

**Senator Specter's Written Questions for Dawn E. Johnsen,
Nominee to be Assistant Attorney General, Office of Legal Counsel**

1. You were featured in a 2006 Alliance for Justice advocacy film entitled "Quiet Revolution," which asserted that Republicans were engaging in a "stealth revolution" to appoint judges who would "rob Congress of its power to enact federal legislation that it believes it necessary to protect the American people." In that film, you asserted that judges such as Chief Justice Roberts and Justices Thomas and Alito are the instruments by which the "radical right" intends to implement its "incredibly extreme" agenda. Then, at a panel discussion introducing the film, you criticized Republicans and their judicial nominees, accusing them of "a stealth attempt to radically remake constitutional law." You added: "[O]ne of our main objectives has to be the object of this film, to unmask what is really going on and to show them for the hypocrites they are." You further stated that the appointment of conservative judges is a "strategy for implementing radicalism."

- a. Do you believe Chief Justice Roberts and Justice Alito are "radical" nominees bent on implementing an "incredibly extreme" agenda?

Answer: No, I do not. I would also point out that I have reviewed *Quiet Revolution* and nowhere in that film do I make any assertion at all about Chief Justice Roberts or Justice Alito, or even mention them. The film does include comments of mine, along with comments of many other lawyers and officials critical of some opinions of the Court and of President Bush's view of executive power, including then-Senator Barack Obama, Senator Lindsey Graham, and many prominent law professors.

2. In your notes for the panel discussion of that same film, you state: "Remember in roberts and alito hearings ... Took to a new level. Worse than not answering-suggest ethical viol" When I asked you about these notes at your hearing, you stated that you "believe what was at issue was alot of back-and-forth about whether it would be inappropriate and somehow an ethics violation for a nominee to answer questions at a certain degree of specificity."

- a. Why do you believe it is "worse than not answering" for a nominee to "suggest" that it might violate the Judicial Canons of Ethics for him or her to answer a question about an issue that might come before the court to which he or she is nominated?
 - b. Do you think it is appropriate for a judicial nominee who is a current judge to comment about a case that is currently pending before the Court to which he or she is nominated?

Answer: I do not believe that it is appropriate for a judicial nominee to comment on a pending case. I have written, and do believe, that it is appropriate for

Senators to ask a judicial nominee to address his or her judicial philosophy and legal views. This will from time to time involve a delicate balance, but I believe it is the correct one in that it allows the Senate to fulfill its constitutional role of providing meaningful advice and consent. My point in the statement you quote was that some Supreme Court nominees who preceded Chief Justice Roberts and Justice Alito have spoken quite expansively about their judicial philosophy and their legal views, and not inappropriately so. I believed it was harmful and wrong to suggest that by doing so, those nominees may have violated an ethical obligation.

3. You stated during a panel discussion of the film “Quiet Revolution:” “I think the recent Supreme Court confirmation hearings were tremendously disappointing. And we saw in the film clip after clip where they were able - the nominees - to get away with saying over and over again the same exact phrases, and nobody effectively called them on it. You know, they certainly are disciplined. The phrase ‘I have no quarrel with’ must mean something very different than any of us think it means.” Are you suggesting Chief Justice Roberts and Justice Alito misled this Committee with their testimony?
 - a. To what extent should judicial nominees be required to explain their views and positions on constitutional issues to the Senate to ensure we do not confirm “stealth” nominees?
 - b. Do you agree with the statement: “The kind of inquiry that would contribute most to understanding and evaluating a nomination is . . . discussion first, of the nominee’s broad judicial philosophy and, second, of her views on particular constitutional issues?”
 - c. Following the first President Bush’s nomination of David Souter to the Supreme Court, you were quoted as demanding that the White House reveal the nominee’s views “on the issue of privacy.” You asserted, “We are telling senators that [President Bush] ought not to be able to use this process to hide this information from the Senate and the American people.” Do you believe that nominees to the Supreme Court should disclose their views to the Senate on the issue of privacy?

Answer: I will first mention that OLC has no role in judicial nominations or appointments. I do believe that the Senate is entitled to examine the judicial philosophy and legal views of a Supreme Court nominee as a component of its constitutional advice-and-consent role. I believe that as part of that process, Senators may ask nominees about their views on the issue of the constitutional right to privacy, and nominees should answer those inquiries. I noted at the time of Justice Souter’s confirmation that there was a special reason for asking for his views on this issue: the Republican Party Platform had called for the appointment of judges who would overrule *Roe*, and the balance on the Court was such that it seemed the next appointment might determine that outcome. In contrast, it would

never be appropriate for a Senator to seek to extract any kind of commitment as to how a nominee would decide a particular case or specific question that might come before the Court.

4. During the Presidential campaign at a Planned Parenthood conference, then-Senator Obama said: “We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.” Do you agree with these criteria for selection of judges?

- a. Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means? If so, under what circumstances?

Answer: I do not believe that judges ever should be guided only by a sense of empathy, nor should such empathy ever interfere with their interpretation of what the law requires.

5. In a 2007 speech before the Indiana Civil Liberties Union, you discussed some of the decisions of the “Roberts Court” and focused on some of the dissents to those opinions. In your notes for that speech, you state that the authors of those dissents are Justices who are “left of center-I hesitate to call them liberal, [because] they only are relative to the rest of the Court.” You then proceeded to discuss Justice Ginsburg’s dissent in the Lilly Ledbetter case. Do you include Justice Ginsburg as a “left of center” Justice who is only liberal “relative to the rest of the court?”

- a. Prior to Justice Ginsburg’s confirmation to the Supreme Court, she wrote on a number of women’s issue. She had written that the age of consent for women should be 12, that prisons should house men and women together in order to have gender equality, that Mother’s and Father’s Day should be abolished because they stereotype men and women, and that there is a constitutional right to prostitution. Do you believe these are merely “left of center” positions?
- b. Do you agree with these positions? If not, with which ones do you disagree?
- c. Justice Ginsburg said that there should be Federal funding for abortion. Do you agree? Is that a merely “left of center” position?

Answer: I do not recall ever hearing that Justice Ginsburg expressed any of the positions you describe. I am reluctant to comment on them without knowing more, but as you describe them in section (a), I do not agree with any of them. I continue to believe that Justice Ginsburg has been a centrist or left-of-center Justice, regardless of how one might characterize the views she expressed before

becoming a judge. If confirmed, I will follow the decisions of the Supreme Court and not views I expressed as an academic or advocate. For example, I support public funding of abortion services as part of general programs providing the poor with medical care, but I fully recognize and would absolutely apply Supreme Court precedent upholding policy choices not to fund abortions. Indeed, during my prior five years of service at OLC, I applied just such precedent.

6. In response to a question from Senator Sessions, you testified at your hearing, that you gave certain Senate staffers “guidance to form their questioning” of Supreme Court nominees John Roberts and Samuel Alito. To the best of your knowledge, information and belief, and to the best of your ability to reconstruct the facts, to whom did you volunteer guidance and what questions did you advise them to ask?

Answer: I recall receiving questions and requests from senior staff working for four Senators who served on the Senate Judiciary Committee in connection with one or both of those nominations. They involved questions of constitutional law and government practices about which I had some knowledge based on my teaching, study, and work in the government. I believe that most of the questions related to issues of presidential power and more generally separation of powers; some related to congressional authority to enact legislation; some related to the right to privacy; and there may have been other areas as well. I do not recall that I ever advised any Senator to ask any particular question; I may have reviewed some draft questions prepared by senior staff, but am almost certain I did not draft any questions myself. I believe these conversations should be viewed as confidential, as comparable conversations with senior advisors to the President would be, and that disclosing them without a Senator’s specific approval might chill the ability of Senators to solicit valuable advice in the discharge of their constitutional advice-and-consent responsibilities.

7. In an article you wrote last year, you asserted that “Progressives need to rethink the theoretical underpinnings of *Roe*—and what is left of *Roe* after [*Planned Parenthood v.*] *Casey* and [*Gonzales v.*] *Carhart*—and also situate access to abortion, contraception and reproductive health care within a broader progressive constitutional vision.” What about the Supreme Court’s current jurisprudence in this area do you feel is deficient?
- a. You also made several references to “the progressive agenda” and remarked in the area of abortion jurisprudence that “the progressive agenda would focus on the courts as the vehicles for desired change.” On what basis do you believe that courts are an appropriate vehicle to enact a “progressive agenda?”
 - b. In what areas other than abortion do you believe the courts should be vehicles for change?

Answer: I believe that clearly courts should not be driven by the pursuit of an ideological agenda. That said, the Constitution specifically enshrines principles of liberty and equality, and it is proper for the judiciary to vindicate these principles. For example, the Supreme Court rendered significant constitutional change in deciding *Brown v. Board of Education* and overruling its decisions accepting of the doctrine of “separate but equal.” I do believe it is appropriate for advocates to work on litigation that vindicates constitutional principles in a way that is consonant with their own conceptions of how those principles should be applied. I have exhorted progressive groups to this task. My response below to question ten describes why I recommend situating abortion within a broader conception of reproductive liberty and health.

8. In your notes from “Talk at Planned Parenthood Midwest Conference, Indianapolis, IN, 11/8/08” you state “OLC does range of issues . . . to domestic issues such as const of fed funding to faith based entities to affirm action. Several abortion issues when I was there.” To which abortion issues were you referring?
 - a. What abortion issues do you anticipate the Office of Legal Counsel could handle in the next four years?

Answer: It would be inappropriate for me to reveal the specifics of nonpublic legal advice that I provided during the course of my service at OLC. It is public knowledge that, as a general matter, OLC reviews pending legislation for constitutional compliance and assists in the preparation of the Executive Branch’s views on legislation, with an eye toward working with Congress to correct any constitutional defects prior to passage. In that capacity, bills regulating abortion have comprised, and I would expect would continue to comprise, a very small percentage of the numerous bills sent to OLC for review each year. For example, restrictions on federal funding for abortion have been included in appropriations bills. When presented with any issue, I would (as I was during my five years of prior service at OLC) be guided by Supreme Court precedent, including those upholding abortion restrictions.

9. In your writings and speeches, you have argued for the highest level of scrutiny for abortion regulations and opposed what some would call mild regulations as failing to meet that standard. For instance, you were quoted during the litigation of *Planned Parenthood v. Casey* as analogizing Pennsylvania’s 24-hour waiting period prior to having an abortion to “a law saying newspapers have to wait 24 hours before publishing a story.” As you know, the Court sustained that waiting period and has sustained other regulations on abortion under a different standard of scrutiny-the “undue burden” test.
 - a. Do you believe the Court erred by adopting something less than a strict scrutiny standard?
 - b. Given your statement implying that a restriction on the right to abortion is

analogous to a restriction on a newspaper exercising its First Amendment rights, do you believe the Court should apply strict scrutiny to other restrictions on specifically enumerated rights such as the Second Amendment? Why or why not?

Answer: Although I personally have criticized the change in standard from *Roe*'s "strict scrutiny," if confirmed and if the issue arises, I of course will apply the *Casey* "undue burden" standard in evaluating the constitutionality of abortion restrictions. The undue burden standard has been the governing standard for more than fifteen years. I understand that in *Heller* the Supreme Court held that the right to bear arms protected under the Second Amendment is an individual right, but that the Court did not identify the level of scrutiny to be applied to gun restrictions. However, I have not ever studied or written about the Second Amendment and do not have a personal opinion on the appropriate standard of review. If confirmed, I would apply *Heller* whenever it is relevant to an issue presented to OLC.

10. In your 2006 article entitled "How *Roe* Will Go," you had sharp criticism for the notion that abortion should be "safe, legal, and rare." You wrote, "The notion of legal restrictions as some kind of reasonable 'compromise' — perhaps to help make abortion 'safe, legal, and rare' — proves nonsensical." Yet both of the last two pro-choice presidents, Clinton and Obama, asserted that the goal should be to keep abortion rare. Do you agree with the goal of striving to keep abortion rare?
 - a. Your article decried the "incremental evisceration of *Roe*" which has manifested itself through "such benign-sounding requirements as waiting periods, informed consent, physical specifications for buildings . . . , and special hospital privileges" which are "designed to sound reasonable while also limiting the number of abortions performed." Other than perhaps requiring doctors to perform the procedure, you seem to oppose virtually every regulation of abortion, no matter how reasonable and benign many of us find them (including many of us who are pro-choice), as a matter of constitutional law. Is that correct?

Answer: I would note first that issues of policy 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 academic and an advocate, 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 the dramatically decreasing availability of abortion services. I do not personally oppose laws that regulate providers of abortion services just as the government does other providers of medical services, when the purpose and effect is truly to protect the health of patients and the safety of the procedure. The Supreme Court has upheld many restrictions on abortion as constitutional, including parental notice and consent laws, funding restrictions, a federal ban on partial birth abortions, and waiting periods. If confirmed as the head of OLC, if ever asked to provide legal advice about the constitutionality of abortion restrictions, my advice would of course be based upon those Supreme Court decisions.

- b. According to William Saletan, your opposition to requiring parents' involvement in the abortion decisions of their teenage daughters was strong enough that you urged NARAL: "Do not, as part of an affirmative legislative strategy, introduce even a liberalized version of a parental consent or notification law." Do you remain opposed to such laws?

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.

- 11. In your 2006 Slate article "The Outer Shell," you wrote that the "conventional wisdom now counsels" that the demise of *Roe* and the "likely backlash" could "cause Republicans political harm-possibly severe harm. In the long run, this could benefit many women." Would you explain what that conventional wisdom is and how exactly the demise of the Republican party will "benefit many women?"

Answer: The "conventional wisdom" to which I alluded was not that the demise of the Republican party would benefit women. I in no way meant to suggest any such thing, either as an expression of the "conventional wisdom" or my own views. It was, rather, the "conventional wisdom" that an overruling of *Roe* would mobilize pro-choice voters which in turn would both harm the Republican Party and benefit women, because voters would be more likely then to vote for Democrats and to more likely protect womens right to choose through political action. In the article you quote, I then took issue with this scenario, saying "I would hesitate to suggest that possibility. The ultimate political and practical consequences are unknowable."

12. Do you believe the United States has the power to preventively detain terrorist suspects?
- a. Must such detentions occur in the United States?
 - b. Does the United States have no authority to detain except after Article III court determinations?
 - i. What in your view constitutes the minimum of due process that should be required for tribunals that authorize or affirm detentions?
 - ii. Would detainees before those tribunals enjoy a presumption of innocence or of guilt?
 - iii. What evidentiary threshold would have to be met in those tribunals that review such cases? A preponderance of the evidence? Clear and convincing evidence? Beyond a reasonable doubt?
 - iv. Would you authorize the admission of evidence in such tribunals not admissible in civilian courts? How would you go about departing from the evidentiary rules that govern civilian courts?
 - v. Would detainees have to be either released or brought to the United States?

Answer: Some of the important questions you raise concern matters of policy, as to which OLC would not be the decision-maker. With respect to the legal questions, I have not studied them sufficiently to form an opinion. If the questions were presented to OLC for resolution, I would follow OLC's traditional methods of interagency consultation before rendering an opinion. I would note that in a January 22, 2009 Executive Order, President Obama established an interagency Special Task Force on Detainee Disposition "to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism." The Special Task Force is co-chaired by the Attorney General. The Task Force has been directed to report to the President on these issues within 180 days of its establishment. Through its work, the Task Force may provide answers to some of the questions you raise.

13. You also had this to say in *Change for America* regarding the Bush Administration's policies regarding detainees and the war on terror: "Notwithstanding the Court's repudiation of some unlawful and harmful policies, many others remain in need of correction." What other policies do you feel are in need of correction, and how do you think they should be corrected?

Answer: As a former Deputy Assistant Attorney General and then Acting Assistant Attorney General, my concern about the Bush Administration's actions in the war on terror has focused on OLC and rule-of-law, not policy, issues. My principal criticism has been the failure of the Bush Administration, most notably on issues of torture and domestic surveillance, to comply with valid laws enacted by Congress pursuant to its ample authority under Article I of the Constitution. My strongest objections were aimed at those occasions when the Bush Administration failed to notify Congress when it asserted the authority not to comply fully with a statutory requirement. That was the impetus for my development of the "Principles to Guide the Office of Legal Counsel," as well as my work last summer with former Associate Counsel to President George W. Bush, Brad Berenson, at the request of Senators Feingold and Brownback, to draft legislation that resulted in the introduction of the "OLC Reporting Act of 2008."

14. In your notes for a 2004 panel discussion hosted by the American Constitution Society, you wrote about the war on terror: "Because this is a different kind of war, if war at all, and war has a long history of specific constitutional meaning, I think it is better to describe more precisely just what we are talking about, rather than use an imperfect analogy." (emphasis added)

a. In your view, are we at war?

Answer: Yes.

b. What do you mean by the "specific constitutional meaning" of war? Does the war on terror fail to meet this definition?

Answer: As I testified at my hearing, there is no question that we are at war. The remarks to which you refer above addressed the broader question whether it was useful to speak generally of a "War on Terror." Specifically, I recounted hearing Lee Hamilton speak about the findings of the 9-11 Commission, which he had just finished co-chairing. 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 radical new national security threats our nation faces. With respect to our conflict with Al Qaeda, or our conflicts in Iraq and Afghanistan, however, there is no question that we are at war.

15. In *Guidelines for the President's Legal Advisors, an introduction to Principles to Guide the Office of Legal Counsel*, you stated that, among other things, OLC opinions should account for "the institutional traditions and competences of the executive branch as well as the views of the President who currently holds office." The OLC under President Clinton held that the president can go to war on his own authority; he can conduct the war as he sees fit; a war can exist between the United States and a non-state entity such as al Qaeda; and Congress's ability to interfere is limited by the president's constitutional powers, including his Commander-in-Chief power.

- a. In your view, do traditions that encompass broad war-making powers, as the Clinton OLC repeatedly noted, fall under the "institutional traditions" that you mention?

Answer: The "institutional traditions and competences of the executive branch" to which I referred would include the body of OLC precedents from earlier Administrations, including the Clinton Administration, and including opinions about the President's Commander in Chief powers.

- b. The Obama Administration's position on several war-on-terror related legal issues so far (e.g., the state secrets privilege, extraordinary rendition, and targeted killing) has been in line with the Bush administration's position. Even on the largest issue of apparent difference - interrogation of terror suspects - the Obama Administration has left the door open to authorizing interrogation techniques beyond those in the Army Field Manual. As an outspoken critic of the Bush Administration, how will you reconcile your views with the present administration's positions if confirmed?
- c. Do you still hold to all of your criticisms of the Bush Administration's conduct of the war on terror?

Answer: I am not currently aware of any views I hold in this area that differ from those of the Administration, but in any event, if I am confirmed my job will be to offer legal opinions as to what the law is or requires regardless of my personal views of the policies in question. As indicated in my answer to Question 13, my criticism of Bush Administration policies in the war on terror has consistently focused on the inappropriate methods used by OLC in rendering opinions on certain legal issues and on the deficient reasoning in those opinions. In particular, my criticism has focused on opinions concerning torture and the terrorist surveillance program and especially the administration's failure to comply—in

some cases in secret—with valid federal statutes that limited executive branch action. The Bush Administration itself has withdrawn or disavowed many of the opinions I criticized. Yes, I still hold to those criticisms.

- d. What criticisms, if any, do you have of the Clinton Administration's practices or policies regarding the same issues?

Answer: Again, my criticisms have been limited to matters of institutional procedure and legal reasoning, not policy. I do not have any specific criticisms of the Clinton Administration in these regards.

16. In *Change for America*, you also argued in criticizing Bush Administration policy that “extraordinary renditions to countries known to use torture” should “immediately end.” Yet former officials of the Clinton Administration have stated that the practice known as extraordinary rendition was regularly practiced during that administration. Richard Clarke, the counterterrorism coordinator for the National Security Council, wrote that renditions—which he defined as “operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government”—“were becoming routine” by “the mid-1990s.” He added that “[s]ometimes FBI arrest teams, sometimes CIA personnel, had been regularly dragging terrorists back to stand trial in the United States or flying them to incarceration in other countries.” Michael Scheuer, former chief of the CIA’s Bin Laden Unit, testified that when the CIA initiated a rendition program in 1995, President Clinton and several of his top advisors “made it clear that they did not want to bring those captured to the U.S. and hold them in U.S. custody.” Mr. Clarke stated that “President Clinton approved every snatch” — another term for rendition — “that he was asked to review. Every snatch CIA, Justice, or Defense proposed during my tenure as [Counterterrorism Security Group] chairman, from 1992 to 2001, was approved.” Former CIA Director George Tenet asserted the following in 2002: “In conjunction with the FBI, CIA had rendered 70 terrorists to justice around the world” prior to September 11. “Al-Qa’ida might have been able to operate freely in Afghanistan, but the terrorists knew they were fair game elsewhere.”

Moreover, in a March 11, 2005 op-ed in the *New York Times* entitled “A Fine Rendition,” Mr. Scheuer asserted that officials in the Clinton White House and Justice Department:

[K]new that taking detainees to Egypt or elsewhere might yield treatment not consonant with United States legal practice. How did they know? Well, several senior C.I.A. officers, myself included, were confident that common sense would elude that bunch, and so we told them - again and again and again. Each time a decision to do a rendition was made, we reminded the lawyers and policy makers that Egypt was Egypt, and that Jimmy Stewart never starred in a movie called ‘Mr. Smith Goes to Cairo.’ They usually listened, nodded, and then inserted a legal nicety by insisting

that each country to which the agency delivered a detainee would have to pledge it would treat him according to the rules of its own legal system.

- a. Ms. Johnsen, you served in the Office of Legal Counsel during this period. To what extent were you aware of participation in the practice of extraordinary rendition by the Clinton Administration generally, and by the FBI or other components of the Justice Department specifically?
- b. Did you ever authorize the practice of rendition or otherwise express an opinion endorsing the legality of the practice? If so, do you believe you made the correct decision?
- c. In retrospect, do you believe that the Clinton Administration's practices with respect to rendition were lawful? Do you believe they were otherwise consistent with American values?

Answer: I know that the practice of rendition did not begin with the Bush Administration and my belief is that it is not in all cases unlawful. I have not engaged in any study of the Clinton Administration's rendition practices that would allow me to comment on their legality or advisability. President Obama has ordered reviews of detention and rendition policies. It would be inappropriate for me to answer those questions that would require me to disclose nonpublic legal advice that I provided during the course of my service at OLC. Moreover, the subject matter is such that, if such advice was given, it likely would have been classified.

17. In November 1994, President Clinton's Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, signed an opinion letter to the White House Counsel in which he said the following:

The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment.

- a. Did you participate in the preparation of this statement?
- b. Do you currently agree with this statement?
- c. Were you aware of this position during your tenure in the Justice Department?

Answer: Yes, I believe that all of the OLC leadership (as well as a few line attorneys) participated in the preparation of this memorandum, which has been publicly released. It involved a core question of presidential power and the separation of powers that OLC considered throughout my tenure there, and with which Congress and the Executive Branch continue to wrestle. I have continued

to think and write about this issue. I generally agree with the statement as a whole, as well as with the way in which Attorney General Eric Holder and Deputy Attorney General-nominee David Ogden recently put it: “[T]he President’s power is at its lowest ebb when he acts contrary to a statute duly enacted by Congress, but the Constitution is the supreme law of the land. There are circumstances where a President can refuse to comply with a statutory provision. These include a legislative veto, see *INS v. Chadha*, 462 U.S. 919 (1983), or a statute purporting to limit the President’s removal power in certain circumstances, see *Myers v. United States*, 272 U.S. 52 (1926).” I further believe, consistent with past practice, that nonenforcement is appropriate only in relatively rare circumstances, and that the President should work with Congress to avoid the enactment of unconstitutional provisions and to repeal any that are enacted. Finally, as I have written and testified, I believe it is critical for the President to notify Congress whenever he determines not to comply fully with a statute (subject to protections for national security information).

18. A few months earlier, in July 1994, Deputy Attorney General Jamie Gorelick argued before the House Select Committee on Intelligence that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. The Committee at the time was considering legislation to subject such searches to approval from the FISA court. That issue arose when attention was drawn to the practice of intelligence agents conducting clandestine searches within the United States. Such searches extended not only to foreign embassies, but to U.S. citizens within our borders. The warrantless searches of the office and home of Aldrich Ames, a U.S. citizen, in June and October 1993 gave rise to concerns that courts might strike down this practice. Deputy Attorney General Gorelick’s testimony before the Senate Intelligence Committee maintained, “the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General.” She stated further, “it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.” In the Justice Department’s view, she testified, it did not matter whether searches were “conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. . . . [w]e believe that the warrant clause of the Fourth Amendment is inapplicable to such searches.”
 - a. Do you agree with this statement?
 - b. Were you aware of this position during your tenure in the Justice Department?
 - c. Do you believe the warrantless searches of the office and home of Aldrich Ames were legal?

Answer: I was generally aware of this issue and of Deputy Attorney General Gorelick's position. Although I had not and still have not carefully studied the question, I had no disagreement with her position and understood it to be the position of the majority of federal courts that had addressed the issue in a related context. I do not know enough about the facts of the Ames case to have a view on whether the searches were legal.

19. In 2000, Assistant Attorney General Randolph D. Moss issued an opinion letter to the Office of Intelligence Policy and Review entitled "Sharing Title III Electronic Surveillance Material with the Intelligence Community," which addressed the statutory provisions governing wiretaps in criminal investigations. That opinion included the following language:

[I]n extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III. . . . Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.

a. Do you agree with this statement?

Answer. I do not recall ever reviewing this particular opinion by Assistant Attorney General Moss. As a general proposition, though, and consistent with my answer to question 17, there are circumstances where a statute might be unconstitutional as applied. The President's authority would, however, be at its lowest ebb, as described by Justice Jackson in his important *Youngstown* opinion. If such circumstances arise, the Executive Branch should notify Congress of that fact and seek to obtain an appropriate statutory change. Communication with Congress is critical in such circumstances: It may well be that Congress simply did not contemplate that application, and where national security truly is endangered Congress and the President should work together to develop an appropriate statutory framework.

20. You stated in a posting on Slate.com that Indiana's voter identification law was "excessive and indefensible" and an effort by Republicans to suppress votes. The Supreme Court upheld Indiana's law as constitutional. There was no finding whatsoever that this law was an attempt to suppress votes as you claimed. In fact,

according to an article in the *Wall Street Journal* on January 30, 2009, Indiana had the largest increase in turnout of Democratic voters of any state in the country at 8.32 percentage points in the November election.

- a. Do you acknowledge that your claims about voter suppression were proven wrong?
- b. If confirmed, will you pledge to comply with the Supreme Court's holding in *Crawford* and acknowledge that state voter identification laws such as Indiana's are constitutional and not "excessive and indefensible?"

Answer. If confirmed I will of course apply the Supreme Court's decision in *Crawford* whenever it is relevant to an issue before the office. 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 is certainly a subject for study.