

**Responses to Senator Chuck Grassley's  
Questions for the Record to  
Virginia Seitz, Assistant Attorney General, Office of Legal Counsel**

- 1. In 1981, the head of the Office of Legal Counsel, Mr. William French Smith, authored a letter to the Judiciary Committee regarding the duty of the Department of Justice to defend an act of Congress. After examining the question, Mr. French concluded as follows:**

**“The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument ultimately be unsuccessful in the courts.”**

**Please take whatever time is necessary to study the issue, and answer the following question: Do you agree with Mr. French’s assessment that the Department must defend a statute whenever a reasonable argument can be made in its defense?**

Response: I am not familiar with the letter quoted in this question. It is, however, my understanding that the Department of Justice has a longstanding practice of defending the constitutionality of acts of Congress and declines to do so only in the rare cases when no reasonable argument can be made in their support and when a law intrudes on the constitutional authority of the executive.

- 2. When the Attorney General announced his decision not to defend the Defense of Marriage Act, he submitted a letter to Speaker Boehner explaining his rationale. He admitted that DOMA had been successfully defended in federal circuit courts. And, he admitted that those circuits had adopted a rational basis scrutiny. Nonetheless, the President determined – at the Attorney General’s recommendation – that DOMA should be reviewed under a heightened scrutiny, and therefore the statute was unconstitutional. Please take whatever time is necessary to study the issue, and answer the following question: Given that other circuit courts had adopted rational basis scrutiny, do you believe there is no reasonable basis on which to defend the statute?**

Response: I do not currently have a view on this question, and I would not be comfortable expressing my view without substantial legal research and analysis and access to the Department’s deliberations about that litigation and its decision, which I do not and cannot have. Based on the information that is publicly available, I understand that this matter is already in litigation and that the President and the Attorney General have decided not to defend the constitutionality of the Defense of Marriage Act. As a result, I do not believe that this issue would come before me if I were confirmed. When

questions about the constitutionality of an act of Congress do arise, I will follow the traditional OLC policies and practices in responding, including researching the relevant facts and law and engaging in consultations with other Department of Justice components and other agencies with relevant expertise and affected interests. If questions about defending the constitutionality of an act of Congress were to arise, I would follow the Department's longstanding practice described in the response to question 1.

**3. Do you agree with the Attorney General's decision not to defend the statute?**

Response: For the reasons given in response to question number 2, I have not developed a position on this question.

**4. If a constitutional challenge to a federal statute reaches the Supreme Court, do you believe the Solicitor General has an independent obligation to assess whether there is any reasonable basis on which to defend the statute?**

Response: I have not studied the statutes, regulations and history governing the particular obligations of the Solicitor General and do not know what his or her responsibilities and traditional role are in connection with the Department's longstanding tradition of defending the constitutionality of federal statutes. OLC issued an opinion, entitled *Role of the Solicitor General*, 1 Op. of the Office of Legal Counsel 228 (1977), which generally describes the Attorney General's authority and the traditional independence of the Solicitor General. It states that the Attorney General has the power to determine the position of the United States in the Supreme Court, but that the Attorney General "participate[s] in the formulation of the government's position before the Court" only in rare instances.

**5. You were a member of the National Association of Women Lawyers Evaluation Committee of Supreme Court nominees. Your Committee evaluated Chief Justice Roberts, as well as Justices Sotomayor and Kagan. Your committee gave "well or highly qualified" rankings to both Justices Sotomayor and Kagan, but only a ranking of "qualified" to Chief Justice Roberts. Last year you spoke at panel for the American Constitution Society, and commented on Justice Kagan's elevation to the Court. You said, "I am a firm believer in the power of critical mass. The level of comfort increases with numbers and ... for the first time there is a significant enough group of women on the court to see whether that has any impact or not."**

**a. Do you believe gender has any effect on the judicial decision making process?**

Response: No, I do not believe that the gender of judges has an effect on judicial decisions.

**b. What impact or change were you looking to observe in the Court from the number of female justices now present?**

Response: The presence of additional female justices (and judges) on the bench might have an impact in two ways: First, once it becomes routine to see women on a court, the public will cease to view women in the judiciary as symbols or “female judges” and will view them simply as judges. Second, judges hold positions of high visibility in the legal profession and in public life. The presence of additional women on the bench may enhance the public perception that the legal profession offers equal opportunities to all.

- 6. You participated in a panel discussion for the Federalist Society that was later published in an article, *Congress and the Court*. You appear to argue that economic rights, such as property rights, are less important than non-economic rights. During the question and answer session, you were asked: “you are coming out and saying that you are willing to diminish the rights of those from whom you take the resources.” You responded: “Absolutely. Though, of course, I do not see economic rights as the kind of undivided whole in which every cent you have is your right. I certainly do not see economic rights that way.” Please fully explain what you meant by this statement.**

Response: The panel the question references took place in 1993, and I do not have a current recollection of what I meant. I was asked to participate because I had been one of the attorneys representing the AFL-CIO in several cases involving economic rights such as the contracts clause, and I was speaking from that perspective. Reading the transcript of the question and answer session, I recall that the panel was discussing judicial review of federal laws affecting economic rights, and I believe this statement was responding to a question about the lawfulness of taxes and tax increases which, as the questioner stated, diminish the resources of some for the benefit of others. In that context, I believe that I was stating that laws such as the tax code are constitutional.

- 7. You argue that society must define “economic liberty” and decide “what goods are entitled to the statutes of secured entitlement.”**

- a. Please define what you mean by “economic liberty”?**

Response: As noted above, I do not have a current recollection of what I meant. Reading the transcript, it appears to me that I meant the ability to control and use one’s property without government regulation.

- b. What role does “economic liberty” play in your legal interpretation of matters regarding both economic and non-economic rights?**

Response: I do not think the definition of economic liberty would play any role in legal interpretation.

- c. What economic rights, in your view, should be diminished?**

Response: As noted above, I do not have a current recollection of this panel session, and I do not have a general view on this topic. Reading the transcript, I believe that we were discussing the constitutionality of regulation of economic rights such as freedom of contract as interpreted during the *Lochner* era. Any personal views I might have about economic rights would not be relevant to or affect any legal analysis I would provide if I were confirmed as Assistant Attorney General for the OLC.

**8. You also said in *Congress and the Court* that you are not an “originalist.”**

**a. How do you define “originalism”?**

Response: As noted above, I do not have a current recollection of this panel session. Reading the transcript, I believe that in the context of this discussion of judicial power to review legislation affecting economic rights, I was using the term to refer to the belief that the Constitution requires the *Lochner* era view of contractual freedom and property rights. I do not think that this is the common use of the term. I believe it is generally used to refer to a belief that all provisions of the Constitution have their original meaning, that is, their meaning at the time of the framing.

**b. What specific aspects of originalism do you reject?**

Response: I do not have an overall interpretive framework of the Constitution. In my work, I generally confront questions of constitutional interpretation in the context of a single constitutional provision and a particular concrete problem. In that setting, I focus not only on the constitutional text and structure and the Framers’ intent, but also on relevant Supreme Court precedent and the other materials that the Supreme Court had deemed relevant to interpreting the particular constitutional provision at issue.

**c. If you are not an originalist, to what method of constitutional interpretation do you ascribe?**

Response: As described in b. above, I would use the traditional method of construction. I would first consider the constitutional text and structure and the Framers’ intent, and I would then look to Supreme Court precedent addressing the relevant constitutional provision and consider all other materials that the Supreme Court had deemed relevant to interpreting the particular constitutional provision at issue. If I were confirmed, in my role at OLC, I would also consider Executive branch precedent interpreting the relevant constitutional provision.

**9. What methods of interpretation and resources will you use as authoritative sources for your legal opinions as the Assistant Attorney General?**

Response: I would use the traditional method of interpretation and the resources described in my response to 8.c. above.

**10. In 2008, Attorney General Holder gave an address at a convention for the American Constitution Society, assuring young lawyers that America would “soon be run by progressives.” He encouraged them to get involved in ACS, telling them that the administration would be “looking for people who share our values...and a substantial number of those people” are going to be “members of the ACS.” Including yourself and President Obama’s first nominee to lead the Office of Legal Counsel, Dawn Johnsen, quite a number of ACS members have been nominated to judicial vacancies, and high ranking positions within the Administration.**

**a. Considering that you are a member of the American Constitution Society, do you support the sentiment expressed by Attorney General Holder’s statement regarding the hiring of ACS members?**

Response: I am not familiar with Attorney General Holder’s speech and am not sure what he intended by his comment. However, if I were to make hiring decisions at OLC, I would consider traditional merits-based criteria in doing so, and I would not consider membership in ACS or the absence of membership in ACS as relevant to a hiring decision.

**b. As a current member of ACS, will you be able to separate your personal political beliefs from your obligations to fulfill the duties of the Office of Legal Counsel?**

Response: Yes. I fully understand that my personal political beliefs must play no role in fulfilling the duties of OLC.

**11. Despite your impressive professional record, you have no experience with matters involving national security and very little background with criminal issues. The OLC handles some of the most complex and obscure legal questions on matters of national security. What aspect(s) of your record prepares you to address questions regarding national security?**

Response: In my twenty-five years of private practice, I have had the opportunity to work on many cases involving complex and difficult constitutional and statutory issues. I understand that the skills and the judgment that result from that extensive experience in constitutional and federal statutory litigation and analysis are directly analogous to the skills and judgment required to provide excellent legal advice on the issues that arise in the national security setting. In addition, I have substantial experience as an appellate generalist in quickly mastering new areas of law and in working with subject-matter experts to ensure that I fully understand all aspects of complex issues that I must address in briefing and arguing an appeal. These skills, too, will be useful in interacting with the national security components at the Department of Justice and with other agencies and in addressing the array of legal issues involving national security that arise

at OLC. Finally, I am comfortable working with teams of individuals who bring different skills to the table in addressing complex legal issues. The attorney-advisers and deputies at OLC have substantial subject matter expertise in all relevant national security areas, and OLC's policies and practices ensure a team approach to analysis of the important legal issues that come before it.

**12. Please describe with particularity the process by which these questions were answered.**

I did a complete first draft of answers to these questions. I then discussed the draft with a representative of the Department of Justice. I then prepared a final draft of my answers and forwarded them to the Department. I understand that the Department will submit my answers to the Committee.

**13. Do these answers reflect your true and personal views?**

Yes.