

Questions for Donald Verrilli from Senator Orrin Hatch

1. During your hearing on March 30, you said that you will apply “the same standard that Solicitors General have applied” and that “there are only two exceptions” to the obligation to defend the constitutionality of statutes. These are if a statute “violates the separation of powers” or “if there is no reasonable argument that can be advanced in defense of the statute.” You said that these are “the two and only two exceptions” to that duty. But later you told me that you would defend the constitutionality of a statute “unless instructed by my superiors not to do so.” If a statute does not violate the separation of powers, and reasonable arguments can be made to defend its constitutionality, would you decline to defend it if your superiors told you not to do so?

ANSWER

I appreciate the opportunity to clarify my position on this question. What I meant to convey was that 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 address more fully in response to Question 5 below), “[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 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. 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.

2. Your position that you would not defend the constitutionality of statutes when instructed not to do so appears to create a third exception to the Solicitor General’s duty. Are you aware of any previous Solicitor General taking this position regarding the general duty of the office, either as a nominee or while in office?

ANSWER

I believe there are two exceptions. First, the Department of Justice will decline to defend a statute when it violates the separation of powers by infringing on the President's constitutional authority. Second, the Department of Justice will not defend a statute when there are no reasonable arguments that can be offered in its defense.

Although some have suggested that there is a third exception consisting of cases in which the President has publicly declared that a law is unconstitutional, I do not view it that way. Discussion of situations in which the President has made such an announcement are addressing a different issue: whether the Solicitor General or a superior officer (the Attorney General or the President) has the final say in determining what position the United States will take in court. As I explain in detail in my response to Question 5 below, the Attorney General (and the President, as the Attorney General's superior) possess the ultimate legal authority to overrule the Solicitor General. Thus, if I am confirmed as Solicitor General, I could not proceed with the defense of a statute in defiance of an order from the Attorney General or the President not to do so.

That does not mean I would carry out an order despite my conviction that doing so would be wrong. 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 partisan 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.

I believe my view is the same as that of other Solicitor General nominees. For example, Paul Clement stated, in written testimony, 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." He went on to say 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 – made clear that he would resign 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.”

I agree with their statements.

3. In your hearing, I asked whether it is the Solicitor General’s duty “actually to defend...if a reasonable argument exists, or to give advice on that argument, or that question?” You responded that “the long-standing tradition of the Department of Justice is to defend statutes as long as there is a reasonable argument to be made in their defense.” Senator Grassley asked what you would do if you thought a reasonable argument could be made to defend a statute but the Attorney General “concluded that a statute should not be defended.” You said that you would only “give my best advice.” These descriptions of the Solicitor General’s duty appear to conflict. Let me ask you again. Is the Solicitor General’s duty actually to defend a statute if reasonable arguments can be made or to give advice on that question?

ANSWER

The Solicitor General’s responsibility and duty is not merely to give advice. The Solicitor General’s responsibility is to defend the constitutionality of a statute when there are reasonable arguments that can be made in its defense and when the statute does not violate the separation of powers. In my testimony, I was trying to make the same point Paul Clement made when he was before this Committee:

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. Of 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.

Elena Kagan expressed the same point in her written testimony in connection with her Solicitor General confirmation hearing:

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. I should clarify here that the critical question is not what would happen if I "personally" disagree with the President, because my personal views would be irrelevant; the critical question is what would happen if the President and I were to disagree on the position that will advance the long-term interests of the United States, which is the Solicitor General's client. That is the only basis on which I would act as Solicitor General, and so that is the only ground on which disagreement between myself and the President might present itself. 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. Needless to say, I do not foresee any significant likelihood that this will happen. But I believe the Solicitor General needs to be able to walk away from the job when her assessment of her role and the obligations attendant on that role differs significantly from those of the President.

I share the views expressed by Paul Clement and Justice Kagan. I believe that the job of the Solicitor General is to determine the litigation position that best furthers the long-term institutional interests of the United States. If I am confirmed, I will do so based on my best judgment of what the law requires – and I agree with Ted Olson's testimony that "a partisan interest from the standpoint of partisan politics" must play absolutely no role. As other Solicitors General have done, I will keep the Attorney General and the President informed of these decisions – in recognition, as I have mentioned above and will address more fully in the response to Question 5 below, that they possess the ultimate authority to direct the Solicitor General to take a different position. But I expect that the Attorney General and the President will rarely, if ever, direct the Solicitor General to take a position contrary to his or her best professional judgment, in recognition of the important values served by respecting the unique role of the Solicitor General (described more fully in the response to Question 5 below). If the Attorney General does become engaged, then it will be critically important for me to give my best advice – which may be, depending on the circumstances, advice that the position the Attorney General wants to take cannot be supported under the law (in other words, to just say "no") and may include a statement that, as Solicitor General, I cannot carry out an instruction not to defend. Of course, as Paul Clement and many other Solicitor General nominees have recognized, the Attorney General and the President have the final call in determining the position adopted in the brief filed on behalf of the United States. But they do not have the right to have me carry out an

order I believe is wrong. So if my advice did not carry the day, and I was instructed to carry out an order I believed was wrong, I would not carry out the order. I would not lend my name or that of the Office of Solicitor General to carrying out such an order, and would resign rather than do so.

4. In his confirmation hearing on April 5, 2001, Solicitor General nominee Ted Olson was asked by Senator Feingold what he would do if the President had “grave reservations about the constitutionality of certain [statutory] provisions. What in that situation is your view of the responsibility of the Solicitor General when those provisions are challenged?” Mr. Olson replied that the President’s view “doesn’t alleviate the Justice Department from its responsibility to do everything it can within reason to defend the constitutionality of the statute.” During your hearing, however, you said that you would “apply the traditional Justice Department standards...to the extent it has not already been decided by the President and the Attorney General.” You told me that “the question really would be whether the Attorney General or the President are satisfied that those standards are met” with regard to defending the constitutionality of statutes.
 - These views appear to conflict. If you believe otherwise, please explain how they are in harmony.
 - Mr. Olson appeared to say that the Solicitor General’s duty is independent of the President’s view, while you appeared to say that it is contingent upon the President’s view. Please explain this apparent conflict.
 - Is it your view that the Solicitor General’s duty to defend the constitutionality of statutes exists only when the President or Attorney General have not already made a decision on that question?

ANSWER

I agree with Ted Olson’s views. In my testimony, I was trying to address a different issue.

Ted Olson stated his view about how the Solicitor General should proceed in a situation in which the President has expressed doubts about the constitutionality of a statute. He said that the fact that a President had doubts, or even grave reservations, about the constitutionality of a statute would not alleviate the Solicitor General of his or her responsibility to apply the traditional standards in deciding whether the statute will be defended in court, including the strong presumption of constitutionality to which all congressional enactments are entitled. Paul Clement made a similar point in his testimony, noting that the “basic analysis . . . would really be no different” but also noting that “whatever prompted the President’s grave doubts would probably be part of our analysis,” and that “I can imagine a situation where the doubts are so

grave that we ultimately decide that a reasonable argument can't be made in defense of the statute." I hold the same views.

In my testimony, I attempted to address a different situation – one in which the President or the Attorney General has not merely expressed doubts, even grave doubts, about the constitutionality of a statute, but has actually issued an instruction not to defend the statute. Once the President or the Attorney General has issued such an instruction, the decision is no longer the Solicitor General's to make, and the Solicitor General cannot defy the instruction and continue to defend the statute. In that situation, the Solicitor General faces a different choice. If I were confirmed, I would not carry out an order if I believed it was wrong (as I explain in more detail in response to Question 1 above). I would not lend my name or that of the Office of Solicitor General to carrying out the order, and would resign rather than do so.

5. In your hearing, Senator Grassley asked what you would do if the President believed that a statute should not be defended. You said you would give your "best advice" but that since "the Solicitor General is exercising authority that is given by statute to the Attorney General...it is the Attorney General's authority." You later told me that "the Solicitor General is exercising the Attorney General's authority."
- What is the basis or source for this theory of derivative authority?
 - Are you aware of any other Solicitor General nominee who has argued that the Solicitor General is merely exercising derivative authority?

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 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, one of the finest Solicitors General – 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 this independence 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 position 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 in 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 from 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 independence 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 1 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 wrong (as I explain in more detail in response to Question 1 above), I would resign rather than carry out the order.

6. In your hearing, you said that there might be “circumstances in which I would feel that integrity and principle required me to resign.” You told me that “there could be circumstances in which integrity and principle would compel me to resign.” Assume that you believed reasonable arguments could be made to defend the constitutionality of a statute but your superiors instructed you not to do so. In your hearing, you appeared to say that this would not be one of those circumstances warranting resignation. So please give me a clear answer. Is that your view? Could a conflict between the Solicitor General and his superiors over whether to defend the constitutionality of a statute justify resignation?

ANSWER

I appreciate the opportunity to clarify my position on this question. 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 partisan 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.

As I have noted, this has been the consistent position of Solicitors General in prior Administrations, and I fully share it.