrow and exceedingly rare circumstances. The first is where the Executive believes the statute infringes on the power of the President. The second, as you correctly noted, is where "there is no reasonable argument that can be advanced in defense of the statute." You are an accomplished and well respected Supreme Court practitioner, and the nominee for Solicitor General of the United States. Please take whatever time you need to study the issue, and answer the following question: Do you believe "there is no reasonable argument that can be advanced in defense" of the Defense of Marriage Act (DOMA)?

ANSWER

The Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D concluded that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny," and based on that conclusion I believe that the Attorney General concluded that there were not reasonable arguments to be made in the defense of Section 3 of DOMA. The letter also stated that "[i]f asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard." Because I was recused from any consideration of the government's position on DOMA, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the Executive Branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of Section 3 of DOMA. Participation in such discussions and deliberations would be essential to developing a fully informed view on the question of whether Section 3 could be defended under the Department of Justice's traditional standards. With that caveat, I can say that, consistent with the Attorney General's statement and despite my necessarily incomplete understanding of the legal issues, reasonable arguments can be advanced that Section 3 of DOMA has a rational basis under the deferential rational basis standard of review.

2. You indicated at your hearing that the President and the Attorney General had already made the decision with respect to DOMA, suggesting you will be absolved of your responsibility to independently assess the validity of that decision. But of course, should DOMA reach the Supreme Court, you will have an independent responsibility as Solicitor General of the United States to decide whether a "reasonable argument [] can be advanced" in its defense. Please take whatever time you need to study the issue, and answer the following questions:

- a. If the Defense of Marriage Act reaches the Supreme Court of the United States, will you vigorously defend it?
- b. If you will not, why not?
- c. If you will, on what basis will you do so?

ANSWER (to Questions 2a, 2b and 2c)

I appreciate the opportunity to address this point, which requires a broader answer that describes the nature of the independent judgment a Solicitor General exercises and the relationship between the Solicitor General and the Attorney General. With respect to Section 3 of the Defense of Marriage Act, the President and the Attorney General have concluded that heightened equal protection scrutiny applies and that no reasonable argument can be made in defense of its constitutionality. They therefore have instructed the Department of Justice not to defend the statute. As I stated at the hearing, although I did not participate in these decisions, I am confident, based on my experience working for this Attorney General and this President, that the decisions were made with appropriate recognition of the gravity of the issue, were made in good faith, and were made on the law. The moment of that decision is past. Should the issue reach the Supreme Court in the future, for the reasons set forth below, I do not believe any Solicitor General – whether he or she had participated in the initial evaluation or arrived in office after that decision was made – would have the authority to file a brief in the Supreme Court defending the constitutionality of Section 3, unless the decision by the President and the Attorney General not to defend were reconsidered based on intervening changes in the law. Whatever my independent judgment on the issue might have been had I occupied the Office of the Solicitor General at the time, the President and the Attorney General have already made this particular decision.

If confirmed as Solicitor General, I will adhere to the vitally important traditions of the Office and exercise my independent judgment regarding the defense of statutes and all other matters. I expect that the President and the Attorney General will respect that independent judgment (and, as set forth in response to Question 3 below, I am prepared to resign if they overrule my decision based on partisan political considerations or other illegitimate reasons, or on an indefensible view of the law). The question of exactly what the Solicitor General's independence consists of is one on which many former Solicitors General, lawyers in the Office of the Solicitor General, and scholars have expressed a variety of opinions. For me, it means the following: The Solicitor General decides what the position of the United States will be in litigation within the Solicitor General's purview based on the law and on the Solicitor General's best judgment of what is in the long-term institutional interests of the United States – partisan political considerations must play absolutely no role. That is true for all decisions a Solicitor General makes, and is certainly true for the decision whether reasonable arguments exist to defend an act of Congress. Therefore, if confirmed, I will exercise independent judgment to decide that statutes should be defended unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable arguments that can be offered in its defense.

Attorneys General and Presidents have come to appreciate the importance of affording the Solicitor General the ability to make independent judgments based on the law and the long-term institutional interests of the United States. This exercise of independent judgment allows the Solicitor General's Office – in the words of Rex Lee – to “provide the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers.” Independence thus allows the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if an administration must forgo taking a position that might advance a particular administration objective in a particular case. This independence also fosters respect for Congress as a co-equal branch of government. Finally, it will always benefit the Attorney General and the President to receive the independent and expert legal judgment of the Solicitor General to mark the boundaries of what the law will allow, and ensure that an administration's legal policy objectives are achieved in fidelity to the rule of law.

As critically important as the exercise of independent legal judgment is to the proper functioning of the Office of the Solicitor General, the Solicitor General does not exercise independence in the sense of having the legal authority to make the final call on the positions the United States will take in court. As many previous nominees have recognized in their testimony before this Committee (and as I describe in more detail in my response to Question 11 below), the Solicitor General exercises independence within a framework that recognizes the ultimate authority of the Attorney General (and the President) – an authority rarely exercised – to decide what position the United States will take in court.¹ Robert Bork put it this way: “I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General's direction so that there is the fact that the discretion that the Solicitor General has, I think, is reposed only because it is understood that he will not abuse it.” Charles Fried testified that: “The statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that “the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General

¹ The relevant provisions of the U.S. Code make clear that the authority to control the litigation of the United States, including litigation in the Supreme Court, rests in the hands of the Attorney General. See 28 U.S.C. § 516 (“the conduct of litigation in which the United States, an agency or an officer thereof is a party, or is interested, . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General”); 28 U.S.C. § 518(a) (“Except when the Attorney General in particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suit in the Court of Claims in which the United States is interested.”); 28 U.S.C. § 518(b) (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States”); 28 U.S.C. § 519 (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or an officer thereof is a party”). The Attorney General has, by regulation, delegated to the Solicitor General the authority to conduct the litigation of the United States in the Supreme Court. See 28 C.F.R. § 0.20 (2010).

has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Kenneth Starr recognized that “the Attorney General retains responsibility for and ultimate direction of the Government’s arguments before the courts.” Seth Waxman explained it this way: “[I]t is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” Paul Clement likewise acknowledged that “the Attorney General and the President . . . certainly have the power to overrule the Solicitor General.” He also stated that: “In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call.” The Supreme Court has also recognized that Congress has “vest[ed] the conduct of litigation before this Court in the Attorney General, an authority which has by rule and tradition been delegated to the Solicitor General.” *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). I agree with these views, and I believe they reflect the same view you stated at the hearing to consider Kenneth Starr’s nomination for Solicitor General: “it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States. By Constitution and statute, he owes his allegiance to the Executive Branch. As an officer of the Executive Branch, the Solicitor General exercises authority only as delegated by the Attorney General.” Therefore, as I explain more fully below, if I were confirmed as Solicitor General I would have no authority to revisit the President’s decision on DOMA or any other matter.

3. If, in your judgment, there is a “reasonable argument that can be advanced” in defense of a particular statute, but the Attorney General nonetheless instructs you not to defend it, what will you do?

ANSWER

I appreciate the opportunity to clarify my testimony on this point. As I tried to convey in my testimony at the hearing on March 30th, if I were instructed by my superiors not to defend a statute, I could not defy that instruction and proceed with the defense of the statute. The Solicitor General lacks any such authority. As Charles Fried testified during his confirmation hearing (and as I addressed more fully in response to Question 2 above), “[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and the Attorney General “has the clear statutory authority to direct the Solicitor General to take a contrary position” to the position the Solicitor General would take in the exercise of his or her own independent judgment. Disregarding such a command would be insubordination and would itself violate the rule of law.

But I did not mean to suggest that I would carry out an order despite my conviction that doing so was wrong. I would not lend my name or that of the Office of the Solicitor General to carrying

out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out the order. If I were to explain to the Attorney General that I believed reasonable grounds existed to defend a statute and that I would not be able to carry out an order to cease defending the statute, I would expect that he would respect my judgment. But I would resign if he did not.

4. If, in your judgment, there is a “reasonable argument that can be advanced” in defense of a particular statute, but the President nonetheless instructs you not to defend it, what will you do?

ANSWER

The Solicitor General’s independent judgment is also subject to being overruled by the President. If the President instructed the Department of Justice not to defend a federal statute in the Supreme Court, the Solicitor General (as a subordinate officer) could not disobey or disregard that command. But I would not lend my name or that of the Office of the Solicitor General to carrying out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out the order. If I were to explain to the President that I believed reasonable grounds existed to defend a statute and that I would not be able to carry out an order to cease defending the statute, I would expect that he would respect my judgment. But I would resign if he did not.

5. At your hearing, you told Senator Hatch, “I think the longstanding tradition of the Department of Justice is to defend statutes so long as there is a reasonable argument to be made in their defense.” Please explain in detail how you define “reasonable argument”?

ANSWER

I understand that, in making judgments about whether reasonable arguments exist to defend the constitutionality of a federal statute, the Department of Justice applies a strong presumption that the statute is constitutional, in recognition of the respect due to a co-equal branch of government, and in light of the presumption that the President who signed the bill agreed that it was constitutional. The Department’s reasonableness standard is difficult to quantify with mathematical precision. An argument the Department puts forward in defense of the constitutionality of a statute must meet the high standards of candor, professionalism, and respect for precedent that the Department expects of its lawyers in all matters. For example, a lawyer in private practice might, consistent with the Rule 11 obligation not to advance a frivolous argument, argue that a statute is constitutional on the ground that the Supreme Court precedent calling its constitutionality into doubt should be overruled. But a lawyer for the Department of Justice is not free, in the same sense that private counsel might be, to advance such an argument no matter the circumstances; the Department’s special obligation to respect the principle of *stare decisis* imposes constraints that private counsel would not face. In addition, in making such judgments, the Department must consider not merely the particular case at hand but also the long-term interests of the United States, and the Department may therefore need to forebear from

advancing a particular argument in one case because of the negative implications for the interests of the United States in other cases. Paul Clement's testimony on this issue at his confirmation hearing illustrates the general point. In explaining the decision not to defend the statute at issue in *ACLU v. Mineta*, which is discussed more fully in response to Question 103(s) below, he stated that "we actually could conceive of an argument to defend the statute," but that it simply did not pass muster under the Department's standards. Similarly, in *Metro Broadcasting, Inc. v. FCC*, the Solicitor General's Office not only refused to defend, but affirmatively attacked, the constitutionality of the federal statute at issue; and in *Turner Broadcasting Inc. v. FCC*, the Justice Department declined to defend a statute at the district court level based upon a conclusion that a constitutional defense could not reasonably be mounted. In both of those cases, the Supreme Court ultimately upheld the statutory provisions. Cases like these demonstrate, at a minimum, that dedicated and skilled lawyers, acting in good faith, can and sometimes do differ over whether reasonable arguments can be made in defense of a statute.

6. Has any individual within the Administration, either prior to or following your nomination, asked you for your views regarding the Defense of Marriage Act? If so, please provide the details, including what was asked, when, by whom, and how you responded.

ANSWER

No.

7. Has any individual within the Administration, either prior to or following your nomination, asked you whether you will defend the Defense of Marriage Act if confirmed? If so, please provide the details, including what was asked, when, by whom, and how you responded.

ANSWER

No.

8. At your hearing, I asked you whether you would defend Section 2 of the Defense of Marriage Act, which permits states to choose whether or not to recognize same-sex marriages from other states. You responded that you have been recused and therefore "have not given any specific consideration to that issue," but that you would "apply the appropriate and traditional standards" in answering that question. Please take whatever time necessary, and answer the following question: If Section 2 of the Defense of Marriage Act is challenged in the Supreme Court, will you vigorously defend it?

ANSWER

If confirmed, I will adhere to the traditions of the Solicitor General's Office and exercise my independent judgment regarding all the legal matters that come before me, including the defense of statutes. Assuming that Section 2 of DOMA does not violate the separation of powers, the question would be whether reasonable arguments could be made in its defense. (The Attorney General's 28 U.S.C. § 530D letter addresses only Section 3 of DOMA.) Because I was recused from litigation involving DOMA, I have given no previous consideration to the question of the constitutionality of any provision of DOMA. Also, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the Executive Branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of any provisions of DOMA. Those deliberations would be crucial to inform my understanding of the issues, including the federal interests at stake, and my judgment about whether reasonable arguments can be made. What I can say is that Section 2 is entitled to a strong presumption of constitutionality, and my provisional view is therefore that a reasonable argument could be advanced in defense of that provision, in light of existing Supreme Court authority. Before making a decision on the question as Solicitor General, however, I would need to give the issue the full consideration it deserves, which would include extensive deliberations with lawyers in the Department of Justice and with Executive Branch departments and agencies that have an interest in the matter – as I understand the Solicitor General's Office does with respect to any matter of significance.

9. At your hearing, Senator Whitehouse said that you will not need to assess whether to defend DOMA because “this is a decision that will [not] be before him in his career because it has already been made. This decision has been taken.” You appeared to agree. You said you would apply the traditional Justice Department standards, “to the extent it has not already been decided by the President and the Attorney General.”
 - a. If a challenge to DOMA reaches the Supreme Court, do you believe that you will have an independent obligation to consider whether there is a reasonable argument to be made in its defense?

ANSWER

Please see my answer to Question 2 above, which I believe answers this question.

- b. Alternatively, should DOMA reach the Supreme Court, do you believe the President's decision, embodied in the Attorney General's letter to Speaker Boehner, would preclude you from making an independent judgment on the issue?

ANSWER

Please see my answer to Question 2 above, which I believe answers this question.

10. Do you believe there is a federal constitutional right to same-sex marriage?

ANSWER

The Supreme Court has not recognized a constitutional right to same-sex marriage. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

11. In response to a question from Senator Hatch, referring to the decision to decline to defend a statute, you said, "at the end of the day, the Solicitor General works for the Attorney General, who works for the President, and, therefore, the Attorney General or the President can issue a direction of that kind." You also told Senator Hatch, "Senator, I would defend the statute unless instructed by my superior not to do so." I am concerned that you do not fully appreciate the extent to which the Office of Solicitor General must remain independent from both the Attorney General and the President.

- a. Please explain your understanding of the difference between the role of Attorney General and Solicitor General.

ANSWER

I appreciate the opportunity to address this question, which touches on the vital importance of the independent judgment a Solicitor General must exercise to discharge the responsibilities of the Office, and on the relationship between the Solicitor General and the Attorney General.

By long tradition, the Solicitor General has been afforded a great measure of independence in carrying out the functions of the Office, in recognition that the exercise of that independent legal judgment in the long run best serves the interests of the Executive Branch, as well as the Congress and the Supreme Court. The question of exactly what the Solicitor General's independence consists of is one on which many former Solicitors General, lawyers in the Office of the Solicitor General, and scholars have expressed a variety of opinions. For me, it means the following: The Solicitor General decides what the position of the United States will be in litigation within the Solicitor General's purview based on the law and on the Solicitor General's best judgment of what is in the long-term institutional interests of the United States – partisan considerations must play absolutely no role in the Solicitor General's judgments. That is true for all decisions a Solicitor General makes, and is certainly true for judgments about whether reasonable arguments exist to defend an act of Congress.

Attorneys General and Presidents have come to appreciate the importance of affording the Solicitor General the ability to make independent judgments based on the law and the long-term

institutional interests of the United States. This exercise of independent judgment allows the Solicitor General's Office – in the words of Rex Lee – to “provide the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers.” Independence thus allows the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if an administration must forgo taking a position that might advance a particular administration objective in a particular case. This independence also fosters respect for Congress as a co-equal branch of government. Finally, it will always benefit the Attorney General and the President to receive the independent and expert legal judgment of the Solicitor General to mark the boundaries of what the law will allow, and ensure that an administration's legal policy objectives are achieved in fidelity to the rule of law.

As critically important as the exercise of independent legal judgment is to the proper functioning of the Office of the Solicitor General, the Solicitor General does not exercise independence in the sense of having the legal authority to make the final call on the positions the United States will take in court. In the overwhelming majority of instances, the Solicitor General does make the final call because the Attorney General and the President respect the Solicitor General's independent judgment and do not seek to intervene. But the Attorney General (and the President, as the Attorney General's superior) do have the legal authority to overrule the Solicitor General's independent judgment about what the litigation position of the United States should be. See 1 Op. O.L.C. 228, 230 (1977) (“Under the relevant statutes . . . the Attorney General retains the right to assume the Solicitor General's function himself.”) As Charles Fried recognized in his testimony before this Committee, “there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment his Solicitor General has given him is a judgment with which he does not concur, and in that event he has the clear statutory authority to direct the Solicitor General to take a contrary position.”

Throughout our nation's history, Congress has vested in the Attorney General the power to control what position the United States will take in court. The Judiciary Act of 1789, which created the office of Attorney General, provided that: “there shall . . . be appointed a . . . person, learned in the law, to act as attorney-general for the United States, . . . *whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned* and to give his advice and opinion upon questions of law when required by the President of the United States or when requested by the heads of any of the departments, touching any matters that may concern their departments.” Act of Sept. 24, 1789, ch. 20 § 35, 1 Stat. 73, 93 (emphasis added). Subsequent Judiciary Acts have expanded and refined the scope of the Attorney General's authority, but that authority has always included control over the positions the United States takes in litigation.

For nearly a century after Congress created the office, the Attorney General remained directly responsible for representing the United States in court. Indeed, the Office of Solicitor General did not exist. As the nation grew and the functions of the Attorney General expanded, it became

impossible for the Attorney General to carry out all of his congressionally assigned functions personally, and the Attorney General therefore often retained private counsel to represent the United States before the Supreme Court and in the lower federal courts – with the result that private counsel were making their own independent, and often inconsistent, judgments regarding what the position of the United States should be in any given case. *See generally* Seth P. Waxman, *Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context*, 1998 *Journal of Supreme Court History* 3.

To alleviate the burden on the Attorney General, to provide for consistency and uniformity in the positions the United States advanced before the Supreme Court and the lower federal courts, and to save the expense of retaining private counsel, *see* Waxman *supra*, Congress created the position of Solicitor General in the Judiciary Act of 1870, which also established the Department of Justice. That enactment provided: “that there shall be in said Department [of Justice] an officer learned in the law, *to assist the Attorney-General in the performance of his duties*, to be called the solicitor-general” Act of June 22, 1870, ch. CL, § 2, 16 Stat. 162 (emphasis added). As set forth in the current U.S. Code, this provision still states that the role of the Solicitor General is to “assist the Attorney General in the performance of his duties.” 28 U.S.C. § 505 (2006).

The provisions of the U.S. Code currently in effect make clear that the authority to control the litigation of the United States, including litigation in the Supreme Court, rests in the hands of the Attorney General. *See* 28 U.S.C. § 516 (“the conduct of litigation in which the United States, an agency or an officer thereof is a party, or is interested, . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General”); 28 U.S.C. § 518(a) (“Except when the Attorney General in particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suit in the Court of Claims in which the United States is interested.”); 28 U.S.C. § 518(b) (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States”); 28 U.S.C. § 519 (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or an officer thereof is a party”).

To implement this allocation of statutory authority, the Attorney General has promulgated a regulation, 28 C.F.R. § 0.20 (2010), that delegates authority to the Solicitor General and sets forth the responsibilities of the Solicitor General as follows:

The following described matters are assigned to, and shall be conducted by, handled or supervised by, the Solicitor General, in consultation with each agency official concerned:

- (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof;
- (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . [;]

(c) Determining whether a brief *amicus curiae* will be filed by the Government, or whether the Government will intervene, in any appellate court [; and]

(d) Assisting the Attorney General, the Deputy Attorney General, and the Associate Attorney General in the development of broad Department program policy.

Thus, as these statutes and regulations establish, the legal authority the Solicitor General exercises is authority that has been delegated by the Attorney General. The Supreme Court has recognized this. For example, in *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), the Court explained that 28 U.S.C. § 518 “represents a policy choice by Congress to vest the conduct of litigation before this Court in the Attorney General, an authority which has by rule and tradition been delegated to the Solicitor General.” 513 U.S. at 96. The Supreme Court also explained this point in *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) (noting that the Attorney General possesses the authority under 28 U.S.C. § 518(a) to conduct the litigation of the United States, and that “[t]he Attorney General by regulation has delegated authority to the Solicitor General”).

Many previous nominees have recognized in their testimony before this Committee that the Solicitor General exercises independent judgment within a framework that recognizes that the Solicitor General’s authority is ultimately derivative of the Attorney General’s authority. Robert Bork put it this way: “I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General’s direction so that there is the fact that the discretion that the Solicitor General has, I think, is reposed only because it is understood that he will not abuse it.” Charles Fried testified that “[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that “the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Kenneth Starr, in his written testimony, recognized that “the Attorney General retains responsibility for and ultimate direction of the Government’s arguments before the courts.” Seth Waxman explained it this way: “it is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” Paul Clement likewise acknowledged that “the Attorney General and the President . . . certainly have the power to overrule the Solicitor General.” He also stated that: “In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an

opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call.”

As I stated in response to Questions 2 through 4 above, however, there is a critical difference between stating that the Solicitor General is subject to being overruled by the Attorney General or the President, and stating that the Solicitor General has no choice but to carry out an order from the Attorney General or the President. Were I convinced that such an order was based on partisan political considerations or other illegitimate reasons, or on an indefensible view of the law, I would resign rather than carry out the order. I do not expect this situation to arise because I believe the Attorney General and the President will respect my independent judgment. But if the situation does arise, I am prepared to resign.

- b. In what ways is the position of Solicitor General of the United States different from the position of White House Counsel or Deputy White House Counsel?

ANSWER

The Deputy White House Counsel assists the White House Counsel in carrying out the functions of the office. The principal function of the White House Counsel is to serve as lawyer to the President (in his official capacity), to the Executive Office of the President, and to the Presidency in a broader sense.

The Solicitor General is not the President’s lawyer. The Solicitor General represents the United States and its long-term institutional interests. In the most fundamental sense, the Solicitor General’s client is the United States because the Solicitor General must determine what position to take in the Supreme Court on the basis of the long-term institutional interests of the United States as a whole – including the interests of all three branches of government – and not merely the interests of the particular department or agency that is the party in a particular case. In a formal sense, and often in a practical sense as well, the client of the Solicitor General does change from case to case. For example, in one case the party represented by the Solicitor General’s Office may be the Federal Communications Commission and in another case it may be the Secretary of the Interior, or it may be a government official sued in his or her individual capacity in a constitutional tort suit. The particular views of the department or agency that is the party in the case may be entitled to particular weight in formulating the position of the United States in the case.

12. If confirmed, how will you maintain your independence from the President?

ANSWER

If confirmed, I will carry out the responsibilities of the Office as other Solicitors General have done. I will rely on the extraordinarily talented and dedicated career attorneys who carry on the day-to-day work of the Office. I will consult with Executive Branch departments and agencies to determine what position is in the interests of the United States. And I will base my decisions solely on the law and the long-term institutional interests of the United States.

In addition, I believe the President and the Attorney General are best served when they have confidence in the judgment of the Solicitor General and therefore do not intervene in the decisions of the Solicitor General's Office. In what Paul Clement described as "those rare matters of such sufficient moment to come to the attention of the Attorney General" or the President, I would provide the Attorney General or the President with my independent judgment of what the position of the United States should be based on the law and the long-term institutional interests of the United States. If a situation arises in which I believe a contrary position cannot be supported under the law, I will say so, and I will make clear that I will resign rather than carry out an instruction that I believe is based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law. I would expect that they would respect my judgment. But I am prepared to resign if they do not.

13. What weight should the Attorney General give to political considerations in making a decision whether or not to defend a statute?

ANSWER

In my judgment, partisan political considerations should play no role in making a decision whether or not to defend a statute.

14. What weight should the President give to political considerations in deciding whether or not to defend a statute?

ANSWER

In my judgment, partisan political considerations should play no role in deciding whether or not to defend a statute.

15. What weight should the Solicitor General give to political considerations in deciding whether or not to defend a statute?

ANSWER

If I am confirmed, partisan political considerations will play no role in my decisions whether or not to defend statutes.

16. Please identify any duly enacted federal statutes currently in effect that you believe cannot reasonably be defended before the Supreme Court.

ANSWER

If I am confirmed, it will be no part of my responsibility as Solicitor General to search for provisions in the U.S. Code that might be unconstitutional. To the contrary, it will be my responsibility to defend federal statutes against constitutional challenge, subject only to the two narrow and rarely invoked exceptions, as explained in my responses to Questions 1 and 4 above. As Seth Waxman explained, the Solicitor General's Office plays a "reactive" role. *Rex E. Lee Conference on the Office of the Solicitor General of the United States: Panel for Former Solicitors General*, 2003 B.Y.U. L. Rev. 153, 173 (2003)

- a. Have you had any discussions with anyone within the Administration, including but not limited to the Attorney General or the President, regarding these statutes?

ANSWER

No.

17. You have strong views when it comes to the death penalty. You have represented death-row inmates before the Supreme Court in more than a dozen cases. The federal government, of course, imposes the death penalty in certain circumstances. If the federal death penalty is challenged in the Supreme Court, will you vigorously defend the statute?

ANSWER

Yes. In *Gregg v. Georgia* in 1976, the Supreme Court held that capital punishment is constitutional. *Gregg* and its progeny have remained the law for more than 30 years, and if confirmed, that is the law that I will follow in carrying out the obligations of the Office. I will vigorously defend the statute. Consistent with my obligation to act in the long-term institutional interest of the United States, I will make decisions regarding this and all other issues based on the facts and the law, including the settled law of *Gregg* and its progeny.

18. The vigorous defense of a statute is not limited to merely filing a brief in its support. For instance, as you well know, decisions regarding which cases to appeal (and when) may significantly impact the defense of a statute. Do you pledge not to undermine in any way any statute for which there is a reasonable basis to advance a defense?

ANSWER

Yes.

19. Justice Marshall, for whom you clerked, believed the death penalty was always unconstitutional. Do you agree with Justice Marshall's views regarding the death penalty?

ANSWER

I clerked for Justice Brennan, whose views about the constitutionality of the death penalty were substantially similar to those of Justice Marshall. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Gregg v. Georgia* and its progeny, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). As I stated in response to Question 17, I will vigorously defend the federal death penalty statute, consistent with my responsibility to defend federal statutes.

20. Do you personally believe death penalty is a legitimate punishment?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). Congress has determined that there should be a federal death penalty, and I will defend the statutes that implement Congress's judgments.

21. How will you ensure that your personal views do not affect your judgment as Solicitor General of the United States?

ANSWER

If confirmed, I will carry out the responsibilities of the Office as other Solicitors General have done. I will rely on the extraordinarily talented and dedicated career attorneys who carry on the work of the Office. I will consult with Executive Branch departments and agencies (and, when appropriate, independent federal agencies) to determine what position is in the interests of the United States. And I will base my decisions on the law.

During my career in private practice I represented a wide variety of clients in cases raising a wide variety of legal and policy issues. I represented the interests of those clients vigorously on the basis of sound legal arguments and without regard to my own views of what the law should be. That is at the core of what it means for a lawyer to represent a client. I understand that, if confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability even if doing so conflicts with my own opinion in a particular matter. And I will do so.

22. In *Kennedy v. Louisiana*, the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Kennedy based his opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006.

- a. Given the heinousness of the crime, as well as the federal government's codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?
- b. Following the Supreme Court's decision, President Obama announced at a press conference: "I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime." Do you agree with that statement?
- c. Would you, as Solicitor General, encourage the Court to reconsider its decision?

ANSWER (to Questions 22a, 22b, and 22c)

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. If I am confirmed, I would not lightly ask the Court to reverse one of its precedents, and I would not do so merely because I personally believed the Court reached the wrong result. There are circumstances, however, in which the Solicitor General properly could ask the Court to reconsider a decision. Of course, because the Solicitor General's Office plays a reactive role, the Office could urge the Court to reconsider the *Kennedy* decision only if an appropriate case were to present itself in which the issue was presented in a manner suitable for Supreme Court consideration.

If I am confirmed, and if a particular case presented the question of whether *Kennedy* should be overruled, I would approach the question of whether the Court should overrule the *Kennedy* precedent in the following manner. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court's criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law's growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. See *Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its

precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. Finally, it would likely be relevant to my decision that the Supreme Court denied a petition for rehearing filed by the Respondent (with the support of the Solicitor General) in the *Kennedy* case which pointed out that the Court had not been informed of the provisions of the UCMJ mentioned in this Question. My decision would be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States), and the views of the President would certainly be a relevant consideration.

23. In *Baze v. Rees*, you challenged the constitutionality of Kentucky’s lethal injection protocol. The issue in *Baze* was Kentucky’s three-drug protocol. When the federal government administers the death penalty, it uses the same three-drug protocol. For that reason the Solicitor General at the time, Mr. Clement, filed an *amicus* brief in support of the State of Kentucky. If you had been Solicitor General at the time, would you have submitted an *amicus* brief in support of Kentucky? Why or why not?

ANSWER

In the *amicus* brief it filed in *Baze v. Rees*, the United States explained its interest in the case as follows:

“This case involves a challenge to the constitutionality of Kentucky’s method of execution - lethal injection - based solely on the risk that the drugs involved will cause pain if improperly administered. Federal law authorizes capital punishment for a variety of offenses and provides that federal death sentences shall be implemented in the manner prescribed by the pertinent State’s own law. In conducting executions by lethal injection, the federal government administers the same series of three drugs as Kentucky. Several federal prisoners who have been sentenced to death are currently pursuing similar method-of-execution claims to the instant claim. See *Robinson v. Mukasey*, No. 1:07-cv-*2 02145 (D.D.C.); *Roane v. Mukasey*, No. 1:05-cv-02337 (D.D.C.). The United States therefore has a substantial interest in this case.”

In my judgment, this statement set forth an entirely appropriate reason for the United States to have participated as *amicus curiae* in the case, under the standards I discuss in my response to Question 39a below.

24. Do you believe the federal government’s administration of the three-drug protocol is constitutional? Why or why not?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

Under the Supreme Court's decision in *Baze v. Rees*, the federal government's three-drug protocol is not inherently unconstitutional because if administered properly it will inflict no pain. Therefore, under *Baze*, the federal protocol would be unconstitutional only if the procedures used to implement the protocol would be "sure or very likely to cause serious illness and needless suffering," and would give rise to "sufficiently imminent dangers" that present a "substantial risk of serious harm." Although I have not studied the matter, I am not aware of any information indicating that the federal government's procedures pose such risks.

25. Please briefly outline the arguments you would make in defense the federal government's three-drug protocol, if it were challenged.

ANSWER

If confirmed, I would defend the federal lethal injection protocol by showing that the procedures used to implement the protocol do not pose the kinds of serious risks the Supreme Court in *Baze v. Rees* established as necessary to make out an Eighth Amendment violation.

26. In *Fort-Wayne Books v. Indiana*, you signed onto an *amicus* challenging Indiana's RICO statute, which provided that obscenity offenses could serve as predicate acts. Even though Indiana's statute required the predicate act to be an obscenity, as defined under the *Miller v. California* three-prong test, you argued it was unconstitutional because it was vague and would have a chilling effect on protected speech. Under the federal RICO statute, sending obscene material through the mail may be used as a predicate act. If this or a similar statute is challenged before the Supreme Court, will you vigorously defend it?

ANSWER

Yes. The Supreme Court definitively resolved the issue in *Fort Wayne Books v. Indiana* more than twenty years ago, and it is well settled that obscenity enjoys no First Amendment protection.

27. I think everyone would agree that protecting children and families from obscenity is a worthwhile objective. Do you concur that the Justice Department must continue to

aggressively pursue criminal and civil litigation against those who violate federal obscenity laws? Why or why not?

ANSWER

Yes. The Department of Justice should continue to pursue criminal prosecutions and civil litigation aggressively against those who violate obscenity laws. If confirmed, I will vigorously defend challenges to the Department's enforcement of obscenity laws. It is well settled that obscenity enjoys no First Amendment protection.

28. You have argued on several occasions against laws that restrict the dissemination of pornography or indecent material, including laws intended to limit its access to children or restrict government financing of such material. In your *amicus* brief in *National Endowment for the Arts v. Finley*, you argued that Congress could not require the NEA to consider "general standards of decency" in making art grants. You argued the statute "imposes impermissible viewpoint-based criteria on NEA grants." In his concurrence, Justice Scalia agreed that it constituted viewpoint discrimination, but he said the First Amendment's prohibition against speech restrictions is inapplicable to congressional funding of that speech. Considering your views on First Amendment rights, please answer the following question:

- a. *Citizens United v. FEC* addressed the political speech of corporations. The Court held that the government had imposed speech restrictions based purely on the identity of the speaker. If you agree that Congress cannot impose speech restrictions upon the NEA, then do you agree that Congress cannot limit the political speech of corporations?

ANSWER

The *amicus* brief I filed in *National Endowment for the Arts v. Finley* was for the Rockefeller Foundation and sets forth the legal position that the Foundation wanted to present to the Supreme Court. The brief made an argument that Congress cannot use the spending power to impose viewpoint-based restrictions on grants that fund expressive activity, if those restrictions would violate the First Amendment had Congress sought to impose them directly. The question whether Congress can directly limit the political expenditures of corporations, which was at issue in the *Citizens United* case, did not involve any question regarding Congress's use of the spending power to impose conditions on federal funds. In all events, if confirmed, whatever personal views I might have respecting any legal issue – and whatever the views of my former clients – those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including the decision in *Citizens United*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

29. In the recent Supreme Court decision of *Snyder v. Phelps*, the Court held that the First Amendment protects funeral protesters in the context of that case. Chief Justice Roberts wrote, “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - as it did here - inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course - to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”

- a. Please evaluate the reasoning of Chief Justice Roberts.
- b. Do you personally agree with the holding?
- c. If not, do you agree with lone dissenter Justice Alito, who said “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case”?
- d. Please evaluate the reasoning of Justice Alito’s dissent.

ANSWER (to Questions 29a, 29b, 29c, and 29d)

Snyder v. Phelps presented an important question of First Amendment law – whether and how the First Amendment limits the imposition of tort liability for the intentional infliction of emotional distress – in the highly charged context of picketing in connection with the funeral of a soldier killed in battle. Chief Justice Roberts’ opinion for the Court concluded that the First Amendment protected the speech at issue because it was speech to the public, on a public street and on matters of public concern, in accord with picketing laws, and it did not interfere with the funeral – even if the views expressed were deeply hurtful to the family of the fallen soldier and considered noxious by most of the public. Justice Breyer concurred to make the point that, while the speech at issue deserved protection in the particular context presented by the case, the case did not require the Court to decide the extent to which the government could regulate such expression consistent with the First Amendment to minimize intrusion on grieving families. Justice Alito dissented. In his view, the expression at issue was properly characterized as a vicious verbal assault on the dead soldier’s family at a time of maximum vulnerability for them, and the words inflicting injury made no material contribution to public debate and should therefore be actionable.

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with any of the opinions in the case or criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. I can say that in my judgment each of the three opinions is a powerfully reasoned and eloquent statement of the legal view it expresses.

30. In his 2010 State of the Union address, the President characterized *Citizens United* this way:

“With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”

- a. Do you agree that *Citizens United* “reversed a century of law”?
- b. If so, please explain the rationale supporting that conclusion.

ANSWER (to Questions 30a and 30b)

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. *Citizens United* involved a constitutional challenge to a congressional enactment, and the Solicitor General was responsible for defending it.

- c. If not, have you expressed your disagreement with anyone at the White House or within the Department, either before or after the President delivered his State of the Union?

ANSWER

In my more than 20 years representing clients in private practice, and in my two years of public service in the Executive Branch, it has often been my professional responsibility to explain to clients what the rule of law will permit and what the rule of law will not permit. As I am sure you can understand, the need for confidentiality is at its zenith in such situations. Clients would not feel free to ask for advice on such difficult and weighty issues if they had reason to fear that their requests, or their lawyers’ responses, would be disclosed to the public. Any conversations I may have had in the White House or at the Department of Justice must therefore remain confidential.

31. You wrote an *amicus* brief in petition for cert to the Supreme Court in *Housel v. Head*. Housel, who was a British National, was convicted and sentenced to death by the State of Georgia. In your brief, you argued Housel’s rights had been violated. However, you did not argue that his *constitutional* rights had been violated, but his “international human rights.” You concluded your brief by arguing, “[i]t is in the interests of the United States and the world community that the legal standards of the United States should reflect and be informed by international human rights.” If confirmed and you are litigating a death penalty case before the Supreme Court, are there any circumstances under which you would urge the Supreme Court to be “informed by international human rights”

ANSWER

In *Housel v. Head*, I filed an amicus brief as counsel for Members of Parliament of the United Kingdom as well as two professional legal organizations – the Law Society of England and the Human Rights Committee of the Bar of England and Wales. They had an interest in the case because the criminal defendant was a British subject. The legal arguments set forth in the brief represented the position that those Members of Parliament and professional organizations wanted to present to the Supreme Court. I served as their lawyer and presented their views.

If confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to the view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution and laws of the United States, except in those rare instances where federal statutes incorporate or make international and/or foreign court decisions binding legal authority.

- a. Please explain the distinction between “international human rights” and constitutional rights.

ANSWER

“Constitutional rights” are the rights established by the United States Constitution, which are binding and enforceable in the United States. “International human rights” are set forth in international treaties, conventions and customary international law. They are not binding and enforceable in the United States unless Congress has made them so.

32. Excepting treaties (and statutes that specifically call for consideration of foreign law), is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the U.S. Constitution?

- a. If so, under what circumstances would you consider foreign law when interpreting the U.S. Constitution?

ANSWER

If confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to the view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution.

- b. If you were a judge, would you consider foreign law when interpreting the Eighth Amendment?

ANSWER

If confirmed, I will not be exercising the responsibilities of a judge. I can say that if I were a judge, I would follow the law established by the Supreme Court.

33. Is foreign law relevant when interpreting any other constitutional amendment (excluding the Eighth Amendment)?

ANSWER

If confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to the view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution.

34. Professor Goodwin Liu, the President's nominee to the Ninth Circuit Court of Appeals, believes that "foreign law can be cited in the same way that a law review article can be cited, which is simply to say, judges can collect ideas from anywhere that they find it persuasive." He distinguished between citing foreign law for "authority," as opposed to merely for "ideas or guidance."

a. Do you believe this is a valid distinction? Please explain.

ANSWER

I recognize that some Justices of the Supreme Court believe that foreign law, while not authoritative or binding, can be a source of helpful ideas in interpreting the Constitution, and thus believe it is a valid distinction, while other Justices of the Supreme Court believe that foreign law should never be considered, even as a potential source of helpful ideas, in interpreting the Constitution. If I were to comment on the validity of the distinction, I would in effect be commenting on a difference of view that Justices of the Supreme Court have expressed in their opinions. I do not believe it would be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or opinions of particular Justices, or to state whether I agree with criticisms of those decisions.

In all events, if I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. If you were a judge, would you use foreign law for “ideas or guidance” when interpreting the U.S. Constitution? If so, under what circumstances and to what extent?

ANSWER

If confirmed, I will not be exercising the responsibilities of a judge. I can say that if I were a judge, I would follow the law established by the Supreme Court.

35. Under what circumstances would it be appropriate for the Solicitor General to change the position advocated by the previous Administration on a case pending before either a lower federal court or the Supreme Court?

ANSWER

Continuity and stability are important values in fulfilling the responsibilities of the Solicitor General to the Supreme Court, and in maintaining the credibility of the Office over the long term. It is my understanding that with respect to most cases, the Office’s position does not and should not change from administration to administration. I do believe there are circumstances under which it would be appropriate for a Solicitor General to change the position advocated by the previous administration, to reflect the legitimate legal policy objectives of an administration. Other Solicitor General nominees have made this point. For example, Ted Olson explained that, while partisan political considerations should play no part in any such decision, the “policies that have been advanced by a President can be and frequently are in any administration” reasons for a change in position. As he explained, “a particular administration may have an interest in enforcing the antitrust laws in a certain way or the environmental laws in a certain way. Those policy interests are among the things that the President is entitled to consider with respect to the discharge of his responsibility to faithfully execute the laws of the United States.” Kenneth Starr put it this way: “there are instances, for example, that the office might in fact be taking a contrary position to the position that had been advanced in a prior administration. That happens. Positions evolve, positions changed. The law does not calcify.”

- a. Have you discussed with anyone within the Administration any positions of previous Administrations that should be altered? If so, what prior positions did you discuss?

ANSWER

No.

36. In an interview with *Christianity Today*, President Obama stated that he believed States could ban partial-birth abortion. Do you agree with the President?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). In *Gonzales v. Carhart*, the Supreme Court upheld the federal Partial-Birth Abortion Act against a federal constitutional challenge. If I am confirmed, it would be part of my responsibility as Solicitor General to defend the Act.

37. In passing the FISA Amendments Act of 2008, Congress approved retroactive immunity for telephone companies that assisted the government in warrantless surveillance. President Obama initially opposed retroactive immunity for telephone companies, although he ultimately voted in favor of the FISA Amendments Act. The ACLU challenged the Act as unconstitutional, but the U.S. District Court for the Southern District of New York dismissed the case. However, the Second Circuit recently reversed the lower court's decision. Should it reach the Supreme Court, will you defend the immunity provision notwithstanding the President's apparent opposition? If not, why not?

ANSWER

I believe the Second Circuit case to which this question refers is *Amnesty International v. Clapper*. That case does not involve the provisions of the FISA Amendments Act of 2008 that provide immunity to telephone companies. It involves a constitutional challenge to Section 702 of the Act, which creates new procedures for authorizing government electronic surveillance targeting non-United States persons outside the United States for purposes of collecting foreign intelligence. I am not aware of a case in the Second Circuit challenging the immunity provisions of the FISA Amendments Act, although it is possible that there is such a case. There is at least one case pending either in the Ninth Circuit or in the U.S. District Court for the Northern District of California challenging the immunity provisions.

The Department of Justice has been vigorously defending both the Second Circuit challenge to Section 702 of the FISA Amendments Act and the Ninth Circuit challenge to the Act's immunity provisions. If confirmed, and based on what I know of the case challenging the immunity provisions, I can think of no reason why I would not continue to defend the interests of the United States vigorously in this case or other cases challenging the immunity provisions in the 2008 law. With respect to *Amnesty International v. Clapper*, I was asked about my ability to participate in the case by Senator Sessions (in view of the fact that I had filed an *amicus* brief in the Sixth Circuit in *ACLU v. National Security Agency*), and I provided the following answer:

If I am confirmed, I will consult with Department of Justice ethics officials and other officials as appropriate, before determining whether recusal is required. Prior to such consultation and analysis, I cannot say definitively that I would not recuse myself from

this matter. Based on what I know now, however, it does not seem likely to me that recusal would be required. The *Clapper* case in the Second Circuit involves a statute that was not at issue in *ACLU v. NSA*; the *Clapper* case raises a different legal issue than in *ACLU v. NSA*; I represented *amici* and not a party in *ACLU v. NSA*; and the brief I filed did not take a position on the standing issue; and the case was several years ago. Assuming I am not recused, I will advocate the position of the United States vigorously in the *Clapper* case. The case involves a challenge to a federal statute and I would have a responsibility to defend that statute vigorously

38. At her confirmation hearing, then-nominee Elena Kagan said,

“If I am confirmed and I disagree with the President on the position to take in a case for which the Solicitor General’s office is responsible, I would do my best to persuade him of the correctness of the office’s views or the appropriateness of deferring to the office. *(I believe that if the disagreement were with the Attorney General, a natural step would be to appeal to the President.) If the disagreement were to continue, I would consider the nature of the case, the nature of the disagreement, and the full range of ways to deal with the disagreement... If I believe this disagreement goes to a highly material matter – a matter, for example, that would involve me in failing to fulfill my essential obligations to the Court or Congress – I would have to resign my office.*”

At your hearing, you appeared far less committed to being independent from the President and Attorney General than then-nominee for Solicitor General, Elena Kagan. Senator Hatch asked, “if you believe that reasonable arguments exist to defend a statute’s constitutionality but the Attorney General or President says otherwise, will you defend the statutes or not, or resign?” You responded, “I would defend the statute unless instructed by my superior to do otherwise.” If you believe there is a reasonable basis on which to defend a statute and therefore the failure to do so would be an abdication of your duty, but the President or Attorney General nonetheless instructed you not to defend it, would you offer your resignation?

ANSWER

I appreciate the opportunity to clarify my testimony. As I stated in response to Questions 3, 4, 11, and 12 above, I believe that a conflict between the Solicitor General and his superiors over whether to defend the constitutionality of a statute could certainly justify resignation. If I, as Solicitor General, decided to defend an act of Congress, and the Attorney General or the President overruled that decision and ordered that the statute not be defended, based on what I believed to be political considerations or other illegitimate reasons, or an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

39. At his nomination hearing, Ted Olson said, “A partisan interest from the standpoint of partisan politics should not be considered” when the Solicitor General chooses to submit an *amicus* brief to the Supreme Court.

- a. What factors would you consider when debating whether the file an *amicus* brief where the government is not a party?

ANSWER

As a general matter, the question whether to file an *amicus* brief is often raised in the first instance by a division of the Department of Justice or an Executive Branch department or agency that believes the United States has a substantial interest in the case and should weigh in. Whether in response to such a request or on the initiative of the Office, the Solicitor General’s Office would typically consult with all Executive Branch departments or agencies that might have an interest in the case or related cases. In some instances, it may be appropriate to consult with the parties in the case or other affected individuals or entities.

If confirmed, in making the judgment whether to authorize the filing of an *amicus* brief, I would take guidance from Rex Lee, who provided a set of guideposts on how to approach this issue. In a lecture entitled *Lawyering for the Government: Politics, Polemics & Principle*, which was published in the Ohio State Law Journal (47 Ohio St. L.J. 595 (1986)), he identified two categories of cases in which the United States would consider filing an *amicus* brief.

The first class of cases consists of “those that involved direct federal law enforcement interests. Examples are Title VII cases, antitrust cases, securities cases, or criminal cases in which the federal government did not happen to be one of the litigants, but the holding in the case probably would have a larger impact on the interests of the United States than it would have on the immediate parties.” In this class of cases, there would generally be strong reasons to file an *amicus* brief on behalf of the United States.

The second class of cases are those that Rex Lee describes as those that “have nothing to do with any federal law enforcement interest, but which fall right at the core of the current administration’s broader agenda” – by which he meant the President’s policy agenda, not partisan political concerns. With respect to this second class of cases, Rex Lee stated: “not only is it all right to file in a few of these non-federal cases, it is a part of your job, but it is a mistake to file in too many.” He went on to state that “while I think it is proper to use the office for the purpose of making my contribution to the President’s broader agenda, a wholesale departure from the role whose performance has led to the special status of the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President’s objectives would suffer.”

If confirmed, I intend to follow the prudent approach Rex Lee described, and I certainly agree with Ted Olson’s view that partisan political considerations must play no role in any decision whether to file an *amicus* brief.

- b. How would you ensure that you do not submit frivolous *amicus* briefs, but only in cases where the interest of the United States is obvious, or direct?

ANSWER

If confirmed, I will follow the approach set forth by Rex Lee, which I described in the preceding answer, which reflects the importance of filing *amicus* briefs only when warranted.

- c. If the Attorney General or the President requested that you file such a brief and you objected, how would you resolve that conflict?

ANSWER

If I am confirmed, and if I disagree with the Attorney General or the President on the position to take in a case for which the Solicitor General's Office is responsible, I would do my best to persuade him of the correctness of the Office's views or the appropriateness of deferring to the Office. If I am unable to persuade the Attorney General or the President that filing a brief is not consistent with the long-term institutional interests of the United States (or is otherwise inappropriate for reasons of the kind Rex Lee identified in the article I referenced above), then I will need to assess the basis of the disagreement. If I believed the instruction was based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not be able to carry out the order. I do not believe there is any significant likelihood that this will happen. But I am prepared to resign if it does.

- d. If the President or Attorney General directed you not to file such a brief, how would you resolve the conflict?

ANSWER

If I am confirmed, and if I am instructed by the Attorney General or the President not to file an *amicus* brief in a case in which I have determined that an *amicus* brief should be filed, I would do my best to persuade him of the correctness of the office's views or the appropriateness of deferring to the office. If I am unable to persuade the Attorney General or the President that the long-term institutional interests of the United States require filing an *amicus* brief in a particular case, then I will need to assess the basis of the disagreement. If I believed the instruction was based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not be able to carry out the order. I do not believe there is any significant likelihood that this will happen. But I am prepared to resign if it does.

40. At his nomination hearing, Ted Olson agreed that the Solicitor General must defend a congressional statute if there is a good-faith argument in support of its constitutionality.

- a. What factors will you consider when determining whether there is a good faith argument in support of a statute?

ANSWER

If confirmed, I will apply the standards the Department traditionally applies. The Department's longstanding practice has appropriately been to defend federal statutes unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable arguments that can be offered in its defense. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. Whose opinion will you consider when making this assessment and what weight would you give to that opinion?

ANSWER

If confirmed, I will continue to follow the time-honored processes of the Solicitor General's Office. Typically, the question whether to file an *amicus* brief is often raised in the first instance by a division of the Department of Justice or an Executive Branch department or agency that believes the United States has a substantial interest in the case and should weigh in. Whether in response to such a request or on the initiative of the Office, the Solicitor General's Office would typically consult with all Executive Branch departments or agencies that might have an interest in the case or related cases. In some instances, it may be appropriate to consult with the parties in the case or other affected individuals or entities. I would give the views expressed in all of these consultations appropriate weight in exercising my independent judgment.

- 41. At his nomination hearing, Ted Olson unequivocally said he would tell the President “no” if the President is in error on a legal question.

- a. Do you agree with Mr. Olson's approach? Why or why not?

ANSWER

I agree with Ted Olson's approach, and with the similar view other Solicitor General nominees have expressed on this issue. For example, Paul Clement testified that that “[o]f course, the President ultimately has the right under the Constitution to have his Solicitor General file the brief he wants filed. At the same time, he does not have the right to insist that I file any particular brief. I can certainly imagine situations in which I would resign before filing a brief that I thought outside the bounds of proper advocacy, and I can imagine other situations in which the handling of a series of briefs would lead me to resign.” Similarly, Kenneth Starr, in his written testimony to this Committee, recognized that “the Attorney General retains responsibility for and ultimate direction of the Government's arguments before the courts.” He then went on to say: “[i]f I were being asked [by the Attorney General or the President] to take what I thought was a legally indefensible position, I would not sign the brief or make that argument.” Charles

Fried – after recognizing that the Attorney General has “clear statutory authority” to overrule the Solicitor General – stated during his confirmation hearing that if a case should arise “in which the Attorney General should direct the Solicitor General to take a position which is not simply one with which he does not agree, but which he feels is influenced by improper factors, or, cannot conscientiously be urged to the Court, then the Solicitor General should simply not do that.” I hold the same view.

b. Have you ever told the President or Attorney General “no”?

ANSWER

In my more than 20 years representing clients in private practice, and in my two years of public service in the Executive Branch, it has often been my professional responsibility to explain to clients what the rule of law will permit and what the rule of law will not permit. As I am sure you can understand, the need for confidentiality is at its zenith in such situations. Clients would not feel free to ask for advice on such difficult and weighty issues if they had reason to fear that their requests, or their lawyers’ responses, would be disclosed to the public. Any conversations I may have had with the President in my role as Deputy Counsel must therefore remain confidential. Any conversations I may have had with the Attorney General in my role as Associate Deputy Attorney General likewise must remain confidential.

42. At his hearing, Ted Olson said he “would consult with the ethics officials in the Department of Justice, and... take their advice into consideration” before deciding whether or not to recuse himself from a particular case.

a. How would you ensure that your representation of the United States is ethically sound and free of any conflicts of interest?

ANSWER

I will strictly adhere to the legal requirements and ethical standards that govern potential conflicts of interest. I will consult with Department of Justice ethics officials and other officials as appropriate, and I will be guided by the advice I receive from them.

b. If there is a potential conflict of interest, how would handle it?

I will strictly adhere to the legal requirements and ethical standards that govern potential conflicts of interest and will be guided by the advice I receive from ethics officials at the Department of Justice, and will accordingly recuse myself from participation in any matter in which my recusal is required.

ANSWER

c. Please identify any potential conflicts or recusals you might face, if confirmed.

ANSWER

I am aware of one case, *General Dynamics v. United States*, in which I represented a party while in private practice against the United States that remains in litigation. If confirmed, I would recuse myself from any participation in the matter.

It is possible that other litigation in which I represented a private party during my time in private practice might present an occasion for the United States to offer its views to the Supreme Court or a court of appeals. The most likely example of such a case is *Viacom v. YouTube*, a copyright infringement case raising issues under the Digital Millennium Copyright Act that is presently before the Second Circuit. If that case, or any other in which I represented a client while in private practice, comes before the Department of Justice, I will recuse myself.

I have also recused myself from all litigation involving Jose Padilla, on the basis of the *amicus* brief I filed on behalf of clients in the Second Circuit, and would continue to do so if confirmed.

There may also be other matters that do not now come to mind. I will be vigilant to ensure that I adhere to the legal requirements and ethical standards that govern potential conflicts of interest.

43. At his nomination hearing, Drew Days said, “the duty [of the Solicitor General is] to ensure that the Government speaks to the Court in a coherent voice.”

- a. Do you agree that it is the duty of the Solicitor General “to ensure that the Government speaks to the Court in a coherent voice”?

ANSWER

Yes. As I explained in response to Question 11 above, one of the reasons for creating the position of Solicitor General was to ensure uniformity and consistency in the positions of the United States in litigation. The Solicitor General must decide what position the United States will take before the Supreme Court. As Drew Days observed, often the many departments and agencies within the Executive Branch, and even divisions within the Department of Justice, will have different and competing views over what the position of the United States should be in a particular case. If possible, the Solicitor General will reconcile differing views into a consensus position. But it may not always be possible to do so. In such cases, it will ultimately be up to the Solicitor General to decide what the litigating position of the United States will be.

- b. How will you ensure the Government speaks to the Court in a coherence voice?

ANSWER

I understand that to arrive at a judgment about what position the United States will take before the Supreme Court involves a great deal of Executive Branch deliberation. Paul Clement described the process this way in his written testimony: “the decision-making process typically involves ongoing give and take and, where there is disagreement in the initial recommendations,

often involves meetings where the goal and sometimes the result is to obtain a consensus position that accommodates the interests that initially produced disparate initial recommendations.” If confirmed, I will follow this time-honored decision-making process.

- c. If you agree with Mr. Days, are there any circumstances under which that duty would trump your duty to defend a statute if there is a reasonable basis to do so?

ANSWER

When Congress passes a law, the Department of Justice should vigorously defend that law against constitutional challenge. There are only two exceptions. The first is where the statute violates the separation of powers by infringing on the President’s constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow and they apply only in rare circumstances, and should be invoked only after the most grave and careful deliberation. Consideration of the views of Executive Branch departments and agencies will be an important part of the process of any such decision. Ultimately, however, the Solicitor General must make an independent judgment regarding the defense of an act of Congress.

44. Drew Days said, “in carrying out [the] responsibility [of the Solicitor General], the Solicitor General ultimately must take a stand,” after “hear[ing] competing views in the administration prior to arriving at a final position and, wherever principle permits, to seek to reconcile differences of affected agencies.”

- a. Do you agree with Mr. Days?
- b. If so, what is your plan, if confirmed, to accomplish this?
- c. If not, what is your view of the responsibility of the Solicitor General?
- d. How much deference will you afford those views when advocating for acts of Congress before the Supreme Court?

ANSWER (to Questions 44a, 44b, 44c and 44d)

I agree with Drew Days that the Solicitor General has the responsibility to determine what the litigation position of the United States will be in cases before the Supreme Court, and that the exercise of that responsibility ultimately requires the Solicitor General to reconcile sometimes competing views of Executive Branch departments and agencies – through the process of interagency deliberation and internal Department of Justice review described in my response to Question 43 above. Ultimately, however, it is the Solicitor General who must exercise independent judgment on the question of defending acts of Congress before the Supreme Court. When advocating for acts of Congress before the Supreme Court, it would generally be sensible for a Solicitor General to give considerable weight to the Executive Branch departments or

agencies Congress has charged with enforcing and implementing those enactments because of their expertise and experience in litigation over the statutes at issue.

45. At his nomination hearing, Mr. Days said, “[I]f people didn’t challenge precedent under some circumstances, we would still be left with *Plessy v. Ferguson*. So I think that one has to achieve some balance between respecting *stare decisis* and being bold enough to challenge where there seems to be good and sufficient justification for doing so.”

- a. Do you agree with Mr. Days that there is a balance between *stare decisis* and challenging precedent where there is “good and sufficient justification for doing so”?

ANSWER

If confirmed, and if the question is raised in a case that comes before me. I would approach the question of whether there is a “good and sufficient reason” for asking the Supreme Court to overturn one of its precedents in the following manner. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court’s criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. *See Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. If confirmed, under what circumstances would you discard precedent in your arguments?

ANSWER

If confirmed, I will never discard precedent in making arguments to the Supreme Court or any other court. Precedent is always entitled to respect, even in the rare cases in which the United States advocates that a precedent be overruled.

46. At his nomination hearing, Charles Fried said, “partisan policy considerations have never entered into our judgments, never should enter into our judgments, and I would never allow them to enter into judgments.” Similarly, Senator Lee asked you whether you believe it is the duty of the Solicitor General to advance the political agenda of the President. You said, “No...I think the duty of the Solicitor General is to advance the long-term institutional interests of the United States, and it is not a partisan job.”

- a. What “long-term institutional interests” of the United States would you advance, if confirmed?

ANSWER

The long-term institutional interests of the United States are determined by the entities to which our Constitution assigns the responsibility to make and execute federal policy: the Congress and the Executive Branch. If confirmed, I would look to the judgments of Congress as expressed in statutes and to the judgments of the Executive Branch as expressed in regulations and other forms of policy guidance. Partisan political considerations will play no part in carrying out my responsibilities.

- b. How will you handle conflicts between these competing interests – the President’s agenda and your duties as Solicitor General?

ANSWER

If I am confirmed, partisan political considerations will play no part in carrying out my responsibilities as Solicitor General. As other Solicitors General – including Rex Lee, Kenneth Starr, and Ted Olson – have stated in their testimony to this Committee, the President’s legal views and policy objectives are legitimate considerations in making judgments about the long-term institutional interests of the United States.

- c. Given your prior positions within President Obama’s Administration, how can the Committee be assured that partisan policy considerations would never enter into your judgments as Solicitor General, if confirmed?

ANSWER

I have given my assurance to this Committee that partisan political considerations will play no part in my judgments if confirmed. To the extent that more is required, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who

know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

- d. At your hearing, you told Senator Lee, “I can assure you that decisions I make will be made on the law and not on partisan considerations.” How will you ensure your views remain grounded in the law?

ANSWER

I believe my response to Question 21 provides a response to this question.

47. At his nomination hearing, Charles Fried said, “if the case should ever arise in which the Attorney General should direct the Solicitor General to take a position which is not simply one with which he does not agree, but which he feels is influenced by improper factors, or, cannot conscientiously be urged to the Court, then the Solicitor General should simply not do that.”

- a. If confirmed, how would you ensure that the Attorney General’s directions are not influenced by improper factors, but based in the law?

ANSWER

If confirmed, I will do as other Solicitors General have done and give the Attorney General my best independent judgment of what the law requires.

- b. If you believe the Attorney General has directed you to take a position for reasons that are improper, what course of action would you take?

ANSWER

If confirmed, I would not expect to face a situation in which the Attorney General directs me to take a position for reasons that are improper. But if I do face such a situation, I will first attempt to persuade the Attorney General to rescind the instruction based on my own independent legal judgment. If I am unable to persuade the Attorney General, then it would be appropriate to consider an appeal to the President if circumstances warrant it. If the Attorney General (or the President) directed that I take a position, based on what I believed to be partisan political considerations or other illegitimate reasons, or on what I believed to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

- c. Please describe the factors that you believe would be improper for the President or Attorney General to consider.

I believe my response to Question 47b above provides a response to this question.

48. At Mr. Fried’s nomination hearing, Senator Metzenbaum asked him whether he could provide an example of the Solicitor General advocating that the Supreme Court reverse a decision recognizing a fundamental constitutional right for individuals. Mr. Fried said there are “many examples of the Solicitor General urging in an *amicus* brief that established Supreme Court precedent be reconsidered.”

a. If you had been asked the question, how would you have responded?

ANSWER

As an historical matter, I can think of instances in which the Solicitor General’s Office has filed briefs advocating the reversal of a decision recognizing a constitutional right for individuals. Between 1985 and 1992, the Office filed briefs advocating that the Supreme Court reverse *Roe v. Wade*. In 2009, the Office filed a brief in *Montejo v. Louisiana* advocating that the Sixth Amendment limitations on interrogations set forth in *Jackson v. Michigan* be overruled. There may well be other instances, but I believe they are infrequent.

b. If confirmed, would you consider filing *amicus* briefs that urge the Court to reconsider some precedent?

ANSWER

The Solicitor General’s responsibilities as an officer of the Supreme Court include fidelity to the principle of *stare decisis* and respect for the Court’s precedents. Although rare, cases may arise in which it is appropriate to ask the Supreme Court to reconsider a precedent, and to do so in a case in which the United States is not a party. One historical example is *Brown v. Board of Education*, in which the United States filed an *amicus* brief urging the Supreme Court to overrule the separate-but-equal doctrine of *Plessy v. Ferguson*. A more recent historical example is *Montejo v. Louisiana* in 2009, in which the Solicitor General filed an *amicus* brief in a state criminal case urging that the Sixth Amendment rule of *Jackson v. Michigan* be overruled.

c. If so, under what circumstances?

ANSWER

If confirmed, I would approach this question in the following manner. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court’s criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the

issue it addressed. *See Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- d. Please identify any issues that you believe warrant Supreme Court reconsideration.

ANSWER

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with any criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. Moreover, if I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

49. As Solicitor General, you would be representing the United States and its laws. While a judge has an obligation to uphold precedent, the Supreme Court can change precedent, and often Courts of Appeals have no binding Supreme Court precedent.
 - a. What principles would guide you in urging a court to modify or overrule an existing precedent?

ANSWER

If confirmed, I would approach this question in the following manner, with respect to a Supreme Court precedent. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court’s criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow

irrelevant or unjustifiable in dealing with the issue it addressed. *See Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. If the question arose regarding court of appeals precedent, additional considerations would come into play, including whether the court’s precedent conflicted with the weight of decisions in other circuits, and whether the precedent had been called into question by an intervening Supreme Court decision. In any court, my decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. Under what circumstances is it appropriate for the Supreme Court to overrule precedent?

ANSWER

It is up to the Supreme Court to decide when it is appropriate to overrule one of its precedents. The Court generally assesses whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. *See Montejo v. Louisiana*. If confirmed, I will apply that law in exercising my independent judgment, consistent with the respect for precedent and the principle of *stare decisis* that the Solicitor General owes to the Supreme Court.

- c. Under what circumstances is it appropriate for a Circuit Court to override its precedent?

ANSWER

A federal circuit court can override a precedent only in an *en banc* proceeding. Federal Rule of Appellate Procedure 35 (and related local rules) set forth the criteria for when *en banc* consideration is appropriate.

- 50. Given the caseload of the Solicitor General’s Office, one of the most common questions you are likely to confront is the degree of deference to afford executive agencies. For example, the Securities and Exchange Commission may believe it has an issue that merits review by the Supreme Court.

- a. How much deference will you afford executive agencies?

- b. If you disagreed with the executive agency, how would you balance your views and the deference you might afford that agency?
- c. If the agency in question were an independent agency, how would you respond to (a) and (b) above?

ANSWER (to Questions 50a, 50b, and 50c)

If confirmed, in answering questions of this kind I would be obliged to follow the law set forth by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and its progeny. The *Chevron* doctrine makes clear that the intent of Congress governs the deference afforded to Executive Branch agencies and departments and to independent agencies. If Congress has spoken directly to the question at issue in a statute, then an agency does not have the authority in implementing the statute to depart from Congress's clearly expressed intent. If Congress has not spoken directly to the question at issue (because, for example, the statute is written in broad terms or particular provisions are ambiguous), then Congress is deemed to have delegated to the department or agency the discretion to make policy judgments in implementing the statute, so long as those judgments are well-reasoned and not inconsistent with the statutory text.

In deciding the litigating position of the United States before the Supreme Court in a case challenging the lawfulness of an agency rule or order, I will (if confirmed) first have to make an independent judgment whether the agency rule or order contravenes the clearly expressed intent of Congress. Although I would certainly give careful consideration to the views of the agency or department charged with implementing the statute, ultimately this is a question on which independent judgment is required to ensure that the will of Congress is respected, and I would not defer to the department or agency in making that judgment. If I concluded that Congress had not spoken directly on the question at issue in the statute, then the department or agency would have discretion to make policy choices so long as those choices were well-reasoned and not inconsistent with the statute. In this latter category, the department or agency's views about policy would be entitled to deference, but the questions of whether the policy choice is based on a well-reasoned analysis and is consistent with the statute are legal judgments on which I would have to exercise independent judgment, giving due consideration to the views of the department or agency on those questions. I would apply the same analysis when considering rules or orders of independent agencies.

51. In his nomination hearing, former Solicitor General Paul Clement said that "one of the things that is really [a] valued tradition[] in the Office of Solicitor General is the fact that there is a great continuity in the office." He was referring to how little changes in the Office from one Administration to next.

- a. In what ways is continuity an asset to the Office of Solicitor General?

ANSWER

In the lecture I referenced in my response to Question 39a above, Rex Lee stated that the Solicitor General's Office "provides the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers." I agree with the views expressed by Rex Lee in this statement. The credibility of the Solicitor General's Office before the Supreme Court is essential to allowing the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if it means that that administration must forego taking a position that might advance a particular administration objective in a particular case.

- b. When is it appropriate, in your view, for a legal position to change between one Administration and the next?
- c. On what basis should those changes be made?

ANSWER (to Questions 51b and 51c)

I believe my response to Question 35 above provides a response to these questions.

- d. If confirmed, would you respect this tradition? Why or why not?

ANSWER

Yes, for the reasons Rex Lee identified.

- e. If so, what particular steps would you take to promote continuity?

ANSWER

If confirmed, I will follow the time-honored processes of the Solicitor General's Office. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). In my judgment, that is the best way to promote the values of continuity that Rex Lee identified.

- 52. In late 2008, the Department of Health and Human Services issued the "Conscience Rule" to end discrimination against health care providers who decline to participate in abortion because of their moral or religious beliefs. Do you believe a reasonable argument can be made to support the "Conscience Rule"?

- a. Do you support a right of health care providers to decline to participate in abortions because of their moral or religious beliefs?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

Several federal statutes guarantee health care providers the right to refrain from participating in abortion procedures because of their moral or religious beliefs. If those laws are challenged, I will vigorously defend them.

- b. Will you defend federal laws and regulations protecting health care providers who decline to participate in abortions because of their moral or religious beliefs?

ANSWER

Yes.

53. In 2007 by a vote of 5 to 4, the U.S. Supreme Court in *Gonzales v. Carhart* rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act's application. Your role as Solicitor General would require you to defend the Act against such challenges. Do you believe *Gonzales v. Carhart* was correctly decided? Why or why not?

ANSWER

I do not believe it would be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court.

- a. Under what circumstances would you fail to defend the Act?

ANSWER

If confirmed, I would apply the standards the Department traditionally applies. The Department's responsibility is to defend federal statutes unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable

arguments that can be offered in its defense. My decisions respecting the Federal Partial-Birth Abortion Act and all other federal statutes would be based on the law as the Supreme Court has determined it, including *Gonzales v. Carhart*, the factual circumstances in which the law is applied, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

54. *Roe v. Wade* and *Planned Parenthood v. Casey* are still good law and uphold the right of a woman to obtain an abortion. However, the "undue burden" standard of *Casey* has been somewhat unclear.

- a. Does the U.S. Constitution confer a right to abortion? If so, what clauses confer that right?

ANSWER

The Supreme Court has held that the Constitution protects a woman's right to terminate a pregnancy in certain circumstances, subject to various permissible forms of governmental regulation. See *Planned Parenthood v. Casey*. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. Does the U.S. Constitution compel taxpayer funding of abortion? Why or why not?

ANSWER

The Supreme Court has held that the U.S. Constitution does not compel taxpayer funding of abortion. The Court held in *Harris v. McRae* that it "simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."

- c. Do you believe the U.S. Constitution permits taxpayer funding of abortion? If so, based on what clause?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Harris v. McRae*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive

deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- d. Does the U.S. Constitution prohibit informed-consent and parental involvement provisions for abortion? Why or why not?

ANSWER

Under prevailing Supreme Court precedent, a particular informed-consent or parental-involvement law will be upheld as constitutional if it does not impose an "undue burden" on a woman's right to terminate a pregnancy. *Planned Parenthood v. Casey* upheld informed-consent and parental-consent provisions under this standard.

55. Virginia Seitz has been nominated to be Assistant Attorney General for the Office of Legal Counsel. Ms. Seitz authored a brief in *Grutter v. Bollinger*, arguing that diversity was a compelling institutional interest.

- a. Do you agree with Ms. Seitz that diversity is a valid institutional interest for a government entity, consistent with the Equal Protection Clause?

ANSWER

The Supreme Court held in *Grutter v. Bollinger* that the Equal Protection Clause of the Fourteenth Amendment permits a state educational institution, in appropriate circumstances, to establish a compelling interest in advancing student body diversity as part of the mission of the educational institution. My understanding is that under the Supreme Court's precedents, an educational institution cannot justify the use of quotas to achieve a diversity objective, but can consider the institutional benefits of diversity only as part of a broader assessment of institutional objectives and must be able to show that methods of promoting diversity that do not involve race-conscious choices are insufficient to achieve the institution's legitimate objectives.

- b. Do you believe the "disparate impact" justification for diversity, advanced in *Ricci v. DeStefano*, conflicts with either the Equal Protection Clause or relevant statutory language?

ANSWER

In *Ricci v. DeStefano*, the Supreme Court held that a race-based action of an employer like the City of New Haven "is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact" provisions of Title VII. The Court did not reach the Equal Protection Clause question because it found the City's actions unjustified under Title VII, but noted that it had not held "that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case."

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Ricci v. DeStafano*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

56. President Obama sharply criticized the Court's decision in *Citizens United v. FEC*. If Congress passes and the President signs into law a statute that attempts to circumvent *Citizens United*, would you be able to defend such a law as consistent with the First Amendment?

ANSWER

I believe that when Congress passes a law, the Department of Justice should vigorously defend that law against constitutional challenge. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government by recognizing the strong presumption of constitutionality that attaches to congressional enactments, and I fully subscribe to it. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. In exercising independent judgment on the question of whether reasonable arguments can be offered in defense of a statute, I would of course make that judgment on the basis of binding Supreme Court precedent, including the *Citizens United* decision. Any such judgment would require extensive consideration and deliberation within the Department of Justice and with all Executive Branch departments and agencies that have an interest in the matter. Of course, any such analysis would require careful scrutiny of the actual legislative text Congress enacted, as well as the legislative record assembled in connection with the legislation.

57. Do you believe the Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S. 3628 (111th Congress), is constitutional? Why or why not?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, my personal views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). That would be true with respect to the DISCLOSE Act (if Congress were to enact it into law) and all other federal laws.

Thus, if Congress were to enact the DISCLOSE Act, I would defend it against constitutional attack unless the law violated the separation of powers, or there was no reasonable argument that could be advanced in its defense.

58. It is likely that the Patient Protection and Affordable Care Act will reach the Supreme Court. And it is likely that the President will wish to defend the Act.

- a. Do you believe there are any reasonable arguments that can be made in defense of the statute?

ANSWER

The Patient Protection and Affordable Care Act is entitled to a strong presumption of constitutionality, like all statutes, and based on my work thus far, there do appear to be reasonable arguments that could be advanced in defense of that statute, in light of existing Supreme Court authority. Before making a decision on the question as Solicitor General, however, I would need to give the issue the full consideration it deserves, which would include extensive deliberations with lawyers in the Department of Justice and with Executive Branch departments and agencies that have an interest in the matter – as I understand the Solicitor General’s Office does with respect to any matter of significance.

- b. Do you believe that the individual mandate can be severed from the Patient Protection and Affordable Care Act? Please explain.

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, my personal views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

My understanding is that the Department of Justice has argued in litigation that the individual mandate (which is also referred to as the minimum coverage provision) can be severed from the bulk of the Affordable Care Act under longstanding Supreme Court severability law that requires courts to preserve as much of a congressional enactment as can be preserved consistent with congressional intent. Based on what I know of the issue, I have no basis for disagreeing with that argument.

- c. Can one make any reasonable arguments in defense of the Act, or does it implicate that exception to the Solicitor General’s duty to defend?

ANSWER

The Department of Justice has advanced arguments in favor of the Affordable Care Act's constitutionality in numerous district and appellate court proceedings. In most of the district court cases decided to date, the courts have dismissed constitutional challenges to the Act on standing or other threshold grounds. At this point, the majority of district courts that have found standing and ruled on the merits have upheld the Act entirely against all constitutional challenges. The two district courts that declared the minimum coverage provision (or individual mandate) unconstitutional nevertheless expressed the view that there was support in the law for the position that the provision is a valid exercise of Congress's Commerce Clause authority and therefore constitutional. On the basis of those rulings, and the arguments the Department of Justice has advanced in defense of the statute, I can see no basis for concluding that the Affordable Care Act would implicate any exception to the Solicitor General's longstanding practice of defending congressional enactments.

- d. Do you believe that the individual mandate is within Congress' power under the Interstate Commerce Clause?
 - i. If yes, on what basis can Congress mandate that individuals purchase a product?
 - ii. Do you believe individuals are engaging in economic activity when they choose not to purchase a private product?

ANSWER (to Questions 58d(i) and (ii)).

If I am confirmed, whatever personal views I might have respecting any legal issue, my personal views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

I understand that the Department of Justice has argued in litigation that the minimum coverage provision (or individual mandate) is a constitutional exercise of Congress's Interstate Commerce Clause authority. The Department's briefs argue that the minimum coverage provision is a constitutional exercise of the Commerce power because it regulates economic activity that substantially affects interstate commerce – one of the categories of Commerce Clause regulation recognized as valid in *Lopez v. United States* – and because it is an integral part of a larger scheme that regulates interstate economic activity. Based on what I know of the issue, I have no basis for disagreeing with those arguments.

- 59. Several commentators, including 9th Circuit nominee Goodwin Liu, have said that *Lopez* and *Morrison* are difficult or “incoherent” standards in outlining the limitations of the

Interstate Commerce Clause. Do you believe the cases provide adequate guidance in determining your answers to the previous questions?

ANSWER

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. If I am confirmed, whatever personal views I might have respecting *Lopez* and *Morrison* or any other legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Lopez* and *Morrison*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

I am generally familiar with the *Lopez* and *Morrison* decisions. The statute at issue in *Lopez* dealt with a law that prohibited possession of a firearm in the vicinity of a school, and the statute at issue in *Morrison* criminalized acts of gender-motivated violence. The noneconomic, criminal nature of the conduct at issue was central to the Court's conclusion in both cases that Congress had exceeded its Commerce power, as was the fact that in both cases the Court considered a stand-alone provision that was not part of a larger scheme of regulation of economic activity. In *Lopez* and *Morrison*, the Court sought to preserve "a distinction between what is truly national and what is truly local." Accordingly, the Court declined to sustain the regulation of noneconomic, criminal activity on the basis of highly attenuated connections to interstate commerce. Those precedents provide guidance as to the limits of Congress's power to regulate interstate commerce.

60. If a future President instructed the Solicitor General not to defend the individual mandate of the Patient Protection and Affordable Care Act and the Solicitor General followed the President's instructions, do you believe the Solicitor General's decision would be consistent with his or her duty to defend all statutes unless no reasonable argument could be advanced? Why or why not?

ANSWER

If a future Solicitor General were to be instructed by a future President to cease defense of the individual mandate (which is also referred to as the minimum coverage provision) in the Affordable Care Act, that Solicitor General would not have the authority to disobey or disregard such a command, for the reasons set forth in my response to Question 2 above. The Solicitor General would instead be faced with the question whether to carry out the order or to resign based on a conclusion that the instruction was based on partisan political considerations or other illegitimate reasons, or on an indefensible view of the law.

61. What principles of constitutional interpretation guide your analysis of whether a particular statute infringes upon an individual right?

- a. Is there any room in constitutional interpretation for the judge's own values or beliefs?

ANSWER (to Questions 61 and 61a)

For most of my career I was a litigator in private practice. While I did litigate constitutional law cases during that time, I was not an academic or a judge, and thus have not had occasion in my career to develop a fully formed theory of constitutional interpretation. I do believe interpretation of any provision of our Constitution should be based on the Constitution's text and structure, relevant contemporaneous history, and precedent interpreting the provision – and that the judge's own values and beliefs should play no role in the interpretive process.

- b. Do you believe that the Constitution, properly interpreted, confers a right to a minimum level of welfare?

ANSWER

The Supreme Court has not interpreted the Constitution to confer a right to a minimum level of welfare. *See, e.g., Dandridge v. Williams*. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?

ANSWER

The Supreme Court has held that the First Amendment does not confer a right to engage in obscene speech. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

62. On April 23, 2010, Arizona signed into law Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," which permitted Arizona police officers to

enforce certain federal immigration laws. On June 3, 2010, President Obama met with Governor Jan Brewer to discuss the law. Attorney General Holder and the Department of Justice filed suit against Arizona on July 6, 2010. The Justice Department argues the Arizona law is unconstitutional because it is preempted by federal law.

- a. Please explain fully your involvement in the decision to challenge Arizona's immigration law.

ANSWER

One function of the White House Counsel's Office is to advise the President and his senior advisors on important legal issues that the Administration confronts. As part of my responsibilities as Deputy Counsel to the President, I assisted the White House Counsel in carrying out that function. I participated in inter-agency deliberations about filing the lawsuit. My responsibilities also have included ongoing monitoring of the litigation, and ongoing consultation with attorneys in the Office of the Deputy Attorney General and the Office of the Attorney General.

- b. Do you personally agree with the Attorney General that the Arizona law is unconstitutional? If so, please explain fully your legal reasoning.

ANSWER

After appropriate deliberations among Executive Branch departments, the Attorney General authorized filing a challenge to the Arizona law. Any legal views or professional advice I may or may not have expressed as part of that process are confidential, and whatever personal views I might have respecting this or any other legal issue would play no role in the discharge of my obligations as Solicitor General.

- c. The district court has yet to reach the question of whether the Arizona law is constitutional. If the Justice Department does not prevail at the district court level, it may only appeal with the permission of the Solicitor General. If confirmed, and the Department does not prevail at the district court level, will you authorize an appeal?

ANSWER

The Ninth Circuit recently affirmed the District Court's decision to issue a preliminary injunction against enforcement of certain provisions of the Arizona law. There will presumably be further proceedings in the case, either in the Ninth Circuit or in the Supreme Court. Because the issue may come before me if I am confirmed, it would be both premature and inappropriate for me to comment upon this or any other particular appeal authorization in advance of a careful analysis of the lower court opinion and the necessary Executive Branch consultation and deliberation. If confirmed, I will make any decisions regarding this case on the basis of the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive

Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

63. Then-nominee Kagan said the "nation's traditional understanding [is] that the Constitution generally imposes limitations on government rather than establish[ing] affirmative rights and thus has what might be thought of as a libertarian slant." She said she "fully accept[s] this traditional understanding" and "would expect to make arguments consistent with it" if confirmed.

- a. What is your view of the Nation's "traditional understanding"? Is it similar or different from that expressed by Ms. Kagan?

ANSWER

My view is similar to the view Justice Kagan expressed.

- b. If confirmed, will you be consistent with your view of the Nation's "traditional understanding" when making arguments to the Supreme Court?

ANSWER

Yes.

64. How would you determine congressional intent in cases of statutory interpretation?

- a. What weight should be given to presidential signing statements when interpreting statutes?
- b. What weight should be given to legislative history and Committee Report language when interpreting statutes?

ANSWER (to Questions 64a and 64b)

If confirmed, I would follow Supreme Court precedent prescribing proper methods of statutory interpretation. Under those principles, if the text of a particular statutory provision (read in the context of the statute as a whole and with due regard for statutory structure), is clear then a court must enforce the clear meaning of the statute, and need not resort to legislative history to interpret the provision. If the meaning of the provision is not clear, then in the view of the majority (but not all) of the Justices on the Court, resort to legislative history, including Committee Report explanations, can be helpful to illuminate the meaning of the statutory text. From time to time the Supreme Court has referenced presidential signing statements in its

opinions, but it has never held that such statements should receive weight when interpreting statutes.

- c. What weight should be given to foreign law in statutory interpretation?

ANSWER

Unless Congress has incorporated foreign law or Supreme Court precedent dictates that foreign law should be considered, I would (if confirmed) give no weight to foreign law when presenting statutory interpretation arguments in court.

65. Then-nominee Kagan said she would “look at what *Congress* intended – not what either the President or foreign law says about the language in dispute” when determining congressional intent in cases of statutory interpretation. Do you agree? Why or why not?

ANSWER

I agree. The principal question in every case of statutory interpretation is what Congress intended when it enacted the law at issue.

66. In *Boumediene v. Bush*, the Supreme Court held that the detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” Slip Op. at 42. The Court based its holding on Article I, Section 9, Clause 2, of the Constitution (the Suspension Clause), which allows for suspension of habeas corpus rights only in cases of rebellion or invasion. In *Al Maqaleh v. Gates*, 605 F.3d 84 (2010), the D.C. Circuit reversed the district court’s finding that the Suspension Clause reached detainees held at Bagram Air Base, 40 miles from Kabul, Afghanistan. Under the precedent of *Boumediene*, the D.C. Circuit Court reasoned that practical obstacles weighed against finding that the aliens could invoke the protections of habeas corpus. Specifically, the U.S. detained the aliens in an active war zone, and in territory under neither *de facto* nor *de jure* sovereignty of the U.S.

- a. Do you believe the D.C. Circuit correctly held that the constitutional right to habeas corpus did not reach detainees at Bagram Air Base in Afghanistan?

ANSWER

Just as I do not believe it would be appropriate for a Solicitor General nominee to express agreement or disagreement with a decision of the Supreme Court, I do not think it would be appropriate to express agreement or disagreement with a court of appeals decision, particularly one that may be subject to further litigation. If I am confirmed, it will be my responsibility to vigorously defend the position of the United States in this case irrespective of any personal views I might have on this or any other issue, and I will do so.

- b. Do you believe that U.S. constitutional rights apply to non-U.S. citizen detainees held by the U.S. Military on foreign soil? If so, please explain why?

ANSWER

The question of what constitutional rights, if any, may be asserted by non-citizens who are detained on foreign soil is an issue that may arise in litigation during my tenure if I am confirmed. If I am confirmed, whatever personal views I might have respecting this or any other legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. If the detainees appeal this case to the Supreme Court, will you vigorously defend the United States' position, and the D.C. Circuit's opinion, that the Suspension Clause does not reach military bases like Bagram Air Base in Afghanistan?

ANSWER

Yes. Based on my understanding of the issues presented in this case, I can see no reason why I would not, if I were confirmed, be able to vigorously defend the position of the United States in this case.

67. Do you believe that the Supreme Court correctly decided *Kelo v. New London*?

ANSWER

In *Kelo* the Supreme Court addressed the question whether a municipality could, consistent with the Fifth Amendment Takings Clause, condemn private property as part of an overall economic development plan that resulted in the transfer of property from one private owner to another private owner who would put the property to a more economically beneficial use. The Court applied rational basis review based on "our longstanding policy of deference to legislative policy judgments in this field," and upheld the taking on the ground that the condemnation and transfer of the property "serves a public purpose." The dissenting Justices believed that the majority's decision departed from the constitutional text, which authorizes takings for "public use," which they believed to be a narrower category of justification than "public purpose."

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. In all events, if confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Kelo* – and my best judgment as to the long-term

institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- a. In light of the widespread negative response to *Kelo*, should the federal government be more reluctant to exercise its power of eminent domain?

ANSWER

The question whether the federal government should be more reluctant to exercise its powers of eminent domain in light of the public response to *Kelo* is a question of public policy, not a legal question that would be confronted by the Solicitor General.

- b. If confirmed, how will you respect property rights while also defending a federal statutory taking?

ANSWER

If the federal government exercised powers of eminent domain authorized by statute, my responsibility as Solicitor General, if confirmed, would be to defend such an action against constitutional challenge under the Takings Clause (or any other constitutional provision) unless no reasonable arguments could be advanced in its defense. In the event that Congress enacted legislation that permitted a federal taking, as I assume that it would, with appropriate respect for constitutional property rights, reasonable arguments should exist to defend that legislation.

68. You authored a brief in *Cruzan v. Missouri Dept. of Health*, arguing that the state’s interest in preserving life was inconsistent with our traditional understandings of the meaning of life.

- a. Do you stand by your brief in *Cruzan*?

ANSWER

In *Cruzan*, I filed an *amicus* brief for my client, the General Board of Church and Society of the United Methodist Church. In that brief, the Church expressed its view to the Supreme Court that a family’s decisions regarding the agonizing issue of whether to withdraw life-sustaining medical care from a person in a permanent vegetative state should – consistent with what the Church described as “the deeply held ethical principles of this nation’s Judeo-Christian tradition” – be entitled to recognition under the Fourteenth Amendment as a fundamental value consistent with the traditions and practice of the American people.

During my career in private practice I represented a wide variety of clients in cases raising a wide variety of legal and policy issues. I represented the interests of those clients vigorously on the basis of sound legal arguments and without regard to my own views of what the law should

be. That is at the core of what it means for a lawyer to represent a client. I understand that, if confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability even if doing so conflicts with my own opinion in a particular matter. And I will do so.

b. Could the federal government properly assert an interest in preserving life?

ANSWER

Yes, assuming the federal government does so pursuant to one of its enumerated powers under the Constitution.

c. If so, would you be willing to defend that interest in spite of your position in *Cruzan*?

ANSWER

Yes. If I am confirmed, whatever personal views I might have respecting any legal issue – and whatever the views of my former clients – those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Cruzan* and its progeny – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

69. Do you believe that the Supreme Court’s decision in *Zelman v. Simmons-Harris*, which held that school-choice programs that include religious schools do not violate the Establishment Clause, was correctly decided?

ANSWER

In *Zelman v. Simmons-Harris*, the Supreme Court held that a school voucher program did not violate the Establishment Clause of the First Amendment because it had a legitimate secular purpose (improving the quality of education for poor children irrespective of religious views) and it neither advanced nor inhibited religion. The voucher program allowed parents to choose to use vouchers for religious or nonreligious private schools for their children, without any constraints or inducements by the government that would favor or inhibit the use of vouchers to finance attendance at religious schools. *Zelman* is consistent with Supreme Court Establishment Clause precedents upholding governmental aid programs that are neutral in that they provide assistance to religious and nonreligious institutions alike.

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. In all events, if I

am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Zelman* and other Establishment Clause precedents – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

70. In a 1996 law review article entitled “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,” then-Professor Elena Kagan stated, “Laws directed at equalizing speech thus join the list of laws that, although facially content neutral, demand strict scrutiny because of the heightened concerns relating to improper purpose.”² What level of scrutiny do you believe the “Fairness Doctrine,” if revived, should be subject to under the First Amendment?

ANSWER

If Congress were to re-institute the “fairness doctrine” as a statute, then it would be my responsibility, if confirmed as Solicitor General, to defend the provision against constitutional attack unless no reasonable argument could be offered in defense of the provision (or unless it were to violate the separation of powers). Without knowing exactly what requirements the law would impose, and without benefit of legislative history and/or a developed administrative record to shed light on Congress’s objectives and the empirical support for Congress’s decisions, it is not possible to assess what standard of review should apply. In all events, if I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

71. The Supreme Court has held the Federal Sentencing Guidelines are advisory and persuasive, but not binding.
- a. Do you believe *Booker* and *Fanfan* were correctly decided?

ANSWER

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. In any event, if I

² Elena Kagan, “Private Speech, Public Purpose; The Role of Governmental Motive in First Amendment Doctrine,” 63 U. Chi. L. Rev. 413, 472 (1996).

am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

b. Do you believe that the Guidelines are unnecessarily harsh on certain offenders?

ANSWER

I represented the Washington Legal Foundation as *amicus curiae* in a case in which the Foundation expressed its view that the Federal Sentencing Guidelines are unnecessarily harsh on certain offenders. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

c. If so, which offenders do you believe the Guidelines treat unfairly?

I believe my answer to Question 71b answers this question.

72. I am a strong advocate of whistleblower protection. The False Claims Act establishes a partnership between public law enforcers and the public taxpayers. Government officials cannot cut down on fraud alone. You are familiar with the False Claims Act from your representation of Comstock Resources in *Comstock Resources v. Kenard*, 545 U.S. 1139 (2005) (cert. denied).

a. If confirmed, how will you ensure that congressional intent behind the F.C.A. is upheld?

ANSWER

According to Department of Justice statistics, the False Claims Act results in the return of billions of dollars annually to the federal treasury. As the text of the law makes clear, and the Department's statistics confirm, the Act's *qui tam* provisions are indispensable to promoting the statute's goals. If I am confirmed, my judgments as Solicitor General will certainly be informed by an understanding of Congress's intent in the False Claims Act, of the vital public policy objectives the Act promotes, and of the importance of vigorous enforcement of the Act.

b. If confirmed, what steps will you take to vigorously defend constitutional challenges to the F.C.A.?

ANSWER

Like all congressional enactments, all provisions of the False Claims Act are entitled to a strong presumption of constitutionality. Although I have not studied the issue, I can think of no reason why I would not pursue a vigorous defense of the Act's constitutionality if I were confirmed as Solicitor General.

73. Recent lawsuits allege that the seal provision of the False Claims Act, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed *in camera* and remain under seal for at least 60 days, and not be served upon the defendant until the court so orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it permits frivolous complaints to remain under seal without causing harm to a defendant. However, prolonged extensions of the seal threaten to undermine its value and purpose. A divided Fourth Circuit recently ruled that the sealing provision does not violate the public's right to access court proceedings because of the government's compelling interest in protecting the integrity of these investigations. *See ACLU v. Holder*, 2011 WL 1108252 (March 28, 2011). I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. Nonetheless, I believe the seal performs a valuable function, particularly in protecting whistleblowers against retaliation.

a. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

b. What steps will you take to vigorously defend this provision of the statute?

ANSWER (to Questions 73a and 73b)

Like all congressional enactments, the seal provision of the False Claims Act is entitled to a strong presumption of constitutionality. Although I do not have any particular knowledge of the Act's seal provision and I have not studied the issue, I can think of no reason why I would not continue with the vigorous defense of the provision's constitutionality if I were confirmed as Solicitor General. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

74. How do you define judicial activism?

ANSWER

Judicial activism is a term that means different things to different people. As a litigator, I have not found the term to be a useful one.

75. Do you agree with the view that the courts, rather than the elected branches, should take the lead in creating a more just society?

ANSWER

No. It is the elected branches of government that should decide and execute policy.

76. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the Supreme Court held that a right to assisted suicide was not protected by the Due Process Clause, the Court reasoned:

“[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.”

- a. Do you agree with the Court’s assessment of the importance of public debate and legislative action?

ANSWER

Yes.

- b. The *Glucksberg* decision has proven to be a case that stimulated healthy debate amongst the states. As Solicitor General, will you argue for more reserved rulings such as the *Glucksberg*, which support the states’ efforts and legislative action as the proper way to effect change?

ANSWER

If confirmed, I anticipate that I might have occasion to invoke the fundamental point of *Glucksburg* – the respect due to the judgments of the democratically elected branches of government, informed by robust public debate – in cases defending congressional enactments against constitutional challenge. When state legislation is at issue before the Supreme Court, the Solicitor General’s office has more discretion than it does with federal issues to decide what position (if any) to take. And that discretion would be informed, first and foremost, by an assessment of the long-term institutional interests of the United States. But the principles of *Glucksburg* stated above could well inform that analysis in an appropriate case.

77. Do you agree with then-nominee Kagan’s statement that “an important consideration for the [Solicitor General’s] office to take into account is the degree to which the courts, by staying their hand, can encourage experimentation and healthy debate among the states and their citizens”? If so, please explain why.

ANSWER

Yes. Doing so enhances the democratic process and respects the values of federalism.

78. Do you believe moral and ethical principles can provide a rational basis to support a law?

ANSWER

Yes.

79. Do you agree or disagree with Justice Holmes’s view of judicial restraint when it comes to second-guessing the legislature on morally inspired legislation, as articulated in *Lochner*?

ANSWER

I agree with the view Justice Holmes expressed in his *Lochner* dissent. In particular, I agree with his view that courts should be restrained in overturning the decisions of the democratically elected branches of government as reflected in duly enacted laws, including laws of the kind Justice Holmes identifies.

- a. How would you articulate your own view in this area, especially as it relates to your potential future role as the chief federal advocate before the Court?

ANSWER

If I am confirmed, one of my principal responsibilities will be to defend federal statutes when they are challenged as unconstitutional. The principle of judicial restraint articulated by Justice Holmes will be a key framing principle in presenting arguments in defense of congressional enactments.

80. Do you believe the Supreme Court correctly decided *District of Columbia v. Heller*?

ANSWER

The Supreme Court held in *District of Columbia v. Heller* that the Second Amendment guarantees an individual right “to possess and carry weapons in case of confrontation.” In light of this individual right, the Court invalidated a statute banning handgun possession in the home. The Court also recognized, however, that “some measures regulating” firearms would be consistent with the existence of this Second Amendment right. In this respect, the Second Amendment right to bear arms is like other fundamental constitutional rights in that it provides strong but not unlimited protection.

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. *Heller* – and the Second Amendment right it guarantees – is settled law. I also recognize that it will be the responsibility of the Solicitor General’s office to defend against constitutional challenge federal statutes and regulations involving firearms for which reasonable arguments can be made. My decisions will be based on the law as the Supreme Court has determined it, including *Heller*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

81. Do you believe the individual right to keep and bear arms is a fundamental right?

ANSWER

In *McDonald v. City of Chicago*, the Supreme Court recognized that the individual’s Second Amendment right to bear arms recognized in *Heller* is a fundamental right, and is therefore incorporated against the States under the Fourteenth Amendment. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. *Heller* and *McDonald* – and the Second Amendment right they guarantee – are settled law. I also recognize that it will be the responsibility of the Solicitor General’s office to defend against constitutional challenge federal statutes and regulations involving firearms for which reasonable arguments can be made. My decisions will be based on the law as the Supreme Court has determined it, including *Heller* and *McDonald*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive

deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

82. The Supreme Court held in *Heller* that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." In 2009, the U.S. Supreme Court expanded that right in *McDonald v. Chicago* by finding that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment. What is your personal opinion of the rights afforded by the Second Amendment?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. *Heller* and *McDonald* – and the Second Amendment right they guarantee – are settled law. I also recognize that it will be the responsibility of the Solicitor General's office to defend against constitutional challenge federal statutes and regulations involving firearms for which reasonable arguments can be made. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

83. If you are confirmed, will you commit to protect an individual's right to possess a firearm?

ANSWER

Yes. If confirmed, I will respect *Heller* and *McDonald* as binding Supreme Court authority that guarantees an individual Second Amendment right to bear arms.

84. Both *Heller* and *McDonald* dealt with the individual right to possess a firearm. The Court specifically declined to consider whether non-enumerated rights were implicated, since the Second Amendment provided a clear enumeration of the right. *McDonald*, in incorporating the Second Amendment and applying it to the states, held that the Due Process Clause, rather than the Privileges or Immunities Clause, incorporated the Second Amendment. In his concurrence, Justice Thomas urged incorporation based on the Privileges or Immunities Clause.

- a. Do you believe that the 9th Amendment can be a source of rights, or is it merely an "inkblot" as Robert Bork famously said?

- b. Should the Court reconsider its jurisprudence on the Privileges or Immunities Clause? Please provide your personal and professional opinion, notwithstanding the status of the *Slaughterhouse Cases*.
- c. If you believe that either the 9th or 14th amendments provide separate sources of rights, please elaborate on what those rights are.

ANSWER (to Questions 84a, 84b, and 84c)

For most of my career I was a litigator in private practice. While I did litigate constitutional law cases during that time, I do not believe I ever had a case raising a Ninth Amendment issue or an issue under the Privileges or Immunities Clause of the Fourteenth Amendment. I was not an academic or a judge, and thus have not had occasion in my career to develop a fully formed theory of constitutional interpretation or of these particular constitutional provisions. Moreover, any answer I might give to this question would inevitably be a comment on existing Supreme Court precedent, and it would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. In all events, if I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

85. You served as counsel of record in an *amicus* brief filed by the Coalition to Stop Gun Violence in *Printz v. U.S.*, 521 U.S. 898 (1997). You argued that the Brady Act did not violate the principles of federalism and state sovereignty. You also argued that the law "must be upheld because the compelling federal interest in immediately addressing the epidemic of handgun violence greatly outweighs the minimal and temporary obligations placed on the states." The Supreme Court decided the Brady Act violated the principles of federalism, state sovereignty and the 10th Amendment.

- a. Considering your history on this subject, what steps will you undertake to ensure that you zealously represent the United States in *all* laws, including the individual right to possess a firearm, if confirmed?

ANSWER

Printz v. United States did not raise any issue respecting the Second Amendment right to bear arms. The issue in the case was whether Congress violated the Tenth Amendment by enacting a statute that required state governments to administer a background check system for an interim period until a federally administered system was operational. If I am confirmed, whatever personal views I might have respecting any legal issue – and whatever the views of my former

clients might have been – those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including the Court’s decisions in *Printz*, *Heller*, and *McDonald*, which are settled law – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. If confirmed, will your representation before the Supreme Court demonstrate respect for our shared values of federalism, separation of powers, and state sovereignty? Please explain.

ANSWER

If confirmed, I will base my decisions on the law as the Supreme Court has determined it, including the Court’s precedents on federalism, separation of powers, and state sovereignty. Of course, a Solicitor General has a responsibility to defend acts of Congress for which reasonable arguments can be made, and that responsibility includes cases in which the a federal statute is challenged on Tenth Amendment grounds or other grounds reflecting interests in federalism and state sovereignty.

- 86. Do you believe that the Supreme Court’s decision in *Morrison v. Olson*, which ruled that the independent-counsel statute did not violate the constitutional separation of powers, was correctly decided?

ANSWER

In *Morrison v. Olson*, the Supreme Court held that the independent counsel provisions of the Ethics in Government Act of 1978 – which insulated the independent counsel from the direct control of the President – did not violate the Constitution’s separation-of-powers principles. Specifically, the Court held that “although the counsel exercises no small amount of discretion . . . we simply do not see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

I recognize that in *Morrison*, the Solicitor General’s Office argued against the constitutionality of the independent counsel law on the ground that it violated the separation of powers by impermissibly limiting the President’s control over executive personnel and functions. *Morrison* thus implicates one of the traditional exceptions to the responsibility of the Solicitor General to defend congressional enactments. Nevertheless, *Morrison* is settled law.

87. There have been only a few instances where the Supreme Court has ruled a law violated the 10th Amendment. See *Printz v. United States*, 521 U.S. 898 (1997); see also *New York v. United States*, 505 U.S. 144 (1992). If confirmed, how will you evaluate acts of Congress to ensure they do not offend the 10th Amendment, or other constitutional amendments, before proceeding with a defense?

ANSWER

If confirmed, I will base my decisions regarding the defense of statutes on the law as the Supreme Court has determined it, including the Court’s precedents on federalism, separation of powers, and state sovereignty. Of course, a Solicitor General has a responsibility to defend acts of Congress for which reasonable arguments can be made, and that responsibility includes cases in which the a federal statute is challenged on Tenth Amendment grounds or other grounds reflecting interests in federalism and state sovereignty.

88. Do you believe that the Supreme Court’s decision in *Boumediene v. Bush*, which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?

a. If yes, how does that square with *Johnson v. Eisentrager*, which Justice Scalia, in his *Boumediene* dissent, said “held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign”?

ANSWER (to Questions 88 and 88a)

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with any of the opinions in the case or criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. Moreover, if I am confirmed, whatever personal views I might have respecting any legal issue those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Boumediene* and *Johnson v. Eisentrager* – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

89. The Attorney General recently announced that the 9/11 co-conspirators, including Khalid Sheikh Mohammed, will be tried in military tribunals at Guantanamo Bay, and not in Article III courts. In 2009, the President said, “[What] I think we have to break is this fearful notion that somehow our justice system can’t handle these guys.” On April 4, 2011, the Attorney General said, “After thoroughly studying the case, it became clear to me that the best venue for prosecution was in federal court. I stand by that decision today.” Clearly, the Attorney General still believes that Article III courts are the appropriate venue for prosecution of the 9/11 co-conspirators, but because Congress encroached upon a “unique executive branch function,” he must settle for military tribunals.

- a. If confirmed, will you vigorously defend the United States’ authority to try the 9/11 conspirators in military tribunals, notwithstanding the statements made by the President and Attorney General in opposition to this venue?

ANSWER

Yes. If I am confirmed, my responsibility as Solicitor General would be to defend convictions, whether they are obtained in military tribunals or in Article III courts. Both the President and the Attorney General have expressed support for using both fora as necessary tools in this effort, but my responsibility will not include deciding what forum is appropriate for a prosecution. I will vigorously defend the authority of the United States to bring prosecutions under the Military Commissions Act of 2009, as well as the authority of the United States to bring prosecutions in Article III tribunals.

- b. If the President or Attorney General instructs you not to do so, what will you do?

ANSWER

If I am confirmed, and I am defending challenges to a conviction obtained in a Military Commission proceeding, it will be because the Attorney General has directed that the defendant be prosecuted in a Military Commission. Therefore, it is difficult to conceive of a situation in which the President or the Attorney General would issue an instruction not to defend. In the exceedingly unlikely event that I received such an instruction, if the instruction was based on what I believed to be partisan political considerations or other illegitimate reasons, or was based on what I believed to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

90. Please describe your experience in the entire nomination selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List the dates of all interviews you had with the President and White House or Justice Department staff. Do not include any contacts with the Federal Bureau of Investigation personnel concerning your nomination.

ANSWER

I was informed in June 2010 by White House officials that I was one of several candidates under consideration for the position. I was interviewed by a group of Executive Branch officials during August 2010. I was informed that I would be the nominee in January 2011. I do not know the details of the selection process.

91. Has anyone involved in the selection process discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

ANSWER

No.

92. Have you participated, at either the White House or the Justice Department, in any strategy discussions related to defending the constitutionality of the Patient Protection and Affordable Care Act? If so, please provide details, including with whom you met or discussed the issue, and when.

ANSWER

One function of the White House Counsel's Office is to advise the President and his senior advisors on important legal issues that the Administration confronts. As part of my responsibilities as Deputy Counsel to the President, I assisted the White House Counsel in carrying out that function. Those responsibilities included ongoing monitoring of the litigation challenging the constitutionality of the Affordable Care Act, and ongoing consultation with attorneys in the Office of the Deputy Attorney General and the Office of the Attorney General in the Department of Justice, attorneys in the Office of the General Counsel of the Department of Health and Human Services, and attorneys in the Department of the Treasury in connection with that litigation.

93. It has been reported that Associate Attorney General Thomas J. Perrelli, the third ranking official in the Justice Department, had to recuse himself on at least 13 active detainee cases and at least 26 cases listed as closed or mooted because Mr. Perrelli's former firm, Jenner & Block LLP, worked on behalf of detainees while he served on the firm's management committee and on its appellate and Supreme Court practice groups.
- a. What role did you play in the representation of David Hicks?

ANSWER

I did not play any role in the representation of David Hicks, although other lawyers at my former law firm, Jenner & Block, did assist military counsel in representing Mr. Hicks. I understand that my name is listed in the official court docket as one of his counsel. I do not know why that is so; it may be because I initially agreed to supervise the lawyers handling the case when the firm first agreed to provide assistance to military counsel. I did not actually participate in the case, and I have verified that Jenner & Block's billing records do not reflect that I billed any time to the case.

- b. While at Jenner & Block, did you perform any legal work on behalf of any other terrorist detainees held at Guantanamo Bay or elsewhere?

ANSWER

I did not perform any legal work representing any other such detainee while at Jenner & Block. I devoted approximately 12 hours of time serving as co-counsel on an *amicus* brief filed in the U.S. Court of Appeals for the Second Circuit in the case of *Padilla v. Rumsfeld*. The case was filed on behalf of a group of retired federal judges and human rights lawyers. It addressed the issue of Padilla's entitlement to habeas corpus and to have the right to communicate with and be represented by to counsel to assist in the habeas proceeding.

- c. During your employment at the Department or at the White House Counsel's Office over the past two years, have you recused yourself on any detainee cases or policy deliberations?

ANSWER

Because of my involvement representing *amici* in the *Padilla* case, I am and have been recused from matters that involved the civil or criminal litigation in which Padilla was a party, including policy deliberations, if any, that involved those cases.

- 94. In an October 20, 2010 New York Times op-ed, former acting Solicitor General Walter Dellinger wrote:

"[T]he government has an obligation to comply with the nation's laws, regardless of whether the president agrees with a particular statute. Doing otherwise would also set a precedent justifying similar nullifications by future administrations."

- a. Please explain your agreement or disagreement with the first sentence.

ANSWER

I believe Mr. Dellinger was explaining his view that the Executive Branch has an obligation, except in rare instances, to enforce existing law whether or not the President agrees with the law or believes it to be unconstitutional. I agree with that view.

- b. Does the President's decision not to defend the Defense of Marriage Act establish the precedent Mr. Dellinger describes?

ANSWER

Mr. Dellinger was drawing a distinction between refusing to enforce a law (which could have the effect of nullifying it) and continuing to enforce a law while declining to defend it against constitutional challenge (which Mr. Dellinger believes can be appropriately respectful of the co-equal branches of government because the law continues to be executed while judicial challenge proceeds, and because continued enforcement provides courts with an opportunity to have the last word, as they should, on the constitutionality of the law). The President and the Attorney General have instructed that the Executive Branch will continue to enforce Section 3 of the Defense of Marriage Act pending a final judicial determination of its constitutionality. As explained in the Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D, the Executive Branch is continuing to enforce Section 3 of DOMA and the President has instructed Executive Branch agencies to continue to enforce Section 3. Therefore, the decision of the President and the Attorney General does not establish the precedent that Mr. Dellinger describes.

- c. Mr. Dellinger used the following example: "The next president might, for example, decide not to enforce the recent health care reform law; all he would need would be a single ruling against the law by a single district court judge, which he would then refuse to appeal." Are you aware of any discussions within the White House or the Department of Justice regarding the possibility of a future Administration not defending the health care reform law?

ANSWER

No.

- d. Mr. Dellinger also wrote "Presidents in rare instances can determine that a law is unconstitutional and decline to comply with it. But a 1994 opinion by the Office of Legal Counsel (where I was the head) concluded that a president can do so only under very special circumstances, including a conclusion on his part that it is 'probable' that the Supreme Court would agree with him."
 - i. Please describe the special circumstances referred to by Mr. Dellinger.

ANSWER

The special circumstances referred to by Mr. Dellinger are set forth in the 1994 OLC opinion concerning when the Executive may decline to enforce (as opposed to defend the constitutionality of) a federal statute. The 1994 OLC opinion in turn references Supreme Court precedent and other Department of Justice authorities, including a 1980 opinion by Attorney General Civiletti. Drawing on these authorities, the 1994 OLC opinion concludes that if “the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.” In exercising such authority, the OLC opinion explains that such a decision is “necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the Executive Branch’s constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.”

- ii. Please explain how these special circumstances apply or do not apply to the DOMA case.

ANSWER

Because the President and the Attorney General have made the decision that Section 3 of DOMA should continue to be enforced pending final resolution of the judicial proceedings challenging its constitutionality, the situation is not addressed by the special circumstances analysis Mr. Dellinger describes.

- iii. If confirmed as Solicitor General, what process and analysis would you undertake in applying these special circumstances?

ANSWER

Because the special circumstances Mr. Dellinger articulated would govern decisions whether to enforce a law, rather than to decisions whether to defend it, they would not be decisions within the responsibility of a Solicitor General. If confirmed and asked for my advice, I would advise the President to follow the analysis set forth in the 1994 OLC Opinion, as well as the Supreme Court authority and other Department of Justice authorities referred to in the Opinion.

- 95. In your opinion, if an Administration believes a federal statute is unconstitutional and a lower court strikes down that law, which is the better course of action: (a) simply permit the lower court’s decision to stand; or, (b) seek review of the lower court’s ruling and argue to the appellate and/or Supreme Court that the law is unconstitutional?

ANSWER

If the Department of Justice has determined that reasonable arguments can be made in defense of a statute's constitutionality, then the Department should defend the statute on appeal, and should neither permit an adverse decision to stand nor appeal and challenge the constitutionality of the law on appeal – with the exception of laws that violate the separation of powers, which the Department will not defend. If the Department has decided that it cannot defend a statute because there are no reasonable arguments that can be advanced in its defense (or because it violates the separation of powers), and is therefore not defending the statute, then the Department will notify Congress pursuant to 28 U.S.C. § 530D. In that situation, it may be necessary for the Department to file a notice of appeal from an adverse district court ruling (or to take other procedural steps) in order to provide Congress an opportunity to step in and defend the statute should it choose to do so. In other circumstances, such as cases involving independent agencies, the Department may also provide the independent agency with an opportunity to step in and defend the constitutionality of a statute, as occurred in 1990 in Supreme Court proceedings in *Metro Broadcasting Co. v. Federal Communications Commission*. If no entity steps in to defend the constitutionality of a statute, then I understand that the Department will typically discontinue appellate proceedings, as I believe occurred in the case of *ACLU v. Mineta* about which Paul Clement testified during his confirmation hearing. If an entity does step in to defend the constitutionality of a statute, then the Department will face a choice whether to forgo participation on the merits of the case or to affirmatively challenge the constitutionality of the law, as occurred in the Supreme Court in the *Metro Broadcasting* case and in *Lovett v. United States* in 1946. Finally, there may be circumstances in which the Department of Justice decides not to appeal for idiosyncratic litigation strategy reasons. For example, the constitutional question may present itself in a unique situation that raises a risk only that the statute will be held to be unconstitutional in narrow circumstances that do not compromise the statute's objectives; or the factual record may present the constitutional question in a particularly unfavorable light, such that an appeal could result in a broad adverse constitutional ruling.

Because these rare cases involve difficult and complex judgments, I do not believe it is possible for me to say that there is a single, better, course to follow in all circumstances.

- a. What are the risks and benefits of each approach?

ANSWER

I do not believe it is possible to provide a cost/benefit analysis of the multiple approaches in the abstract. The risks and benefits of following one or another of these approaches will depend critically on the specific context in which the issue arises. If confirmed, I would approach the question of how to proceed with an appeal by looking to the long-term institutional interests of the United States, taking account of the interests of all three branches of government.

- b. If confirmed as Solicitor General, what factors would you consider in determining which strategy to follow?

ANSWER

If confirmed, my decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. If the President or Attorney General disagreed with your strategy, what approach would you take?

ANSWER

Unless overruled by the Attorney General or the President, I would follow the approach I believed was correct in the exercise of my independent judgment. If I were overruled, I could not defy an instruction from the Attorney General or the President. As I explained more fully in my response to Question 2 above, doing so would violate the rule of law. But I would not lend my name or that of the Office of the Solicitor General to carrying out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out the order. If I were to explain to the Attorney General or the President that I believed reasonable grounds existed to defend a statute and that I would not be able to carry out an order to cease defending the statute, I would expect that he would respect my judgment. But I would resign if he did not.

96. What is your understanding constitutional duty of the Executive to “take Care that the Laws be faithfully executed” as contained in Article II, § 3 of the U.S. Constitution? In particular, what specific duties and responsibilities are placed on the Solicitor General to ensure this duty is performed?

ANSWER

In the recent case of *Free Enterprise Fund v. PCAOB*, the Supreme Court reminded us that “Article II vests “[t]he executive Power . . . in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” Art. II, § 1, cl. 1; *id.* § 3. As the Supreme Court explained, “[i]n light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’” *Id.* (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). To accomplish the legal business of the United States, the founding generation created the executive office of Attorney General in the Judiciary Act of 1789: “And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.” Judiciary Act of 1789, ch. 20,

sec. 35, 1 Stat. 73, 92-93 (1789). As an Executive Officer, the Attorney General therefore assists the President in the discharge of the “Take Care” obligation. By statute, the responsibility of the Solicitor General in turn is to “assist the Attorney General in the performance of his duties.” 28 U.S.C. § 505 (2006). Thus, the Solicitor General ultimately supports the President as an executive officer assisting in the discharge of the President’s “Take Care” duties.

97. Former Solicitor General Seth Waxman wrote an essay entitled “Defending Congress,” printed as a Faculty Publication by Georgetown Law School. *See also* 79 N. C. L. Rev. 1073-1088 (2001).

In that article, General Waxman notes that during the first 200 years following ratification of the Constitution, only 127 federal laws were struck down. Since about 1995, he notes that the practice of declaring federal laws unconstitutional has become almost “commonplace” or at least with increased frequency. Arguing that constitutional adjudication has undergone a paradigm shift, he asks “How does, and should, the shift affect the function of the Solicitor General”?

a. Please provide a thoughtful response to General Waxman’s question.

ANSWER

In my judgment, the “paradigm shift” Seth Waxman discussed in the quoted passage does not alter the function or responsibility of the Solicitor General to defend federal statutes against constitutional challenge. That responsibility is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government by recognizing the strong presumption of constitutionality that attaches to congressional enactments. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President’s constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow and they apply only in rare circumstances, and should be invoked only after the most grave and careful deliberation, and that remains true irrespective of the judicial pace of invalidation of congressional enactments.

To the extent courts become more active in subjecting acts of Congress to searching judicial scrutiny to test whether Congress has exceeded an enumerated Article I power or has exceeded the limits of the Tenth Amendment or principles of state sovereign immunity, then the defense of federal statutes will invariably occupy more of the time and resources of the Solicitor General’s Office. It bears noting, however, that the pace of judicial invalidation of congressional enactments has subsided somewhat in the years since Mr. Waxman wrote the article.

b. General Waxman continues, describing the process as “Every year the Solicitor General must decide, one case at a time, what the interests of the United States are with respect to several thousand different cases in the federal and state courts. Should the United States appeal, or seek rehearing, or petition for certiorari, or file a brief amicus curiae, or intervene? What issues should the United States raise, and what arguments should it make? How should the law be interpreted or the doctrine

applied? The goal is for the United States to speak with one voice—a voice that reflects the interests of all three branches of government and of the people.”

- i. What is your view of the final sentence in this excerpt?

ANSWER

I agree with the statement.

- ii. Please explain how the interests of all three branches of government and of the people can be reflected when the Executive is seeking to declare an Act of Congress unconstitutional.
- iii. If this goal cannot be met (speaking with one voice), what would you do as Solicitor General to ensure the interests of all branches of government are reflected in the judicial process?

ANSWER (to Questions 97b.ii and 97b.iii)

As I discuss more fully in answers to Questions 43 and 44 above, often the many departments and agencies within the Executive Branch, and even offices within the Department of Justice, will have different and competing views about what the position of the United States should be in a particular case. If possible, the Solicitor General will reconcile differing views into a consensus position. But it may not always be possible to do so. In such cases, it will ultimately be up to the Solicitor General to decide what the litigating position of the United States will be. In making that decision, the interests of the legislative and judicial branches are also significant. Most simply put, Congress’s interest is in having its duly-enacted statutes defended, and the courts’ interest is in having a full and fair presentation from the government to allow a legally correct resolution of the dispute. The Solicitor General’s Office has a long tradition of representing the United States’ interests before the Supreme Court with the highest standards of candor and professionalism, and I will continue to uphold and preserve that approach to litigation if confirmed.

Although the United States is able to speak with one voice before the Supreme Court in the vast majority of cases, there are rare occasions when it is not possible for the Solicitor General to represent the interests of all three branches of the federal government. Those circumstances are reflected in the two exceptions to the traditional practice of the Department of Justice to defend federal statutes. The first exception is when the statute intrudes on Executive prerogatives in violation of the separation of powers. In that circumstance, the Solicitor General cannot represent the interests of all three branches of government because the interests of the two political branches diverge. In such cases, it is his or her responsibility, as an Executive Branch officer, to protect the interests of the Executive Branch. The second exception is where there is no reasonable argument in defense of the statute’s constitutionality. In that circumstance, the Solicitor General cannot represent the interests of all three branches of government because his or her responsibilities as an officer of the Supreme Court and fidelity to the rule of law are

paramount. Precisely because all three branches of government will not be speaking with one voice in these cases, it is critical that the Department of Justice, including the Solicitor General, approach these cases with an appropriate sense of gravity and an understanding – reflected in the strong presumption of constitutionality that every congressional enactment is afforded – of the need to ensure that the interests of all three branches of government are fully accounted for in the process of deciding what position the Department will take in litigation.

In 28 U.S.C. § 530D, Congress has recognized that there will be situations in which the Department of Justice will not defend the constitutionality of a statute. By providing for timely notice to the Congress that the Executive Branch will not defend a statute, Section 530D ensures that there will be an opportunity for the Congress, should it choose to do so, to participate in order to defend the constitutionality of the statute at issue. In addition, the Department of Justice traditionally has conducted itself in litigation in such situations in a manner that provides an opportunity for Congress to participate. If confirmed, I will follow these traditional practices.

- c. Another excerpt from General Waxman’s essay reads: “Simon Sobeloff reflected that ‘[t]he Solicitor General is not a neutral; he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case.... [N]ot to achieve victory, but to establish justice.’ Passages like that are inspirational. Perhaps they are even reassuring, because in a sense they mean that even when the Solicitor General loses a case, he wins. But they offer little in the way of practical guidance. Reflecting on his tenure, Francis Biddle wrote that, for the Solicitor General, ‘the client is but an abstraction.’”

- i. Who is the client of the Solicitor General?

- ii. Does the client change from case to case?

ANSWER (to Questions 97c.i and 97c.ii)

In the most fundamental sense, the Solicitor General’s client is the United States because the Solicitor General must determine what position to take in the Supreme Court on the basis of the long-term institutional interests of the United States as a whole – including the interests of all three branches of government – and not merely the interests of the particular department or agency that is the party in a particular case. In a formal sense, and often in a practical sense as well, the client of the Solicitor General does change from case to case. For example, in one case the party represented by the Solicitor General’s office may be the Federal Communications Commission and in another case it may be the Secretary of the Interior, or it may be a government official sued in his or her individual capacity in a constitutional tort suit. The particular views of the department or agency that is the party in the case may be entitled to particular weight in formulating the position of the United States in the case.

- iii. What are your thoughts on the notion that the client “is but an abstraction”?

ANSWER

I understand the view that the client is “an abstraction,” but, based on my reading and my conversation with former Solicitors General, that would not be my characterization. For the reasons described in the preceding answer, the Solicitor General has very concrete clients in the form of Executive Branch departments and agencies who may be parties to a case and whose views about what the litigating position of the United States should be in a particular case will often reflect considerable expertise and institutional history. But the Solicitor General’s relationship to those “clients” is quite different than the relationship of an attorney to clients in private practice. In representing clients in private practice, it is an attorney’s responsibility to inform the clients of what positions can be advanced in court consistent with the rule of law, and to provide the attorney’s best judgment as to what lines of argument would be most effective. Within the constraints of what the rule of law would allow, however, it is ultimately the decision of an attorney’s private clients what arguments to make and how to make them. In contrast, as I discussed in response to Questions 2 and 11 above, it is up to the Solicitor General to decide what the litigating position of the United States will be in the Supreme Court based on his or her independent judgment. Unlike a lawyer in private practice, the Solicitor General has the authority to modify or overrule the position the federal department or agency would like to present in the Supreme Court, and in fact has an obligation to do so if the long-term institutional interests of the United States require it.

- d. In pages 1076 – 1077 of his essay, General Waxman describes the process he experienced as Solicitor General. He discusses the memos, the meetings, the collaboration and recommendations. Please review those pages and answer the following questions:
 - i. Why do you believe General Waxman does not include any consideration of political factors as part of the process?

ANSWER

I assume that is because Mr. Waxman believes – as do I – that partisan political considerations should play no role in the process of deciding what position the United States should take before the Supreme Court.

- ii. Why do you believe General Waxman does not mention consulting with the Attorney General or President on how or if to proceed?

ANSWER

I do not know why Mr. Waxman does not mention consulting with the Attorney General or the President in the passage on pages 1076-77. It may be because in the vast majority of cases handled by the Solicitor General’s office, the independent judgment of the Solicitor General is the last word on what the litigating position of the United States will be. But Mr. Waxman – like most of the Solicitor General nominees before this Committee – has recognized that consultation with the Attorney General or the President is appropriate in the most significant matters. For

example, in another passage in the same article referenced in this Question (on pages 1087-88), Mr. Waxman explained that before declining to defend the federal statute in *Dickerson v. United States*, he and the Attorney General “discussed our conclusion with the President and he agreed.” Also, during his remarks at a symposium in honor of Rex Lee at Brigham Young Law School, Mr. Waxman made the following statement:

I felt entirely free, when something of the magnitude of *Dickerson* or *Piscataway* arose to ask for some of [the President’s] time. The point was not to ask him what on earth the United States should do. That’s a decision in the first instance for the solicitor general to make. The purpose of the meeting was to make sure, given how important the issues were, that the position we proposed to take represented an appropriate exercise of his constitutional authority. It is, after all, *his* constitutional authority, not the solicitor general’s or the attorney general’s. 2003 B.Y.U. Law Review 163 (2003).

At his confirmation hearing, Mr. Waxman stated: “[I]t is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” In testimony at his confirmation hearing, Kenneth Starr similarly stated that “the President clearly does have ultimate executive responsibility under our system of laws, and at times it is appropriate, entirely appropriate for the President to . . . become involved in a particular matter if it is a matter of great moment.”

- iii. What do you think he meant by the statement, “The process always involves the Solicitor General’s independent evaluation of the relative importance of each case and the cost of pursuing it”?

ANSWER

In this passage, Seth Waxman was discussing the decision by a Solicitor General to authorize an appeal from a lower court decision adverse to an agency or department of the United States government, or to authorize the filing of a petition for certiorari to the Supreme Court. These are two of the Solicitor General’s responsibilities set forth in 28 C.F.R. § 0.20, the provision – discussed in response to Question 2 above. As Mr. Waxman explains in the article, the Solicitor General does not routinely authorize appeals when the federal government loses at the trial level, and the Solicitor General authorizes the filing of petitions for certiorari in only a fraction of the cases in which the federal government has lost in the courts of appeals. In the quoted passage, Mr. Waxman was explaining the basis on which he made the judgment whether to authorize an appeal or a petition for certiorari. If confirmed as Solicitor General, I would follow the same approach.

- iv. If you are confirmed as Solicitor General, what evidence can you point to that you will be able to provide an independent evaluation of each case?

ANSWER

I provided the Committee with my assurance, at the hearing and again in my written testimony, that I will exercise independent judgment in fidelity to the rule of law. Beyond that, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

98. General Waxman ends his essay with the following paragraph:

“Any decision not to defend the constitutionality of an Act of Congress tests the mettle of the Solicitor General. That is as it should be. Confronting issues of such moment, I took instruction and solace from Francis Biddle, who observed, following his own tenure in office that, so long as the Solicitor General maintains fidelity to the rule of law, he ‘has no master to serve except his country.’ This country is quite a master. And what a privilege it was to be its servant.”

- a. You testified that if confirmed, you would be subject to the direction of the Attorney General and the President. How does this square with the notion that the Solicitor General has no master to serve except his country?

ANSWER

I agree with Mr. Waxman, and I do not believe there is any difference between the view he expresses in this quotation and my position. As Mr. Waxman stated in this quotation, a case may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment cannot be defended under the Constitution (for Mr. Waxman it was the decision not to defend 18 U.S.C. § 3501(a) in *Dickerson v. United States*, which he was discussing in this passage), and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation. Or a situation may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment should be defended, and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation as well. Nevertheless, as you pointed out at the hearing to consider Kenneth Starr’s nomination for Solicitor General: “it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States. By Constitution and statute, he owes his allegiance to the Executive Branch. As an officer of the Executive Branch, the Solicitor General exercises authority only as delegated by the Attorney General.” Therefore, as I set forth more fully in response to Question 2 above and as other Solicitor General nominees have recognized in their testimony before this Committee, if confirmed I will be subject to the direction of the Attorney General.

I expect that the Attorney General will respect my exercise of independent judgment and I will of course make my decisions based on my independent judgment. But as Charles Fried testified at his hearing, the Attorney General “does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Fidelity to the rule of law would preclude any Solicitor General from defying a direction from the Attorney General. But, as I have also explained, if the Attorney General or the President were to overrule a decision by me as Solicitor General, and the decision is based on what I believe to be partisan political considerations or other illegitimate reasons, or on what I believe to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order. That is how I will serve no master except my country.

- b. Do you feel that being deferential or subservient to the President and/or the Attorney General would ever conflict with maintaining fidelity to the rule of law? If so, what would you do - maintain fidelity to the rule of law or defer to the President and/or Attorney General? If your answer is maintaining fidelity, how would you accomplish that?

ANSWER

I believe my answer to Question 98a provides a response to this Question. To be clear, if confirmed as Solicitor General, I would maintain fidelity to the rule of law rather than defer to the Attorney General or the President if I believed their directive were based on partisan political considerations or other illegitimate reasons, or on what I believe to be an indefensible view of the law.

- c. If you are confirmed as Solicitor General, who will make any decision not to defend the constitutionality of an Act of Congress? You, the Attorney General or the President?

ANSWER

I believe my answer to Question 98a provides a response to this question. To be clear, if confirmed as Solicitor General, I will decide whether a statute should be defended in the exercise of my independent judgment. I do not expect that the Attorney General or the President will override my judgment. Nevertheless, my judgment, like that of any Solicitor General, could be overruled by the Attorney General or the President. Fidelity to the rule of law would preclude any Solicitor General from persisting with the defense of a statute in defiance of a direction from the Attorney General or the President. But, as I have explained, if the Attorney General or the President were to overrule a decision by me as Solicitor General, and the decision is based on what I believe to be partisan political considerations or other illegitimate reasons, or on what I

believe to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

- d. Do you have the “mettle” to make such a decision independent of the Attorney General or President? If yes, what evidence can you provide – have you done so in the past?

ANSWER

If confirmed, I will exercise independent judgment in fidelity to the rule of law on all matters, including decisions whether to defend congressional enactments. If the Attorney General or the President were to overrule a decision by me as Solicitor General, and the decision is based on what I believe to be partisan political considerations or other illegitimate reasons, or on what I believe to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order. As Mr. Waxman stated in the quotation to which this Question refers, a case may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment cannot be defended under the Constitution (for Mr. Waxman it was the decision not to defend 18 U.S.C. § 3501(a) in *Dickerson v. United States*, which he was discussing in this passage), and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation. Of course, a case may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment should be defended, and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation as well – even if it means resigning rather than carrying out an order not to defend in that situation.

With respect to the question of my own mettle, I provided the Committee with my assurance, at the hearing and again in my written testimony, that I will exercise independent judgment in fidelity to the rule of law. Beyond that, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

- 99. Former Solicitor General Drew Days has written, “In my estimation, the President should think about the ways in which his intervention will be perceived by those outside the Oval Office, and how it may affect the Solicitor General’s continuing ability to serve as a credible advocate for the government, particularly in his appearances before the Supreme Court.”

- a. Do you agree or disagree with this assessment?

ANSWER

I agree.

- b. In what ways might the President's intervention in the decision-making process of the Solicitor General affect that Solicitor General's ability to serve as a credible advocate for the government?

ANSWER

If the President were to intervene in the decision-making of the Solicitor General on the basis of partisan political considerations or other illegitimate reasons, or on an indefensible view of the law, such actions could adversely affect the credibility of the Solicitor General as an advocate for the government before the Supreme Court (and other courts). In contrast – as Kenneth Starr, Seth Waxman and Paul Clement recognized in their testimony before this Committee – it is appropriate, in cases of great moment, for the Attorney General or the President to have a view respecting what the position of the United States should be. It is also appropriate for the President's legitimate legal policy objectives to be considered in formulating the litigating position of the United States (as Ted Olson explained in his testimony). But it would be imprudent, and put the credibility of the Solicitor General's Office at risk, for any President to intervene too frequently or too aggressively, even for valid legal policy reasons. As Rex Lee stated: "while I think it is proper to use the office for the purpose of making my contribution to the President's broader agenda, a wholesale departure from the role whose performance has led to the special status of the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President's objectives would suffer." I agree with Rex Lee's views.

- c. Do you think the President's intervention could affect the credibility of the Solicitor General before the Supreme Court? Why or why not?

ANSWER

I believe my answer to Question 99b above answers this question.

- d. Given that you have indicated you will not revisit the President's decision regarding DOMA, even though your duty will require you to make an independent assessment, what effect do you believe this will have on your own credibility with other government officials?

ANSWER

As an officer of the Executive Branch, the Solicitor General exercises authority only as delegated by the Attorney General. Therefore, as I set forth more fully in response to Question 2 above, if I were confirmed as Solicitor General I would have no authority to revisit the President's decision on DOMA or any other matter. As you recognized, Senator Grassley, at Kenneth

Starr's hearing, "it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States." Were I to state in response to a question from this Committee that I would revisit a decision of the President or the Attorney General and make an independent assessment in defiance of their instructions, I believe that would gravely damage my credibility with other government officials. Such a statement would indicate that I do not understand the nature and source of the Solicitor General's authority, or that I would defy the rule of law by asserting authority the Solicitor General does not possess. In contrast, I believe my credibility with other government officials, including the Justices of the Supreme Court, is best preserved by describing accurately and honestly my understanding of both the vital importance of the Solicitor General's independence and the reality that the Solicitor General serves at the pleasure of the President and exercises authority delegated from and under the direction of the Attorney General – and by making clear that, while I recognize the superior authority of the Attorney General and the President, I would not lend my name or that of the Office of the Solicitor General to carrying out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out such an order.

- e. Given the President's decision regarding DOMA, and your apparent unwillingness to recognize your duty to revisit that decision, do you believe your credibility before the Supreme Court will be affected? Why or why not?

ANSWER

I believe my answer to Question 99d above answers this question.

- 100. In his opening statement at the confirmation hearings of Alberto Gonzales to be Attorney General, Senator Leahy remarked "But, you know, there are going to be times--there may well be times when the Attorney General of the United States has to enforce the law, and he cannot be worried about friends or colleagues at the White House. His duty is to all Americans--Republicans, Democrats, Independents, all Americans." Do you agree with this sentiment? Do you think this applies to the Solicitor General as well? Please explain your answer.

ANSWER

Yes, I believe the duty of the Solicitor General is to all Americans, irrespective of partisan politics.

- 101. Senator Leahy went on to say "The Attorney General is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of every single American."

Do you believe the Solicitor General should be a forceful, independent voice for justice and in defense of the constitutional rights of all Americans? If so, how do you intend to accomplish this?

ANSWER

I believe the Solicitor General must always exercise independent judgment in advancing the long-term institutional interests of the United States. Those interests include respecting the constitutional rights of all Americans. If confirmed, I intend to do so by carrying out the responsibilities of the Office of Solicitor General with fidelity to the rule of law.

102. Can you provide examples of how you have been an independent voice during your government service? Are there any examples from your private practice?

ANSWER

In my more than 20 years representing clients in private practice, and in my two years of public service in the Executive Branch, it has often been my professional responsibility to explain to clients what the rule of law will permit and what the rule of law will not permit. As I am sure you can understand, the need for confidentiality is at its zenith in such situations. Clients would not feel free to ask for such advice on difficult and weighty issues if they had reason to fear that their requests, and their lawyers' responses, would be disclosed to the public. Any conversations I may have had with the President in my role as Deputy White House Counsel must remain confidential. Any conversations I may have had with the Attorney General in my role as Associate Deputy Attorney General likewise must remain confidential.

In addition, I provided the Committee with my assurance, at the hearing and again in my written testimony, that I will exercise independent judgment in fidelity to the rule of law. Beyond that, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

103. Listed below are some of the cases in which the Department of Justice decided not to defend the underlying statute, or presented to the Court both sides of the argument. For each case, please answer the following:

- a. Briefly summarize the reason for the Department's position;
- b. Explain why you agree or disagree with that position;

- c. Identify whether or not the case falls within an exception to the duty to defend a statute that you have previously discussed with the Committee, or alternatively, whether it falls within an exception not previously discussed;
- d. Identify whether or not the case indicates that the Solicitor General was directed by the President or Attorney General to follow a particular course of action or inaction.
 - (a) *Myers v. United States*, 272 U.S. 52 (1926)
 - (b) *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)
 - (c) *United States v. Lovett*, 328 U.S. 303 (1946)
 - (d) *Oregon v. Mitchell*, 400 U.S. 112 (1970)
 - (e) *Buckley v. Valeo*, 424 U.S. 1 (1976)
 - (f) *Mountain States Legal Foundation v. Watt* (consolidated with *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Mont. 1981))
 - (g) *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982)
 - (h) *INS v. Chadha*, 462 U.S. 919 (1983)
 - (i) *Synar v. United States*, No. 83-3945, 626 F. Supp. 1374 (D.D.C. 1986).
 - (j) *Federal Defenders of San Diego, Inc., et al. v. United States Sentencing Commission*, 680 F. Supp. 26 (D.D.C. 1988)
 - (k) *Morrison v. Olson*, 487 U.S. 654 (1988)
 - (l) *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)
 - (m) *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980)
 - (n) *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994)
 - (o) *Commodity Trend Service, Inc. v. CFTC*, No. 97-C-2362, 1999 WL 965962 (N.D. Ill., 1999) and *CFTC v. Blitz*, No. 98-C-6057 (N.D. Ill., 1999) (consolidated on review by *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 233 F.3d 981 (7th Cir. 2000))
 - (p) *Dickerson v. United States*, 530 U.S. 428 (2000)
 - (q) *Breyer v. Meissner*, 214 F.3d 416 (3rd Cir. 2000)
 - (r) *Federal Election Commission v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001)
 - (s) *ACLU v. Mineta*, 319 F.Supp.2d 69 (D.D.C. 2004)
 - (t) *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)

ANSWER

I have reviewed the decisions listed above and other publicly available records and historical information. However, a complete description, understanding and evaluation of these matters would require examining not only the judicial decisions, but the briefs submitted as well as other relevant documents. For each of the cases, I am providing a response based on the information I have been able to obtain and review. In all cases, I have no basis to disagree with the position taken by the Executive Branch. It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Department of Justice or the President with respect to how a prior case was handled –

particularly because I played no part of the analysis and internal deliberations that preceded the decisions.

(a) *Myers v. United States*, 272 U.S. 52 (1926)

Attorney General Civiletti has thoroughly described the circumstances in *Myers*:

In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court was asked to decide whether the President had acted lawfully in removing a postmaster from office in contravention of an Act of Congress. The Act provided that postmasters were not to be removed by the President without the advice and consent of the Senate. . . .

When the case came before the Supreme Court, the Solicitor General, appearing for the United States, assailed the attempt to limit the removal power. He argued that the statute imposed an unconstitutional burden upon the President's supervisory authority over subordinate officers in the Executive Branch. Senator Pepper made an *amicus curiae* appearance and argued that the statute was constitutional. The Court ruled that the statute was unconstitutional. More to the point, the Court ruled that the President's action in defiance of the statute had been lawful. . . . It gave rise to no actionable claim for damages under the Constitution or an Act of Congress in the Court of Claims.

. . . . *Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 1980 WL 20999, at *4(1980). As summarized by a subsequent OLC opinion, in *Myers*, "[t]he President refused to comply with – that is, enforce – a limitation on his power of removal that he regarded as unconstitutional, even though the question had not been addressed by the Supreme Court. A member of Congress, Senator Pepper, urged the Supreme Court to uphold the validity of the provision. The Supreme Court vindicated the President's interpretation without any member of the Court indicating that the President had acted unlawfully or inappropriately in refusing to enforce the removal restriction based on his belief that it was unconstitutional." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994).

Myers is an example of the Executive both not defending and not enforcing a federal statute that unconstitutionally encroaches on Executive authority. Neither the Supreme Court's decision nor the historical record is completely clear, but this appears to be a case of the President concluding that the statute was unconstitutional, refusing to enforce it, and then having that position defended by the Solicitor General in court.

(b) *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)

Humphrey's Executor “concerned the President’s power to remove a member of the Federal Trade Commission on the grounds of policy differences, despite the existence of a for-cause removal provision in the statute establishing the Commission.” *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124 (1996). President Roosevelt defied the statute by attempting to remove a member of the FTC and the Department of Justice argued in court that the statute was unconstitutional. However, the Supreme Court “dismissed *Myers* as inapposite,” holding that the FTC was “‘an administrative body’ exercising ‘quasi-legislative or quasi-judicial powers,’ rather than an agency of the executive branch.” *Id.* As explained by the Department of Justice’s March 22, 1996 letter from Assistant Attorney General Fois to Senator Hatch, *Humphrey's Executor*, like *Myers*, was a case in which “the President or the Department of Justice declined to enforce or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.”

Humphrey's Executor is an example of the Executive both not defending and not enforcing a federal statute that unconstitutionally encroaches on Executive authority. Neither the Supreme Court’s decision nor the historical record is completely clear, but this appears to be a case of the President concluding that the statute was unconstitutional, refusing to enforce it, and then having that position defended by the Solicitor General in court.

(c) *United States v. Lovett*, 328 U.S. 303 (1946)

In *Lovett*, “the President enforced a statute that directed him to withhold compensation from three named employees, even though the President believed the law to be unconstitutional. The Justice Department argued against the constitutionality of the statute in the ensuing litigation. (The Court permitted an attorney to appear on behalf of Congress, amicus curiae, to defend the statute.)” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994). In *Lovett*, “[t]he President directed the Attorney General not to defend the constitutionality of the provision.” *Press Briefing by Counsel to the President Jack Quinn and Assistant Attorney General Walter Dellinger* (Feb. 9, 1996).

Lovett is an example of the Executive enforcing but not defending the constitutionality of a federal statute based on a conclusion that the constitutionality of the statute could not be defended (and perhaps because the statute unconstitutionally encroached on Executive authority as well). Neither the Supreme Court’s decision nor the historical record is completely clear, but this appears to be an example of the President directing the position taken by the Department of Justice.

(d) *Oregon v. Mitchell*, 400 U.S. 112 (1970)

Mitchell concerned the constitutionality of a statute that lowered the voting age from 21 to 18 for state and local elections. Solicitor General Erwin Griswold “concluded that reasonable arguments could be made for the statute’s constitutionality, and he defended the voting age

provision in the Supreme Court accordingly. He began his oral argument, however, by informing the Court of the views of the President and of the Department of Justice questioning the statute's constitutionality and urged the Court to 'give consideration to these views.' In a close vote, the Court struck down the law." Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081-82 (2001).

Mitchell is an example of the Executive formally defending the constitutionality of a federal statute based on the conclusion that reasonable arguments could be made in defense, while publicly expressing the constitutional doubts of both the President and the Attorney General to the Supreme Court, so that the Supreme Court would receive an accurate report of the Executive's legal views.

(e) *Buckley v. Valeo*, 424 U.S. 1 (1976)

In *Buckley*, the "Attorney General and Solicitor General, though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress." Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). Whereas, as explained by Solicitor General Seth Waxman, the brief of the Attorney General and Solicitor General in defense of the statute "elegantly put forward the best First Amendment defense of the contribution and expenditure limitations of the Federal Election Campaign Act," their amicus brief "present[ed] a different, ninety-five page discussion of the First Amendment issues in a manner that 'attempted to assist in analysis without pointing the way to particular conclusions.'" Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1082-83 (2001).

Buckley is an example of the Executive not defending the constitutionality of a portion of federal statute based on the conclusion that the statute unconstitutionally encroaches on Executive authority, while both defending and offering "neutral" arguments about the remainder of the statute. I have discussed my views on this approach in response to Question 11 posed by Senator Sessions.

(f) *Mountain States Legal Foundation v. Watt* (consolidated with *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Mont. 1981))

These consolidated cases involved the actions of a House Committee, which, pursuant to a federal statute, proclaimed an "emergency situation" with regard to certain public lands and ordered those lands withdrawn from mineral leasing activity by the Secretary of Interior. The Secretary complied. Plaintiffs then sued, claiming that the Committee's actions and the underlying statute were an unconstitutional violation of separation of powers, bicameralism, presentment and delegation of legislative power. The federal defendants, represented by the Department of Justice, argued that the plaintiffs lacked standing, but that if they had standing, then the statute should be interpreted as not granting the House Committee statutory authority for its actions, or, alternatively, that the statute authorizing such actions was unconstitutional. The House Committee, the Senate, and Senator Baucus all filed *amicus curiae* briefs arguing for the

constitutionality of the statute at issue, but apparently by the time of oral argument urged the court not to reach the constitutional issue. The court held that the statute implicitly allowed the Secretary of Interior to revoke a Committee-initiated emergency withdrawal (via the Secretary's power to determine the scope and duration of any withdrawal), thus not requiring the court to reach the constitutional questions. However, the court also noted that if the statute were not interpreted to allow the Secretary such discretion, it would be unconstitutional.

Mountain States Legal Foundation is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority, although the Executive also urged the court not to reach the constitutional question by interpreting the statute at issue in a manner that did not unduly diminish Executive power. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(g) *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982)

Consumers Union involved a federal statute providing for a legislative veto by requiring the Federal Trade Commission, “after promulgating any final rule, to submit such rule to Congress for review. The rule becomes effective after ninety days of continuous session following submission unless both Houses of Congress adopt a concurrent resolution disapproving the final rule.” 691 F.2d at 576. Consumer groups challenged the statute after Congress vetoed a rule promulgated by the FTC to protect used car customers; the FTC did not attempt to implement the rule after the veto. The “House and Senate, as named defendants, . . . vigorously aired their position on the constitutionality of the congressional veto,” *id.* at 577, whereas the FTC, represented by the Department of Justice, apparently agreed with the plaintiffs that the veto was unconstitutional. The D.C. Circuit ruled that the statute and congressional action were unconstitutional (under separation of powers and presentment), relying on the reasoning of the recent D.C. Circuit decision in *Consumers Energy Council v. FERC* that struck down the legislative veto.

Consumers Union is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(h) *INS v. Chadha*, 462 U.S. 919 (1983)

Chadha “involved the withholding of citizenship from an applicant pursuant to a legislative veto of an Attorney General decision to grant citizenship. Despite a Carter Administration policy against complying with legislative vetoes . . . , the executive branch enforced the legislative veto, and, in so doing, allowed for judicial review of the statute. As with *Lovett*, the Justice Department argued against the constitutionality of the statute.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994). As the Supreme Court recognized in *Chadha*, “[w]e have long held that Congress is the proper party to

defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” *Chadha*, 462 U.S. at 940.

Chadha is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(i) *Synar v. United States*, No. 83-3945, 626 F. Supp. 1374 (D.D.C. 1986)

In *Synar*, the “Department of Justice appeared on behalf of defendant United States in [a] declaratory judgment action to argue against the constitutionality of [the] Gramm-Rudman-Hollings provision that gave [the] Comptroller General a role in exercising executive functions under the Act.” Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). By letter dated December 30, 1985, Attorney General Meese had informed Congress that, although the Department of Justice would continue to argue that the plaintiffs lacked standing to sue in *Synar*, in the event the court found standing, the Department would take the position that the provisions concerning the role of the Comptroller General and the Director of the Congressional Budget Office were unconstitutional. In so informing Congress, Attorney General Meese cited a November 21, 1984 letter from Attorney General Smith to Congress, in which the Department of Justice had previously alerted Congress (in the context of different but related legislation) that it viewed the Comptroller General’s role as violating the separation of powers to the extent that the Comptroller General was performing duties other than those of a legislative officer. In that earlier letter, the Attorney General informed Congress that it would neither defend the constitutionality of nor enforce the provisions regarding the Comptroller General.

Synar is an example of the Executive not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. Although the record indicates that the Executive did not enforce at least some statutory provisions implicating the Comptroller General, it is not clear whether the provisions in *Synar* were executed prior to judicial resolution. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(j) *Federal Defenders of San Diego, Inc., et al. v. United States Sentencing Commission*, 680 F. Supp. 26 (D.D.C. 1988)

In *Federal Defenders*, groups of federal public defenders challenged the constitutionality of the Federal Sentencing Guidelines. The Department of Justice moved to dismiss the plaintiffs’ challenge, arguing that the plaintiffs lacked standing and that the Guidelines and Sentencing Commission were constitutional. The district court held that the plaintiffs lacked standing to bring such a challenge. On January 27, 1988, Attorney General Meese notified Congress that the Department of Justice intended to defend the Guidelines and the Sentencing Commission, but based on an argument that the Commission was exercising Executive power

and was not located in the “judicial branch,” as the Sentencing Reform Act stated. The Guidelines were ultimately upheld in *Mistretta v. United States*, 488 U.S. 361 (1989), in which the Department of Justice, representing the United States, argued for their constitutionality. The Department’s Supreme Court brief in *Mistretta* argued that despite words in the Sentencing Reform Act purporting to locate the Sentencing Commission in the “judicial branch,” the Commission was actually an independent commission within the Executive Branch and therefore constitutional. The Department’s brief appeared to tacitly acknowledge that if the words “judicial branch” were given constitutional significance, then the statute would be unconstitutional (presumably as a violation of the separation of powers), but it therefore urged severance of the phrase in order to avoid invalidation of the Act.

As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(k) *Morrison v. Olson*, 487 U.S. 654 (1988)

In *Morrison*, the “President viewed the independent counsel statute as unconstitutional. The Attorney General enforced it, making findings and forwarding them to the Special Division. In litigation, however, the Justice Department attacked the constitutionality of the statute and left its defense to the Senate Counsel, as *amicus curiae*, and the independent counsel herself.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994). The Supreme Court upheld the statute.

Morrison is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. As far I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(l) *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)

Metro Broadcasting concerned the Federal Communication Commission’s “policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation,” and an appropriations statute prohibited the FCC from changing this policy. Letter from Assistant Attorney General Foia to Senator Hatch (March 22, 1996). The FCC complied with the statute barring a policy change, but “the Acting Solicitor General, appearing on behalf of the United States as *amicus curiae*, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection.” *Id.* The Acting Solicitor General authorized the FCC to appear before the Court through its own attorneys ‘in order for the Court to have the benefit of the views of the administrative agency involved,’” (citing brief for the United States) and the FCC defended the constitutionality of the statute and the FCC policy. *Id.* The “Senate Legal Counsel also appeared on behalf of the Senate as *amicus curiae* to defend the constitutionality of the statute.” *Id.* The Court upheld the statutorily mandated FCC policy.

Metro Broadcasting is an example of the Executive enforcing but not defending the constitutionality of a federal statute based on a conclusion that the constitutionality of the statute could not be defended. Although the historical record is not entirely clear, this appears to be a case in which the Department of Justice concluded that there were no reasonable arguments that could be offered in defense of the statute that required the FCC to maintain its minority preference policy. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(m) *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980)

League of Women Voters concerned a statutory provision that barred noncommercial television stations from endorsing or opposing political candidates. “The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.” Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). The FCC stated that it would enforce the statute but “would not defend the statute’s constitutionality.” *Id.* “Senate Legal Counsel appeared in the case on behalf of the Senate as *amicus curiae*.” *Id.* The trial court dismissed the case as unripe, and, “[w]hile appeal of that decision was pending, a successor Attorney General reconsidered the Department’s previous position and decided that the Department could defend the statute’s constitutionality.” *Id.* The Supreme Court eventually struck down the statute. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

League of Women Voters is an example of the Executive enforcing but not defending the constitutionality of a federal statute. This appears to be a case in which the Department of Justice concluded that no reasonable arguments could be made in defense of the statute. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Acting Solicitor General regarding the litigating position of the United States.

(n) *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994)

Turner concerned the “must carry” provisions of the 1992 Cable Act, which required cable operators to carry certain channels. “The Act was enacted over President Bush’s veto. In his veto message, the President stated that one of the reasons for his veto was that the must-carry provisions were unconstitutional.” Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). The FCC took steps to comply with the 1992 Act, but “the Department of Justice, appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, ‘consistent with President Bush’s veto message to Congress.’” *Id.* In a letter sent on November 4, 1992 from Assistant Attorney General Stuart Gerson, the Department of Justice notified Congress that “because President Bush had determined that the ‘must-carry’ provisions of the [Act] were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court.” *Id.* Assistant Attorney General Gerson’s letter stated that the “department would not substantively and could not ethically take a different position at this time” from that of the President, in light of

the legal advice that the Justice Department had provided President Bush and the President's veto of the bill. Letter from Assistant Attorney General Gerson to President of the Senate Dan Quayle (Nov. 4, 1992). As that letter stated: "[T]he President is the ultimate client of the Department of Justice in all litigation involving the Executive Branch In light of the strong position taken by the President on must-carry in reliance on our analysis, an ethical conflict of interest would be created were the department now to defend these actions of the statute." *Id.* The subsequent Administration reconsidered the position of the previous Administration "and decided that the Department should defend the constitutionality of the must-carry provisions," Letter from Assistant Attorney General Foias to Senator Hatch (March 22, 1996), which were eventually upheld by the Supreme Court.

Turner is an example of the Executive enforcing but not defending the constitutionality of a federal statute. According to the available documents, this appears to be a case in which the Department concluded that it could not reasonably defend the constitutionality of the provisions at issue, particularly in light of the decision that the law was unconstitutional.

(o) *Commodity Trend Service, Inc. v. CFTC*, No. 97-C-2362, 1999 WL 965962 (N.D. Ill., 1999) and *CFTC v. Blitz*, No. 98-C-6057 (N.D. Ill., 1999) (consolidated on review by *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 233 F.3d 981 (7th Cir. 2000))

These cases involved, among other things, a First Amendment challenge to an anti-fraud provision of the Commodities Exchange Act that required plaintiffs to register as a commodity trading adviser. The plaintiffs argued that the registration requirement was overbroad and thus failed First Amendment scrutiny, a claim on which they prevailed against the Commodity Futures Trading Commission in the district court. "The CFTC originally appealed the district court's decision that the registration requirements . . . are unconstitutional as applied to [plaintiff], but voluntarily dismissed that appeal," as the "CFTC ha[d] recently adopted a rule exempting from registration CTAs that do not direct client accounts and provide only impersonal trading advice." 233 F.3d at 985 n.1. The CFTC continued to pursue other issues in the case on appeal. By letter dated March 6, 2000, Solicitor General Waxman informed Congress that the CFTC would not be appealing the adverse district court ruling on the First Amendment claim, "based on unusual factors affecting only this case and a few similar cases," and noting that the decision not to appeal did "not reflect a determination on the part of the Executive Branch that the statute in question is unconstitutional." As the Solicitor General explained, the "unusual circumstances" entailed "the Commission's adoption of a new exemption, and its reasonable determination not to continue litigating the constitutional issue in light of the availability of that exemption."

Thus, *Commodity Trend Service* is a case in which the federal defendant defended the constitutionality of a statute in the lower court, and then decided not to pursue an appeal of an adverse First Amendment ruling in light of a material regulatory change that removed the constitutional issues going forward. Strictly speaking, it does not involve a decision not to defend a statute based on the conclusion that it violates the separation of powers or that no reasonable arguments can be made in its defense. As far as I am aware, the case and the

historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(p) *Dickerson v. United States*, 530 U.S. 428 (2000)

Dickerson concerned the constitutionality of a federal statute that sought to overrule the Supreme Court’s decision in *Miranda*. As explained by Solicitor General Seth Waxman: “as we saw it, the Supreme Court’s repeated, consistent application of *Miranda* to the States could only mean that the doctrine is a constitutional one; and because the statute in question could not be reconciled with *Miranda*, it could constitutionally be applied only if the Court were to overrule *Miranda* and the dozens of cases that have followed, applied, and extended the landmark decision. Taking into account all of the factors informing the doctrine of stare decisis, and all of the interests of the United States, neither the Attorney General nor I could conclude that *Miranda* should be overruled. We discussed our conclusion with the President, and he agreed.” Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1087-88 (2001).

Dickerson is an example of the Executive not defending the constitutionality of a federal statute based on the conclusion that no reasonable arguments could be advanced to defend the statute unless the Department of Justice were to ask the Supreme Court to overrule binding precedent, a step the Department concluded it could not take consistent with the standard the Department traditionally applies. The historical record that I have examined indicates that the Solicitor General and Attorney General jointly reached that decision, and then shared it with the President, who concurred.

(q) *Breyer v. Meissner*, 214 F.3d 416 (3rd Cir. 2000)

In *Breyer*, a Nazi war criminal sought to prevent his denaturalization and deportation by claiming that he should be deemed an American citizen by birth – a claim that failed under certain provisions of federal immigration statutes. Under those provisions, “all children born abroad in 1934 or later to an American mother or father were entitled to American citizenship at birth; by contrast, children born abroad before 1934 were entitled to citizenship only if their fathers were American.” 214 F.3d at 422. Because Breyer was born abroad before 1934 and only his mother was American, the INS denied his claim to citizenship. The Justice Department defended the constitutionality of the provisions at issue in the district court and the Third Circuit, which reversed the district court and struck down the provisions as violating equal protection by discriminating against Breyer’s mother on the basis of sex. However, the Third Circuit also remanded to the district court for further proceedings to determine whether Breyer’s actions had amounted to a voluntary renunciation of his citizenship. Accordingly, as indicated by Solicitor General Waxman’s August 25, 2000 letter to Congress, the Department decided not to seek certiorari “[i]n light of the current interlocutory posture of the case.”

Breyer is an example of the Executive enforcing and defending the constitutionality of a federal statute. The Department did not seek certiorari from the Third Circuit’s interlocutory decision for strategic reasons, but it did continue to pursue the case against the plaintiff’s claim to citizenship. As far as I am aware, the decision and the historical record are not clear as to the

interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(r) *Federal Election Commission v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001)

FEC v. NRA involved a Federal Election Commission enforcement action against the National Rifle Association based on allegations that the NRA, in three separate election cycles, violated campaign finance laws prohibiting corporate contributions to federal elections. The D.C. Circuit determined that the laws could be constitutionally applied to the NRA with respect to two election cycles in which the NRA received substantial contributions from for-profit corporations, but that the laws could not be constitutionally applied to the NRA for the remaining election cycle, in which the corporate contributions received by the NRA were de minimis. FEC attorneys litigated the case, which did not involve attorneys from the Justice Department. It appears that the FEC did not seek certiorari from the portion of the D.C. Circuit's ruling that the campaign finance laws could not constitutionally be applied to the NRA's activities for one of the three election cycles at issue.

FEC v. NRA is an example of an independent agency enforcing and defending the constitutionality of a federal statute. The FEC largely prevailed before the D.C. Circuit but did not seek certiorari from one aspect of the D.C. Circuit's ruling for a variety of strategic reasons, elaborated in Solicitor General Olson's December 21, 2001 letter to Congress. As far as I am aware, the historical record is not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(s) *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004)

ACLU v. Mineta involved the constitutionality of a federal statute that denied federal funding to public transit authorities that were involved in any activity promoting the legalization of marijuana, pursuant to which a public transit authority denied advertising space to an organization promoting reform of the marijuana laws. The district court held that the statute constituted viewpoint discrimination in violation of the First Amendment and enjoined its enforcement. Although the Justice Department defended the constitutionality of the statute in the district court, on December 23, 2004, it notified Congress pursuant to 28 U.S.C. § 530D that it would not appeal the district court's ruling. Acting Solicitor General Clement explained to Congress that the district court had struck down the statute under "well established Supreme Court precedent" concerning viewpoint discrimination under the First Amendment, and thus concluded that "the government does not have a viable argument to advance in the statute's defense and will not appeal the district court's decision." General Clement explained that the law arguably could be defended if public transit authorities implemented the law by barring a wider swath of speech in a viewpoint-neutral manner, but that such a position would not appear to be consistent with congressional intent. Before notifying Congress, the Department had filed a protective notice of appeal in the D.C. Circuit; its letter to Congress was dated approximately one month before the deadline for filing the brief of the United States. Congress did not choose to participate in the appeal.

ACLU v. Mineta is a case in which the Department defended the constitutionality of a federal statute in a district court, and then decided not to pursue an appeal of an adverse First Amendment ruling in light of the lack of a “viable” argument to advance in the statute’s defense. However, as the Department had made non-frivolous arguments in defense of the statute in the district court, it appears that the Department could have proceeded with the appeal by making non-frivolous but non-“viable” arguments. As far as I am aware, the historical record is not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

(t) *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)

Witt involved an as-applied challenge to the Air Force’s “don’t ask, don’t tell” policy. Like *Breyer v. Meissner*, discussed above, the Executive both enforced and defended the statute, and the Department of Justice declined to seek certiorari from an adverse court of appeals ruling at the motion to dismiss stage, for litigation strategy reasons. I have explained my observations on this matter, including the decision by the Department not to seek certiorari from the Ninth Circuit’s interlocutory ruling, in my response to Question 13 of Senator Sessions. The case does not reflect, and I did not play any part in and do not have any other knowledge of, any interactions among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

104. Do you feel you have been treated fairly in the confirmation process?

ANSWER

I was treated with great courtesy at my confirmation hearing, and at the several individual meetings with members of this Committee. The advice and consent power of Article II, Section 2 of the Constitution is a weighty responsibility, to be exercised by members of this Committee as they think best on the basis of information they believe they need, and I would not presume to offer any opinion about the way in which the Members of this Committee have carried out this responsibility.

105. Would you like the opportunity to return before the Committee to clarify, expand or correct any of the answers you have previously provided?

ANSWER

I believe that the hearing, my visits with individual Senators, and my responses to the questions for the record have provided me with the opportunity to present my views fully.

106. Please describe your experience during the post-nomination process, from your date of nomination to the hearing. Include strategy meetings, moot or other preparatory sessions, meetings with DOJ or White House officials, and courtesy visits with Senators.

ANSWER

I had various meetings with members of the White House staff and Department of Justice officials to prepare for the hearings. I had courtesy visits with the following members of the Committee: Ranking Member Grassley, Senator Graham, Senator Lee, Senator Kohl, Senator Whitehouse, Senator Klobuchar, Senator Franken, and Senator Blumenthal.

107. Please describe with particularity the process by which these questions were answered, including preparation of responses, review of responses, suggested revisions, and submission of final responses.

ANSWER

I reviewed the questions and prepared a first draft of a response to each. I asked several people to review the draft answers and make editorial suggestions. I received those editorial suggestions, and made some revisions to the responses in light of the suggestions I received. I also revised the responses several times myself.

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

ANSWER

Yes.