

Senator Chuck Grassley
Follow-Up Questions for the Record

David Jeremiah Barron
Nominee, U.S. Circuit Judge for the First Circuit

- 1. During your hearing, I asked you about your role in providing guidance regarding the Affordable Care Act. You said it is the ordinary task of the Office of Legal Counsel to review legislation that is pending in Congress. But you would not answer my questions because you did not want to waive a privilege.**

To be clear, I am not asking you to detail specific conversations, but as you know, answering my questions regarding what you worked on while at OLC does not implicate any privilege. With that in mind, while at OLC, did you provide, formally or informally, any advice on the following topics:

- a. The constitutionality of Obamacare?**
- b. An assessment or judgment regarding possible litigation based on any proposed or actual procedural event that occurred in either chamber concerning Obamacare?**

Response: While information about whether or not a client asked a particular question is confidential, I can say that one function of the Office of Legal Counsel (OLC) is to review virtually all pending federal legislation for constitutional issues, and I have been authorized by the Department of Justice to confirm that I did so here in my role as the Acting Assistant Attorney General for the Office.

- 2. Please describe your involvement with the Obamacare legislation and/or the administration's preparation or planning for potential litigation regarding that legislation, including but not limited to your attendance at meetings, whether you provided any opinions, views or comments, and whether you reviewed and/or approved any documents with respect to the foregoing.**

Response: As indicated in response to question 1, OLC regularly reviews pending legislation for constitutional issues and did so for the Affordable Care Act. In addition, it is not unusual for Department of Justice litigators to solicit and consider OLC's input on legal issues that arise in litigation, and I have been authorized by the Department to say that in my role as head of OLC I participated in the Department's process for developing a response to litigation challenging the constitutionality of aspects of the Affordable Care Act.

3. Would you commit to providing the Committee with any documentation of the foregoing?

Response: I am no longer employed by the Department of Justice, and I have no documentation relating to the foregoing in my possession.

4. In your responses to my questions, you stated that it was “not accurate or useful to ascribe the outcome of a particular decision to a judge’s conservative or progressive ‘tilt,’” and proceeded to suggest that a judge only decides cases at hand in accord with the facts particular to that case. If a judge is to rely only on the relevant legal texts and judicial precedent reflecting them, how do you account for varying opinions within the federal judiciary?

Response: I believe it is a judge’s obligation to decide a case on the basis of the facts and the law, including precedent. While judges do at times disagree about what the facts and the law and precedent require in some specific cases, statistically they agree more often than they disagree. I do not believe there is any single explanation that accounts for the differing judgments of judges in particular cases. There are no Justices on the Supreme Court, for example, who vote the same in every case.

5. You also said that a judge should not base a decision on whether an outcome could be classified as “progressive” or “conservative.” Rather than focusing on an outcome, is it not true that judges do, in fact, interpret constitutional provisions according to some preconceived theory of interpretation?

Response: Assuming the phrase “preconceived theory of interpretation” also encompasses a commitment to use traditional methods of interpretation as explicated by applicable precedent then it would be accurate to say that judges likely have such theories.

6. When you stated that “Federalism is what we make of it,” and “It’s time for progressives” to do so, did you mean progressives should “make the most of Federalism,” in an outcome-centered way or in an interpretative way?

Response: I made that statement at the conclusion of an article I wrote as an academic. In that statement, I cautioned critics of the Rehnquist Court’s federalism decisions not to assume that defenses of unlimited national power would promote what might be called “progressive” outcomes. In doing so, I did not argue that judges should decide a particular case implicating federalism on the basis of whether the outcome could be classified as “progressive” or “conservative.” I also argued in that article that, outside the courts, state and local governments were important sources of policymaking, including

for what might be considered “progressive” policies, and the quoted statement was also referring to that point.

- 7. In response to one of my questions related to the above quote, you said that you would simply “apply all relevant Supreme Court and First Circuit precedent to the particular facts,” and nothing more. Certainly every judge or Justice presumes he or she is doing simply that when deciding cases. How would you differentiate yourself from those who do, in fact, espouse a certain judicial philosophy or theory of interpretation?**

Response: My own view is that a judge is bound to apply traditional methods of legal interpretation in light of applicable judicial precedent in resolving particular cases on the basis of the facts at issue. I do not feel I am in a position to characterize how that approach to judging may differ from the approach that others may espouse.

- 8. If it is not accurate or useful to describe divergences on the federal bench as “progressive” or “conservative,” why have you followed the practice of other commentators in using the terms with respect to the Supreme Court?**

Response: While I do not believe it is accurate or useful to use the terms “progressive” or “conservative” to ascribe the basis for the divergences on the Court in any particular case that is at issue, I have used those terms in the course of academic debates to challenge arguments that some scholars have made regarding the need to substantially diminish the traditional role of the Supreme Court in resolving constitutional controversies in order to promote what might be called “progressive” outcomes. I have also joined in the academic practice of using those terms in discussing divergences on the Court in certain types of closely divided cases, such as cases concerning federalism.

- 9. In my Questions for the Record, I asked you to identify any “‘right-wing distortions of the Constitution’ you are concerned about of feel need to be countered” and you responded that you were not familiar with Mr. Edelman’s article. His article aside, my questions remain. Do you believe there are any right-wing distortions of the Constitution? If so, please identify them.**

Response: In our history, persons of various views have surely made claims about the Constitution that have distorted its meaning, but I do not know what is meant by the phrase “right-wing distortions,” as it is not a phrase I believe I have ever used, and so cannot offer any examples that might fall within it. In any event, I do not believe the appropriate role of a judge would be to “counter” any distortions that might be put forward. The role of a judge is to decide the particular case at issue in light of the factual record and the applicable law.

10. In my Questions for the Record, I also asked you to identify decisions where you found a court's decision to be incorrect. You told me that you would follow precedent faithfully. But I am trying to understand how you analyze cases. Are there federal cases outside of the Supreme Court or the First Circuit that in your view have been incorrectly decided? Please list them and explain why the legal reasoning is faulty.

Response: Although as an academic there have been instances in which I have raised concerns about the reasoning in a federal court's opinion, I recognize that in doing so I did not have the benefit of the briefing of the parties, discussion with fellow judges hearing the case, and consideration of the full factual record. The role of a federal judge is very different from that of an academic; if I were fortunate enough to be confirmed as a federal judge, I would apply precedent without regard to any personal views I might have, if any, regarding the correctness of a particular case. In terms of indications of my approach to analyzing cases, I would point to the opinions I have given to the Committee that I signed while serving as Acting Assistant Attorney General of the Office of Legal Counsel.

11. You told me that you submitted your answers to my original questions to an attorney at OLP then revised your draft answers before submitting them in final form. What did you change after speaking to an attorney at OLP? Please submit the answers you drafted before their content was edited by OLP.

Response: The answers I provided to the Committee on December 9, 2013 are solely my own, and they are based on my own judgments. For that reason, I believe only those answers, and not any earlier drafts, accurately reflect my true and personal views about the questions that you asked.