

Questions from Senator Orrin Hatch

1. Your career has devoted to using the judicial system to pursue a specific agenda. In your writings, you have mapped out what you call a “progressive constitutional agenda.” And yet the Department of Justice in general, and the Office of Legal Counsel in particular, must be free from political or ideological agendas or influence. What can you offer to satisfy me that with your long record of advocacy and politically-driven decision making you are fit for a position that must be completely non-political?

Answer: I completely agree that the Office of Legal Counsel must be protected from harmful political or ideological agendas or influences. Maintaining the independence of the office—protecting its analysis and advice from corrupting influences—is the single most important responsibility of those who lead OLC. I believe that my five years of service in a leadership position at OLC—three and a half years as Deputy Assistant Attorney General and a year and a half as acting Assistant Attorney General—demonstrate my commitment to the independence and integrity of the office.

Since leaving OLC, much of my scholarship has examined the importance of keeping the office free from harmful political or ideological behavior, and has explored concrete ways of preventing such harm. I would cite in particular to my work developing and promoting the “Principles to Guide the Office of Legal Counsel,” the first principle of which essentially captures the spirit of your question: “OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies. The advocacy model of lawyering . . . inadequately promotes the President’s constitutional obligation to ensure the legality of executive action.” Dawn Johnsen, 54 UCLA Law Review 1559 (2007) (quoting the Principles).

I believe all my work in the leadership of the Office of Legal Counsel from 1993 until 1998 demonstrate that I made decisions not according to any political or ideological preferences, but according to the law. Letters written on behalf of my nomination by the people with whom I worked closely during those years attest to my commitment to the rule of law, including from throughout the Department of Justice and also top lawyers and officials from the CIA, the National Security Council, the Secret Service, and the Departments of Defense, Education, and Health and Human Services. To cite just one specific example, clearly counter to the policy preferences of all involved, I advised that the Clinton Administration could not unilaterally waive a congressionally enacted statute of limitations in order to pay what it viewed as meritorious claims against the government for racial discrimination against African-American farmers. My opinion also pointed out that new legislation would be required to authorize the expenditure, and Congress in response enacted such legislation. I pledge to this Committee that I will continue to honor the critical independence from policy preferences and party politics that is indispensable to the Office of Legal Counsel.

2. In that same vein, in your article titled *Lessons from the Right*, you include the Republican Party and the Federalist Society in *the Right*. I am a member of both. You accuse the Right of hypocrisy and “insidious rhetoric designed to mislead and obfuscate.” You have denounced the “utter hypocrisy of the radical right,” accused previous Republican administrations of arrogance and the “complete disrespect” for either Congress or the courts, and elsewhere have used similar rhetoric to make similar accusations. Much of your work exhibits a disturbing degree of animosity toward approaches, viewpoints, or arguments with which you might not agree. What can you offer to satisfy me that you will not lead the OLC with the approach you frequently take in your writings and speeches?

Answer: I would point to my years of service in the leadership of OLC during the Clinton Administration as demonstrating my commitment to maintaining the integrity of that Office and my ability to do so. Furthermore, I have always endeavored to seek common ground where possible and to proceed respectfully where it is not. For example, I recently worked in a bipartisan fashion with former Associate Counsel to President George W. Bush, Brad Berenson, at the request of Senators Feingold and Brownback, to draft legislation to bring greater transparency and integrity to OLC, which resulted in the introduction of the OLC Reporting Act of 2008.

3. In “Tipping the Scale” on washingtonmonthly.com in 2002, you said that “the Rehnquist court is also noteworthy - to many, notorious - for its direct role in resolving a presidential election in the way likely to lead to a strengthening of the court’s new direction.” The clear implication of your statement is that at least four Justices voted to consider that case, seven voted to find a constitutional violation, and five voted for a remedy intentionally to facilitate election of a President who might appoint judges with a particular judicial philosophy. Do you believe that such considerations played any part in the decisions by those Justices?

Answer: In this passage, I was commenting on the fact that the effect of the Supreme Court’s decision in *Bush v. Gore* was to resolve the outcome of a presidential election, which in turn influenced the future composition of the Supreme Court. I did not in any way suggest, or mean to suggest, anything about the motivations of any of the Justices, something about which I have no information.

4. Nominees will often say that regardless of their personal views they will follow the law and acknowledge that Supreme Court decisions are the law of the land. But you wrote just last year that “progressives should agree - and should endeavor to persuade others - that restrictive abortion laws do violate women’s constitutional rights, whether or not the Court protects those rights.” It appears that your judgment about what is or is not constitutional is driven by progressive politics as well as by the Supreme Court’s decisions. Vice President Biden spoke at Attorney General Holder’s investiture and referred to the mission statement of the Department of Justice. He said: “There is no

mention in that mission statement of politics. There is no room in that mission statement for ideology. And that's how it should be. Because there is no place for politics or ideology in this building." How are your statements, like the one I quoted, consistent with what the Vice President said?

Answer: I agree with Vice President Biden's statement. My statement reflects the fact that nearly everyone who studies public law believes that the Supreme Court sometimes gets decisions wrong (though sometimes disagreeing about which decisions were in error). I noted that even if a case like *Roe* were overruled, progressives should still rely on the principles enshrined in the Constitution as a way of persuading their fellow citizens that they should work to protect those rights in the legislatures.

But that was advice for citizen advocates and legislators. The Office of Legal Counsel, in determining the law governing the executive branch, follows decisions of the Supreme Court, and that is what I will do if I am confirmed as head of OLC. My role at OLC would be to apply the law according to decisions of the Supreme Court—regardless of how I personally thought the cases should have been decided.

5. You were on a panel at a conference on terrorism and the rule of law at the University of Chicago in October 2004. In your notes, you wrote that "this is a different kind of war, *if war at all*." Your notes indicate that saying we are at war is using "an imperfect analogy." At his confirmation hearing, however, Attorney General Holder said that "there is no question but that we are at war." Do you agree with the Attorney General that we are unequivocally at war? If so, what has changed in your thinking since October 2004 when you questioned whether we are at war and considered war simply an imperfect analogy?

Answer: As I testified at my hearing, there is no question that we are at war with Al Qaeda. The remarks to which you refer addressed the broader question whether it was useful to speak generally of a "War on Terror." Specifically, I recounted hearing former Congressman Lee Hamilton speak about the findings of the 9-11 Commission, on which he had just finished serving as vice chair. I noted his explanation that our Nation was caught unprepared by the 9-11 attacks because we had not adjusted our understanding of national security to the new demands and threats we were (and are) facing. I further noted that the Commission had recommended several urgently needed changes to our national security apparatus, including in the areas of threat identification, intelligence, and international relations. And I emphasized the Commission's bottom-line conclusion; namely, that the radically changed nature of the threat we face as a nation demands a dramatically different understanding of the requirements of our national security. It was in this context that I pointed out that, despite their direct and serious engagement with these issues, neither Representative Hamilton nor the Commission's Report had generally used the language of "war" or a "War on Terror." I suggested that—following the Commission's lead—it might be a wise

choice not to use this language when talking about constitutional questions related to the new national security threats we face, because war has a long history of specialized constitutional meaning. It might be better, I suggested, to try to describe more precisely the radically new national security threats our nation faces. With respect to our conflict with Al Qaeda, or our conflicts in Iraq and Afghanistan, however, I do not consider “war” to be an imperfect analogy at all. Rather, as the Attorney General stated, it is an accurate description of the nature of those conflicts.

6. You met with the Columbia Law School’s Human Rights Institute about their recommendations for the war on terror. They say that the two choices for handling the terrorists detained at Guantanamo Bay are release or criminal prosecution in domestic courts. Do you agree with that?

Answer: No, I do not agree that release or criminal prosecution in domestic courts are the only two possible dispositions for individuals held at Guantanamo Bay. The President’s executive order of January 22, 2009 concerning closure of Guantanamo recognizes the possibility of other dispositions. That order has set in motion an interagency process for determining how each of the Guantanamo detainees should be handled.

7. At her confirmation hearing, Solicitor General nominee Elena Kagan said that under military law there is no requirement to let captured enemies go back to the war. Do you agree?

Answer: Yes, I do agree with Dean Kagan’s statement that under traditional military law, enemy combatants may be detained for the duration of the conflict. That is what the Supreme Court said as well in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

8. Attorney General Holder said at his confirmation hearing that if there is evidence that a detainee is dangerous, then “I don’t think.. .that that is a person who we can release.” Do you agree with him or with those who say that these detainees should be either released or tried in civilian courts as criminals?

Answer: As indicated above, I do not believe that release or criminal prosecution are the only possible dispositions for detainees. The President’s review of the appropriate disposition of each of the detainees is underway.

9. The *Washington Post* reported on Friday, February 20, that the Pentagon, at President Obama’s direction, has reviewed treatment of detainees at Guantanamo Bay and concluded that it meets the requirements of the Geneva Convention. Are you aware of this and what do you think is the significance of this finding?

Answer: I have seen the *Washington Post* story. I have not seen the Pentagon report. In his executive order of January 22, 2009 concerning the closure of the

detention facility at Guantanamo Bay, the President directed that all detainees there be treated humanely and in accord with Common Article 3 of the Geneva Conventions. I understand the Pentagon investigation was undertaken in order to ensure compliance with that portion of the executive order.

10. In the book *Change for America*, you wrote that the practice of rendition should “immediately end.” During his confirmation hearing, CIA Director Leon Panetta said that the practice of rendition should not be ruled out. Who is right?

Answer: I did not, in *Change for America* (or anywhere else), call for an “immediate end” to the practice of rendition. There thus is no conflict between what I wrote there and what you quote Leon Panetta as having said at his hearing. I do not oppose the practice of rendition, which public sources reveal did not begin in the Bush administration. What I wrote is: “Guantanamo, secret black sites, and extraordinary renditions to countries known to use torture also are stains on the United States’ reputation as a champion for the rule of law and human rights. All should immediately end.” The rest of the paragraph calls, not for an end to the practice of rendition, but for a review of detention and rendition policy to ensure that the United States does not transfer detainees to other countries where they will be tortured. President Obama has ordered that review.

11. In a 1989 article, you wrote that the state’s interest in protecting the life of children before birth is *never* enough to outweigh a woman’s right to have an abortion, even after viability. This is inconsistent with *Roe v. Wade*’s trimester framework as well as how that framework was later revised in *Planned Parenthood v. Casey*, a decision you have also criticized. Do you still believe what you wrote, that the state’s interest in protecting the life of children before birth can never overcome a woman’s right to an abortion?

Answer: I am unsure of the statement to which you are referring, but your description is inconsistent with the way I have talked about and understood the issue for decades including in 1989. I believed then, and continue to believe, that *Roe v. Wade* was correctly decided, including in its core holding that prior to the point of viability, the ultimate decision whether or not to continue a pregnancy is for the woman, in consultation with her family, her physician, and the religious advisors she chooses to consult. After the point of viability, the government may ban abortion as long as it includes an exception where the woman’s health or life is at stake. I believe *Roe* struck the right balance and that after the point of viability the state can overcome the woman’s interests and impose a criminal ban on abortion, with necessary exceptions for life and health. If confirmed as the head of OLC, my advice on constitutional and other legal matters will be based on the Supreme Court’s decisions, not my own views.

12. In the brief you wrote in *Webster v. Reproductive Health Services*, a case that did not involve a ban on abortion, you argued that statutes curtailing a woman’s abortion choice “are disturbingly suggestive of involuntary servitude, prohibited by the Thirteenth Amendment.” When Senator Specter asked you about this at your hearing on February

25, you acknowledged writing the brief but said: “I have never argued that there is a Thirteenth Amendment violation when the government restricts abortion....I will say categorically I do not believe the Thirteenth Amendment is relevant at all.” Yet that was not the only time you have made this argument. In an interview with *Glamour* magazine in 1989, you said: “Any move by the courts to force a woman to have a child amounts to involuntary servitude.”

- Do you believe that restrictions on abortion force women to be pregnant?
- If, as you said at your hearing, you now believe that the Thirteenth Amendment and involuntary servitude are irrelevant to abortion, please explain how you came to reject the previous positions cited above?

Answer: *Webster v. Reproductive Health Services* was a case in which the Court was urged to overrule *Roe v. Wade*. It was widely believed at the time that the Court might do so, or at least substantially limit *Roe*. As I testified at my hearing, I do not believe that abortion restrictions violate the Thirteenth Amendment. My longstanding view has been that the right at issue is protected by the Fourteenth Amendment, as *Roe v. Wade* held and as the Court has since reaffirmed. The brief does not argue (nor does the quote in *Glamour*) that abortion restrictions violate the Thirteenth Amendment, and I am quite certain that I never have made that argument anywhere else. The brief to which you refer argues throughout that the Court should reaffirm *Roe* based on the Court’s holding there that the Fourteenth Amendment protects the right of a woman to decide whether or not to continue a pregnancy prior to the point of fetal viability. I believe that if the government were permitted to prohibit abortion prior to fetal viability, such an abortion restriction could force women to continue to be pregnant (or resort to an illegal abortion procedure), and that would violate the Fourteenth Amendment. I cannot say more about what the footnote intended because, until I was told of the *National Review* article about it, I did not recall it nor do I remember its genesis. I would note that eleven lawyers signed that brief and that it was written on behalf of seventy-seven organizations, which I do recall led to a great deal of negotiation among counsel and organizations about the content of the brief.

13. In an op-ed just a few years ago, you argued that abortion restrictions as a reasonable compromise, “perhaps to help make abortion ‘safe, legal, and rare’ - proves nonsensical.” The phrase “safe, legal, and rare” that you criticized was the position of the Clinton administration, during which you served in the same position to which you have now been nominated. Do you still believe that the Clinton approach to abortion was nonsensical? How do you square your opposition to reasonable compromise with your opening statement at your hearing about finding common ground approaches?

Answer: I would note first that this is an issue of policy, which will be no part of my work if I am confirmed to head OLC. While people of good will disagree on abortion, I believe we can all agree that it is desirable to reduce the number of abortions, and I believe that reducing the number of unintended pregnancies is an

important way to achieve that goal. I have always strongly favored common-ground approaches that reduce the number of abortions by reducing the rate of unintended pregnancy and by supporting women who decide to bear children by giving them the resources necessary to bear healthy babies. In the quotation to which you refer, I was criticizing certain abortion restrictions, not the phrase “safe, legal, and rare.” In my writings as an advocate and academic, I have criticized abortion restrictions that are designed to look like reasonable compromises, but that have the effect of disproportionately harming the most vulnerable of women, in particular poor and low-income women who suffer most from dramatically decreasing availability of abortion services.

14. One book describes your work with the National Abortion Rights Action League and says that you drew a hard line against restrictions even such as parental involvement in a minor’s abortion decision. It says that you told NARAL: “Do not, as part of an affirmative legislative strategy, introduce even a liberalized version of a parental consent or notification law.” Do you still believe that?

Answer: I was speaking there, in my position as an advocate, of what was best as a matter of legislative strategy, in particular the appropriate strategic response to the risk of bad amendments substantially changing a bill once a particular subject was raised. It has been a long time since I have been involved in such legislative work and I do not have a judgment about what should be done now with respect to the same issues of legislative strategy. I do remain opposed to laws that mandate parental consent or notice, though I believe minors generally should involve their parents. This is all, of course, a matter of policy, which would not be my role at OLC. If I were to be confirmed to head OLC, I would in giving legal advice adhere to all Supreme Court decisions, including those that upheld parental notice and consent requirements.

15. In the brief you filed in *Webster*, you argued that abortion restrictions violate the Constitution’s guarantee of equal protection by having a disparate impact on women. Do you still believe that? Please explain how women and men are similarly situated with respect to pregnancy and childbirth.

Answer: The *Webster* brief did not argue that abortion restrictions violate the Constitution’s guarantee of equal protection, but instead—as the Court held in *Roe* and reaffirmed in *Casey*—that such restrictions violate the Fourteenth Amendment’s guarantee of liberty. At a few points, the brief noted, as the Supreme Court itself has, that the interpretation of women’s liberty interests should be informed by equality concerns. The brief does not rest upon any notion that men and women are similarly situated with respect to pregnancy, which they of course are not.

16. In the brief you filed in *Bray v. Alexandria Women ‘s Health Clinic*, you characterized abortion clinic protesters as “politically motivated mob violence” engaged in “terrorist” behavior. Do you acknowledge that some people who protest abortion or

encourage women to give birth to rather than abort their babies do so out of a genuine belief that abortion kills preborn children and a genuine desire to help women who may not otherwise believe they are able to care for a child?

Answer: Yes, I absolutely believe and know that to be true. I appreciate this is an issue that divides Americans, and even families. I have close friends, family, and members of my church who strongly differ on this issue, as is true I would expect of most of us. That is why I support so strongly the search for common-ground approaches that reduce abortions by reducing unintended pregnancies and provide support for healthy childbearing and healthy families.

17. In a blog posting on Slate.com in April 2008, you attacked the Supreme Court's decision in *Crawford v. Marion County Election Board*. You said the Indiana voter identification requirement upheld in that case discourages voting and is actually intended to prevent certain groups from voting. This is yet another example of intemperate and political dismissal of positions or arguments you may not agree with. Many people believe that protecting the integrity and validity of the voting process by ensuring that those who cast votes are legally entitled to do so is essential to our democracy. You may not share that belief, but to say that those people are lying to hide a secret objective to disenfranchise certain groups sounds like politics or ideology blinding you to the facts. Are you aware that Indiana and Georgia, with the strictest voter ID laws in country, had the two highest increases of Democratic voters in the country in the 2008 election. In Georgia, the African American share of the vote increased more than twice as much as it did in the neighboring state of Mississippi, which has no voter ID requirement. The facts directly contradict your prediction. Were you aware of these results and do they change your evaluation of that decision, and the motivation behind the voter ID requirement?

Answer: I share your belief that protecting the integrity and validity of the voting process by ensuring that those who cast votes are legally entitled to do so is essential to our democracy. My post did not say anything to the contrary, nor did it accuse anyone of lying. Rather, it described my view that we should strive to make voters feel welcome and encourage them to participate in our great democracy. As the post mentioned, I was reacting to stories I had heard and read in Indiana that suggested that "many, but by no means all," supporters of the Court's decision might not have been bothered by the fact that the law might discourage some people from voting. It seems to me that the high overall Democratic voter turnout in Indiana or elsewhere does not necessarily prove any particular effect of voter ID requirements, though that certainly is a subject for study. If confirmed I will of course apply the Supreme Court's decision in *Crawford* whenever it is relevant to an issue before the office.