

Senator Jeff Sessions
Questions for the Record
Donald B. Verrilli

1. Do you agree that the Executive Branch has a clear and unwavering duty to vigorously defend the constitutionality of any law for which a reasonable defense may be made?

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. These exceptions are narrow and they apply only in rare circumstances, and they should be invoked only after the most grave and careful deliberation.

2. Do you agree that there is a difference between refusing to defend a law that the administration regards as unconstitutional and refusing to defend a law that the administration opposes on policy grounds?

ANSWER

Yes.

3. Do you agree that if an administration refuses to defend clearly constitutional laws based on its own policy views, it is violation of the oath to protect and defend the Constitution and the laws of the United States?

ANSWER

Yes.

4. If you are confirmed, will you commit to vigorously defend the Constitution and all federal laws for which a reasonable defense may be made?

Yes. If I am confirmed, I will vigorously defend the Constitution, and I will defend federal laws against constitutional challenge. As described in response to Question 1, there are only two exceptions to this responsibility. 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 decline to defend a statute when there are no reasonable arguments that can be offered in its defense.

5. In a *Kentucky Law Journal* article, Clinton administration Solicitor General Drew Days wrote, “[t]he Solicitor General has the power to decide whether to defend the constitutionality of the acts of Congress or even to affirmatively challenge them.” Are there any federal statutes now on the books that you believe are unconstitutional?

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 to challenge as 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 response to Questions 1 and 4 above, and I will fulfill that responsibility. 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)

6. At your hearing, you testified that because of your recusal, you “do not have any developed sense about the legal analysis or issues” with respect to the administration’s decision not to defend the Defense of Marriage Act (“DOMA”). Please take some time now to consider this issue and fully answer the following questions with specificity. Please also note that the fact of your recusal does not prevent you from discussing your views on this matter.

- a. In his famous *Lochner* dissent, Justice Holmes wrote:

“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

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

ANSWER

I agree with the view that Justice Holmes expressed in the passage quoted above. 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.

- ii. How would you articulate your own view in this area, especially as it relates to your likely 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.

- b. Do you believe the federal government has a rational basis for DOMA? How would you analyze the constitutional issue on the matter, whether under the Due Process Clause or the Equal Protection Clause?

ANSWER

Because I was recused, 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 of DOMA could be defended under the Department of Justice's traditional standards. Thus, any opinion I can offer in response to this question is necessarily limited and provisional.

I can say, however, that, under the most deferential standard of review available under the equal protection component of the Due Process Clause, a reasonable argument can be advanced that Section 3 of DOMA has a rational basis. That conclusion is consistent with the Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D, which 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."

- c. Do you believe there is a federal constitutional right to same-sex marriage? Have you ever expressed an opinion as to whether there is a federal constitutional right to same-sex marriage? If so, what was that opinion?

ANSWER

The Supreme Court has not recognized a constitutional right to same-sex marriage. I do not believe I have ever expressed an opinion as to whether there is one. 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).

7. Please explain with specificity the parameters of your recusal.

- a. Did your recusal cover your time in the Office of White House Counsel?

ANSWER

Yes. It began on February 9, 2009 when I began my employment in the Administration, and I signed the Administration's ethics pledge on March 4, 2009. The recusal extends for two years; the advice of White House ethics counsel was that the preferable, more conservative approach would be to mark the technical end of the recusal period from the date I signed the pledge.

- b. If not, did you advise the President or any members of the administration with respect to DOMA?

ANSWER

I did not advise the President or any members of the administration with respect to DOMA.

8. When Attorney General Holder announced that the administration would no longer defend DOMA, he claimed that by doing so, it was acting consistent with the Justice Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense."

- a. Do you agree that there are several reasonable arguments in defense of DOMA, including that the law is rationally related to legitimate government interests in

procreation and childrearing, or do you agree with the administration that it is not rationally related to those ends?

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." As such, I can say (despite my necessarily incomplete understanding of the legal issues) that reasonable arguments can be advanced that Section 3 of DOMA has a rational basis under that most deferential standard of review.

- b. Do you agree that the Bush administration successfully defended DOMA using precisely the foregoing arguments?

ANSWER

My understanding is that the Department of Justice in some cases has successfully defended Section 3 of DOMA under a rational basis review standard in part based on the foregoing arguments.

- c. Do you agree that those same arguments have been widely relied on by federal and state courts in upholding states' traditional marriage laws?

ANSWER

My understanding is that some state and federal courts have upheld state restrictions on same-sex marriage in part based on those arguments, while other courts have rejected these arguments as a justification for such restrictions.

9. At your hearing, Senator Grassley asked whether you would defend DOMA if confirmed. You testified that "the President has made a decision about the Defense of Marriage Act, and the Attorney General has made a decision about the Defense of Marriage Act" and that you "would in good faith apply the traditional Justice Department standards to answering that question to the extent it has not already been decided by the President and Attorney General." However, you also explicitly testified that there are only two exceptions to the Solicitor General's obligation to defend the laws of the United States – "if in the view of the executive branch the legislation violates the separation of powers by

making an incursion into the President's constitutional domain" and "if there is no reasonable argument that can be advanced in defense of the statute."

- a. Is it your testimony that a decision by the President and/or the Attorney General that a law can no longer be defended is an exception to the Solicitor General's duty to vigorously defend all laws of the United States?

ANSWER

I appreciate the opportunity to clear up any confusion my testimony may have caused on this point, which involves both the nature of the independent judgment a Solicitor General exercises and the relationship between the Solicitor General and the Attorney General.

If I am 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. 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. That is true for all decisions a Solicitor General makes, and is certainly true for the determination whether reasonable arguments exist to defend an act of Congress. Therefore, if I am confirmed, I will exercise independent judgment to decide that federal 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.

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 many previous nominees have recognized in their testimony before this Committee, the Solicitor General exercises independence within a framework that recognizes the ultimate

authority of the Attorney General (and the President) 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 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

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 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”). 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. 28 C.F.R. § 0.20 (2006).

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).

But the fact that the President and the Attorney General have authority over the Solicitor General is entirely distinct from the question whether a Solicitor General should carry out an order despite a conviction that doing so would be wrong. As I address more fully in response to Question 10 below, if I am confirmed, while I could not defy an instruction from my superiors, I also would not carry out an order that I believed was wrong. I would have the choice, and I would make the choice, to resign rather than lend my name or that of the Office of Solicitor General to carrying out an order I believed was wrong.

I do believe that it is highly unlikely that such a circumstance would arise in the tenure of any Solicitor General, because 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.

- b. If not, does the defense of DOMA fall under one of the two exceptions to the Solicitor General’s duty to defend the laws of the United States that you articulated at your hearing? If so, which one?

ANSWER

The Attorney General has stated that the defense of Section 3 of DOMA falls into the recognized category of cases in which the Department of Justice cannot offer a reasonable argument in defense of the statute's constitutionality. For the reasons explained above, the Attorney General has the authority to make that judgment.

10. You testified that if you believed reasonable arguments existed to defend a statute's constitutionality, but the Attorney General or President concluded otherwise, you "would defend the statute unless instructed by [your] superior not to do so." However, you also testified that "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." Please explain how declining to defend a law for which you believe there are reasonable grounds at the direction of your "superior" is consistent with the duty of the Solicitor General "to advance the long-term institutional interests of the United States."

ANSWER

I appreciate the opportunity to clarify my position on this issue. 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 addressed more fully in response to Question 9a 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 also 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 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 that the long-term interests of the United States would be best served by a Solicitor General who adheres to such a course of decision and action, ensuring not only that he acts with the independence that I discussed in response to Question 9a, above, but also with the integrity to resign if and when appropriate.

11. In 1976, the Justice Department was faced with defending the Federal Election Campaign Act, which the Attorney General, Edward Levi, and Solicitor General, Robert Bork, believed was unconstitutional under the First Amendment as a restriction of political speech. Their solution was to delegate to the senior deputy of the Solicitor General's office the defense of the statute, thus ensuring a first-rate defense. Simultaneously, the Attorney General and Solicitor General filed a friend-of-the-court brief exploring the difficulties of the statute but not taking sides in the dispute. In this way, they both called attention to the very considerable difficulties the Constitution posed for the statute and mounted the best defense of it that they could.

- a. Do you agree with this approach?

ANSWER

Based on histories and scholarly commentary I have read in the past regarding the approach the Department of Justice took in the Supreme Court in *Buckley*, I believe the decision to file multiple briefs was a reasonable attempt to deal with the difficulties that can arise in the rare but important cases in which the Executive Branch has grave doubts about the constitutionality of an act of Congress. Such cases involve the pressure of potentially conflicting obligations to defend the statutes Congress enacts and to uphold the Constitution and take care that it, as the supreme law of the land, is faithfully executed. As I understand the history in *Buckley*, the Solicitor General and the Attorney General believed that certain provisions of the 1974 Federal Election Campaign Act violated the First Amendment. They therefore submitted to the Supreme Court an *amicus* brief identifying what they believed were the many constitutional difficulties with the statute. But the Solicitor General's Office also submitted a brief defending the statute against the First Amendment challenges. This approach did allow the Department of Justice to defend the statute, but some have said that the Department's decision to file an additional *amicus* brief pointing out the constitutional problems with the statute undermined the effectiveness of the Office's defense of the statute.

- b. Do you agree that given the administration's position on DOMA, the approach taken by Attorney General Levi and Solicitor General Bork is more consistent with the duty to defend laws of the United States than its current strategy of abandoning the law altogether and abdicating its duty to defend to the House of Representatives?

ANSWER

As noted in my response to Question 11a above, the approach of the Department of Justice in the *Buckley* litigation is one reasonable option for dealing with this difficult issue. But it is not clear that it is more consistent with the goal of ensuring a first-rate defense of federal statutes. Some have suggested that, by sending a mixed message to the Supreme Court, it does not best advance the goal of ensuring a first-rate defense of the statute. The procedures Congress established in 28 U.S.C. § 530D could in some circumstances be considered a better means of ensuring a first-rate defense of

the statute. If the Department of Justice declines to defend a statute, and through § 530D ensures that Congress has the opportunity to step in and defend the constitutionality of the statute, that approach may achieve the goal of a first-rate defense of the statute without the risk of mixed messages.

- i. If not, do you at least agree that it is important that the Solicitor General be able to perform both tasks in appropriate cases?

ANSWER

Yes.

- ii. Do you agree that the Solicitor General's office is required to give every constitutional issue it is confronted with the scrutiny it requires?

ANSWER

Yes.

- iii. Do you agree that, in the absence of that scrutiny, the defense of a major statute may be inadequate?

ANSWER

Yes.

- 12. In August 2009, the Justice Department, under former Solicitor General Kagan, filed a reply brief in *Smelt v. United States*, challenging DOMA. In that brief, the Justice Department volunteered that "this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal" and asserted that it "does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing."

- a. I am assuming that, based on your testimony, you were recused from participation in this case. If not, please correct that assumption. However, regardless of whether you were recused, as Senator Blumenthal said at your hearing, you are "an expert appellate litigator" who "has participated in more than 100 cases before the Supreme Court, including 12 arguments [and] about 90 cases before the United States Court of Appeals and the State supreme courts, arguing [your]self over 30 of those appeals." Is it your expert opinion that this brief was necessary to support the government's positions in the case?

ANSWER

Because I was recused, I did not participate in any of the deliberations or have knowledge of any of the judgments that went into the decision of how best to

defend the constitutionality of Section 3 of DOMA in the *Smelt* case or any other. Such deliberations are critical to developing a fully informed sense of the matter. With that caveat, and stressing that I have no knowledge as to how these judgments were actually made, I can see why attorneys litigating the case for the United States might have concluded that such statements were necessary in order to defend the constitutionality of the law effectively. At the time the brief was filed, it was public knowledge that the Administration did not support DOMA as a matter of policy and supported its repeal. Attorneys litigating the case might have concluded that their duty of candor to the court – a duty to which Department of Justice lawyers must adhere scrupulously – required such a statement. They might also have concluded that it was better as a litigation strategy to point out the Administration’s policy objections to Section 3 of DOMA themselves, in a manner that afforded them some control over how those objections would be portrayed, rather than leaving it to opposing counsel to point out the Administration’s position in the first instance. The litigators might also have preferred to put the court on notice through the briefing so as to avoid having to deal with the issue for the first time at oral argument.

- b. Would you characterize the brief as a “vigorous” defense of the law?

ANSWER

Based on my limited and provisional knowledge, I think it would be fair to characterize the brief as “vigorous” for the reasons set forth in response to Question 12a above.

13. Because of her widely-publicized opposition to Don’t Ask, Don’t Tell and the Solomon Amendment, Justice Kagan was specifically asked at her confirmation hearing on her nomination to be Solicitor General if she would be able to defend those laws as Solicitor General. She answered, in part, that she would “apply the usual strong presumption of constitutionality,” as reinforced by “the doctrine of judicial deference to legislation involving military matters.”

However, during her tenure as Solicitor General, two cases challenging Don’t Ask, Don’t Tell came up – *Pietrangelo v. Gates* in the First Circuit and *Witt v. Department of the Air Force* in the Ninth Circuit. In both cases, the plaintiffs argued that the Supreme Court’s recent decision in *Lawrence v. Texas*, meant that the Don’t Ask, Don’t Tell law should be struck down as unconstitutional. The First Circuit upheld the law, correctly deferring to military policy, analyzing the issue as a general matter, and refusing to order a series of trials where the government would have to justify the application of the law to each individual service member. In contrast, the Ninth Circuit did not apply the traditional deference for military policy and instead invented a new standard of review for the plaintiff’s “Substantive Due Process” challenge, and held that the plaintiff was entitled to a trial where the Government would have to defend the application of the law to the individual plaintiff in that case.

- a. *Pietrangelo* was decided in June 2008. The losing side decided to seek an appeal to the Supreme Court, and after a series of delays, the government had to decide by early May 2009 whether it would support or oppose the Supreme Court taking the case. You were Associate Deputy Attorney General at that time. Were you at all involved in that process? If so, please explain your involvement.

ANSWER

I had no involvement in that decision.

- b. In the Solicitor General's May 2009 brief to the Supreme Court, the government urged the Court not to take *Pietrangelo*, and pointed to *Witt* as a better vehicle for the Court to hear constitutional challenges to Don't Ask, Don't Tell. Were you at all involved in that decision? If so, please explain your involvement.

ANSWER

I had no involvement in that decision.

- c. Three days earlier, on May 3, 2009, the government also decided not to seek an appeal from the Ninth Circuit's decision in *Witt*. Were you at all involved in that decision? If so, please explain your involvement.

ANSWER

I had no involvement in that decision.

- d. Do you agree that, by refusing to appeal *Witt*, the government essentially blocked the Supreme Court from considering the constitutionality of Don't Ask, Don't Tell at that time?
- i. Do you think allowing the case to go forward in the District Court was consistent with the duties of the Solicitor General to vigorously defend the law?

ANSWER

Because I had no involvement in the decision, I did not participate in the analysis and deliberations in the Department of Justice or in the deliberations that I presume occurred between the Department of Justice and the Department of Defense prior to the decision not to seek certiorari in the *Witt* case in 2009. I have reviewed the April 24, 2009 letter from the Attorney General pursuant to 28 U.S.C. § 530D, that set forth the basis for the Department's decision. The letter explains that the decision not to seek certiorari at that time was based on two principal considerations: (i) the interlocutory posture of the case, and the Supreme Court's presumption

against granting certiorari in a case before a final judgment has been rendered; and (ii) the judgment that the development of a factual record on remand in the district court would strengthen the government's case on appeal after a final judgment. Without having the kind of detailed understanding of the case that would have come from participating in the analysis and deliberations within the Department of Justice and with the Department of Defense, I can only say that the explanation offered in the § 530D letter certainly could reflect a litigation judgment consistent with a duty to defend the law vigorously. Specifically, the litigators might reasonably have concluded that the case would be in a better posture for eventual Supreme Court review after a remand to develop a full factual record that could potentially have refuted the allegations in the plaintiff's complaint.

- e. The Solicitor General's office under the Bush Administration fully recognized the damage that would result if the Ninth Circuit's decision in *Witt* was not immediately appealed. That is why they quickly sought *en banc* review by the full Ninth Circuit. They said the decision "creates an inter-circuit split, . . . a conflict with Supreme Court precedent, and an unworkable rule that cannot be implemented without disrupting the military." Do you agree with the Bush administration's approach, or former Solicitor General Kagan's approach?

ANSWER

Because I had no involvement in the matter, I did not participate in the analysis and deliberations in the Department of Justice or in the deliberations that I presume occurred between the Department of Justice and the Department of Defense prior to the decision not to seek certiorari in the *Witt* case in 2009. Without having the kind of detailed understanding of the case that would have come from participating in the analysis and deliberations within the Department of Justice and with the Department of Defense, I can only say that the question whether to seek *en banc* review in a court of appeals is not the same as the question whether to seek Supreme Court review, and therefore it could well be possible to conclude that both choices were sensible litigation judgments. For example, once the Ninth Circuit denied *en banc* review in the *Witt* case, the Department of Justice litigators could well have concluded that the more prudent course was to allow the case to return to the district court.

- 14. According to case records, you wrote and submitted an *amicus* brief in the Sixth Circuit litigation in *ACLU v. NSA*, where the ACLU and a group of lawyers sued the National Security Agency claiming that they were injured and had standing to challenge the Terrorist Surveillance Program – the program that reportedly monitored al Qaeda and terrorist communications – because they communicated regularly with clients overseas and those communications might be chilled as a result of the surveillance program. The Sixth Circuit dismissed this case for lack of standing.
 - a. Please provide a copy of the *amicus* brief that you submitted.

ANSWER

A copy is being provided with this response.

- b. Did your brief advocate in favor of granting standing to the ACLU and the group of lawyers to challenge the Terrorist Surveillance Program based on what was nothing more than a fear of possible surveillance?

ANSWER

No. The brief, which was filed on behalf of two organizations that were participating in the case as *amici curiae* – the Constitution Project and the Center for National Security Studies – did not address the standing issue or press any argument in favor of standing for the plaintiffs in the case. The brief addressed only the question on the merits regarding whether the Terrorist Surveillance Program could be justified as lawful.

- c. The Second Circuit ruled two weeks ago in *Amnesty International v. Clapper* that a similar group of civil rights organizations and lawyers did have standing to sue on the same grounds asserted in *ACLU v. NSA*, albeit under the section of FISA enacted in 2008 to deal with interception of overseas communication. Given your advocacy on this issue in the past – essentially the same issue – do you plan to recuse yourself from any consideration of this matter, including whether the United States should appeal the Second Circuit’s ruling?

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*; 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.

- d. Did you personally believe the Terrorist Surveillance Program was unconstitutional before it was brought under FISA?

ANSWER

The brief I filed in *ACLU v. NSA* set forth the views of the clients I was representing as *amici*. The brief advanced arguments based on the familiar separation of powers

framework set forth in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*. If I am confirmed (and if I am not recused from this matter), whatever my personal views might be, those views will play no part in the discharge of my duties. It will be my responsibility to apply the same standards in cases involving challenges to the Terrorist Surveillance Program that I would apply in any case – standards that are based entirely in the law and seek to advance the long term institutional interests of the United States. And I will do so.

- e. There was a significant debate prior to the enactment of the FISA Amendments Act regarding whether telecommunications carriers should receive immunity for any assistance they provided to the federal government through the Terrorist Surveillance Program. What position did you take – whether publicly or in informal settings – regarding the question of immunity for these carriers?

ANSWER

I do not believe that I took a position one way or the other – publicly or in informal settings – regarding the question of immunity for telecommunications carriers under the FISA Amendments Act.

- 15. You clerked for Justice Brennan from 1984 to 1985 and have attributed your passion for *pro bono* work in capital cases to that experience. Justice Brennan believed that the death penalty was unconstitutional under any circumstances. In his concurrence in *Furman v. Georgia*, he, along with Justice Marshall, wrote that they would have held any use of the death penalty is *per se* a violation of the Eighth Amendment.
 - a. Do you agree with Justice Brennan that the death penalty is *per se* unconstitutional? If not, do you agree that the death penalty is constitutional in most circumstances in which it is imposed?

ANSWER

In *Gregg v. Georgia* in 1976, the Supreme Court held that capital punishment is not *per se* unconstitutional. *Gregg* and its progeny have remained the law for more than 30 years, and if I am confirmed, that is the law that I will follow in carrying out the obligations of the office. Although I am not familiar with the facts and procedures in each case, in general I believe it is reasonable to conclude that the death penalty has been constitutionally imposed in most circumstances under *Gregg* and its progeny.

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

ANSWER

The term “judicial activism” means different things to different people. I believe Justices Brennan and Marshall made their decisions on the basis their understandings of the text of the Eighth Amendment, relevant history, and the Supreme Court’s Eighth Amendment precedent.

16. You have represented several death row inmates before the Supreme Court, the lower federal courts, and state courts, many of these *pro bono*. According to a July 18, 2007 article in the *National Law Journal*, you consider these representations to be “different” and “more emotional.” You further stated:

“I try very hard to make it as dispassionate and law-focused as I can. . . . But I do want the justices to understand that when I say it, I really believe it. I believe that the inadequacy of the representation [the defendants] got is as shockingly bad as I am telling them it is. . . . In part it’s what I bring to it, but also what the justices bring. It’s emotionally charged on both ends.”

- a. Did the article accurately recount your statements? If not, please take this opportunity to correct the record.

ANSWER

The article accurately quotes my statements. In these quotes, I was trying to convey my conviction that enforcement of the Sixth Amendment right to the effective assistance of counsel was essential to the legitimacy of the adversarial process, and thus of particular importance in cases in which a defendant faces a death sentence.

- b. During the confirmation process for her nomination to be Solicitor General, Elena Kagan stated that her “role as Solicitor General . . . would be to advance not my own views, but the interests of the United States” and that she was “fully convinced” that she could “represent all of these interests with vigor, even when they conflict with my own opinions.” Do you agree that is the duty of the Solicitor General?

ANSWER

Yes. I am in complete agreement with the views Justice Kagan expressed in her testimony. 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 and to the best of my ability without regard to my own views of what the law should be. I understand that, if I am fortunate enough to be 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.

17. In *Wiggins v. Smith* you represented the defendant, who was convicted of drowning a 77-year-old Maryland woman in her bathtub during a robbery and was sentenced to death. In the 2007 *National Law Journal* article cited above, you were quoted as saying you had “a strong emotional connection” to the defendant and described him as “the most sympathetic” of the defendants you have represented because “[h]e had no prior criminal record; he had not engaged in preying on others.” Do you think it is possible that the circumstances of a crime could be so extreme that the defendant’s lack of a criminal record is irrelevant?

ANSWER

I do think that the circumstances of a crime could be so extreme that a death penalty would be warranted under applicable law even if a defendant lacks a criminal record. Under the Eighth Amendment law articulated by the Supreme Court in *Gregg* and its progeny, a capital defendant is afforded the opportunity to present to the sentencing authority any reasonable argument in mitigation of punishment, and the courts (as well as some state capital punishment statutes) have generally recognized that the lack of a criminal record is one such mitigating circumstance. But I certainly agree that the absence of a prior criminal record is never a *per se* bar to imposing the death penalty in an appropriate case.

18. On at least three occasions, while serving as *pro bono* counsel to death row inmates, you have challenged the so-called three-drug protocol mode of execution as violative of the Eighth Amendment’s prohibition on cruel and unusual punishment.
- a. While you are free to argue for marginal issues as an advocate, do you personally believe this violates the Eighth Amendment?

ANSWER

In each of the three cases, I was approached by counsel who had filed the cases and had litigated them in the lower courts, and was asked to provide assistance. In each of the cases, I agreed to do so and advanced legal arguments on behalf of the clients to the best of my abilities. In making those arguments I did not take the position that the three-drug protocol is inherently cruel and unusual punishment.

For example, the brief I filed on behalf of my clients in the Supreme Court in *Baze v. Rees* acknowledged that the lethal injection “method of execution is not inherently inhumane if performed properly,” but then argued that the particular procedures that Kentucky used to carry out executions created a serious risk of errors that could result in the infliction of extreme suffering. In rejecting this claim, the Supreme Court ruled that Kentucky’s procedures did not pose a substantial risk of serious harm, and therefore did not violate the Eighth Amendment. As the Court pointed out, the trial record in the case provided only limited support for the assertion of an unacceptably high risk of harm – an outcome that I find fair and reasonable on the basis of the record evidence.

Similarly, the Eighth Circuit case of *Crawford v. Taylor* did not involve a claim that lethal injection is inherently cruel and unusual punishment, but instead challenged the adequacy of the particular procedures Missouri used to carry out lethal injections. After the State instituted significant changes to the procedures in response to the lawsuit, the Eighth Circuit held that the revised procedures did not present a constitutionally intolerable risk of error.

Hill v. McDonough, a case in which I served as co-counsel in the Supreme Court, did not directly raise the question whether lethal injection is constitutional. The case instead raised the question whether challenges to lethal injection procedures could be brought in a case under 42 U.S.C. § 1983.

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 and to the best of my ability without regard to my own views of what the law should be. I understand that, if I am fortunate enough to be confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability, regardless of my personal views of the matter. And I will do so.

- b. If confirmed, will you commit to vigorously defending any challenges to this protocol?

ANSWER

Yes, if I am confirmed I will vigorously defend challenges to the federal government's use of lethal injection as a method of execution. 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 set forth in *Baze v. Rees*.

- 19. On April 1, 2009, the *Washington Post* reported that the Office of Legal Counsel at the Department of Justice issued a legal opinion that the D.C. voting rights legislation then being considered by Congress was unconstitutional. The story further stated that, upon receiving this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General's office. According to the story, lawyers in the Solicitor General's office "told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment." Do you believe it was appropriate for the office of the Solicitor General to render an advisory opinion about a pending bill that was not even yet a law?

ANSWER

I cannot speak to the specifics of the deliberations implicated by this question, because of Executive Branch confidentiality interests, but I can say that I believe it is generally within the authority of the Attorney General to seek the legal advice of the Solicitor General on a legal topic, consistent with and respectful of the particular roles of the Office of the Legal Counsel and the Office of the Solicitor General. One of the functions delegated by regulation from the Attorney General to the Solicitor General is to “assist[] the Attorney General, the Deputy Attorney General, and the Associate Attorney General in the development of broad Department program policy.” And the Attorney General can always, when appropriate, call on the other officers in the Department to assist him in the discharge of his duties.

20. According to your questionnaire, during your tenure as Associate Deputy Attorney General at the Department of Justice, you supervised the work of the Civil Rights Division for a “brief period.”
- a. What were the exact dates during which you were responsible for supervising the Civil Rights Division?

ANSWER

I arrived at the Department of Justice as an Associate Deputy Attorney General in early February 2009. Beginning then, my responsibilities included monitoring the civil litigating divisions of the Department (Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax) on behalf of the Deputy Attorney General. I do not remember the exact date on which responsibility for monitoring the Civil Rights Division shifted from me to another Associate Deputy Attorney General, but I believe it was in May 2009.

- b. Were you involved in any way with the Department’s decision to dismiss three defendants from *United States v. New Black Panther Party for Self-Defense, et al.*, No. 2:09cv0065 (E.D. Pa. May 18, 2009)? If so, please explain your involvement and the decisionmaking process.

ANSWER

I played no part in the Department’s decisions respecting *United States v. New Black Panther Party for Self-Defense, et al.*, including the decision to dismiss defendants. As part of my monitoring responsibilities, I was generally aware of the case and of the decision to dismiss defendants. I reported on the case, along with many others, to the Deputy Attorney General. As a regular part of my duties as Associate Deputy Attorney General, I attended meetings in the Department at which reports on the case were given.