

Follow-up Questions of Senator Tom Coburn, M.D.

Hearing: “*Nomination of Elena Kagan to be Solicitor General of the United States*”

United States Senate Committee on the Judiciary

February 10, 2009

Solomon Amendment

President Obama has said, “the notion that young people...anywhere, in any university, aren’t offered the choice, the option of participating in military service, I think is a mistake.” As solicitor general, you are tasked with deciding whether and when to appeal if a lower court rules against the government in any case.

- If a lower court strikes down the Solomon Amendment, which it appears this Administration supports, will you recommend intervening on behalf of the government to defend the policy, even though you once described its defeat as “gratifying?” (Reported in the Harvard Law news on 11/30/04 after the Third Circuit struck down the Solomon Amendment)
- Would you recuse yourself from personally arguing a case involving the Solomon Amendment?
- Will you commit to ensuring a vigorous defense of the Solomon Amendment, providing the resources and expertise necessary to vehemently defend the policy?
- Do you believe that you would enjoy a job that requires you to advance a policy that you have described as “discriminatory,” “deeply wrong,” “unwise,” “unjust,” “abhor[rent],” a “profound wrong,” and a “moral injustice of the first order?”

Answer: As I stated at my confirmation hearing, I know well the facts and issues involved in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and I feel confident in saying that had I been Solicitor General at the time that the 3rd Circuit held the Solomon Amendment unconstitutional, I would have sought certiorari in the Supreme Court, exactly as then-Solicitor General Paul Clement did. *A fortiori*, now that the Supreme Court has upheld the Solomon Amendment, if confirmed I would vigorously defend it against constitutional challenge. I would not recuse myself from participating in or personally arguing such a case because I would feel confident in my ability to supply such a defense given the responsibilities and role of the Solicitor General. I understand that role as representing the interests of the United States, not my personal views. I indeed think that I would enjoy, as well as be deeply honored by, the Solicitor General’s position if I am fortunate enough to be confirmed. The advocate’s role is frequently to put aside any interests or positions other than those of her clients. And as I hope I expressed at my confirmation hearing, I would take enormous pride in representing and advancing the interests of the United States as a client – even if I would not myself have voted for every one of its statutes.

Solomon Amendment — Amelioration

The Association of American Law Schools (AALS) requires that law schools “ameliorate” the “presence of the military on campus.” This guide, produced by the Association of Legal Career

Professionals, was produced after the Supreme Court upheld the validity of the Solomon Amendment.

- Are you familiar with the “Amelioration Best Practices Guide,” published by the Association of Legal Career Professionals in August 2007?
- As dean of Harvard Law School, did you ever consult the Guide or adopt any of its recommendations? If so, which ones?
- The only ameliorative step that is “absolutely mandated” by the AALS is that a notice be posted stating that the military’s so-called discriminatory practices are inconsistent with the schools nondiscrimination policy. Also required, however, is an additional “amelioration” step. Do you believe that an additional step is necessary? If so, why is notice insufficient to educate law students of the difference in policy?
- Do you believe that law schools should not only ameliorate any perceived ills that stem from military activities or presence on campus, but that they should also protest either the military’s presence or policies? (The Guide refers to a “commitment to acts of protest and amelioration.”)
- The Guide describes “[p]rotesting or picketing military recruiters when they come to campus” as an “ameliorative step.”
 - o Do you think the Guide’s characterization of protesting or picketing as “amelioration” is accurate?
 - o Do you believe such conduct is appropriate?
 - o As dean, do you ever encourage or participate any such protests or pickets of the military?

Answer: I am not familiar with the 2007 Guide to which this question refers, and I never consulted it. I do have some knowledge of earlier AALS guidance on the same issue, which suggested that law schools engage in “amelioration practices.” My general approach to this guidance was to interpret it as urging law schools to create a respectful and welcoming environment for gay and lesbian students, which as the dean of Harvard Law School, I would have tried to do regardless. I have never specifically thought about the questions whether the AALS should require “amelioration steps” beyond notice or what the AALS counts as “amelioration.” Again, because I understood the concept of “amelioration” as doing the kinds of things that make a community of students feel welcome and respected on campus (which I do for many communities of students), I never experienced this guidance as particularly intrusive. I certainly do not think law schools should feel any obligation to protest the military’s restrictive employment policies; at the same time, I believe in principles of free expression that permit members of a law school community to engage in peaceful and non-disruptive protests of all kinds, including to express opposition to governmental policies. The freedom to engage in such expressive activity indeed was relevant to the Court’s decision in *Rumsfeld v. FAIR*: in holding that the Solomon Amendment does not violate the First Amendment, the Court noted that “law schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy,” *id.*, at 60, and “students and faculty are free to associate to voice their disapproval of the military’s message.” *Id.*, at 69-70. During my tenure as Dean, Harvard Law School itself never sponsored or organized protests of the military’s employment policy, but students sometimes did so. I made remarks at one assembly organized for this purpose by

Lambda, our gay and lesbian student organization, in October 2004; I have provided press coverage of this event to the Judiciary Committee. I believe I also may have attended but not spoken at one other event of this kind.

ROTC:

- As dean of Harvard Law School, your decision to restrict military recruiters' access to students was limited to career services. Does your personal opposition to the Solomon Amendment mean that you also support barring the ROTC from college campuses?
- As dean of the law school, did you ever express objection to the exclusion of the ROTC from Harvard?

Answer: As dean of Harvard Law School, I felt a responsibility to apply and defend the School's longstanding nondiscrimination policy, which prohibits our Office of Career Services from assisting *any* organization (not just the military) that discriminates in employment. At the same time, I worked to ensure that military recruiters in fact had available an alternative and effective method of access to our students. My statements and actions defending the Law School's general nondiscrimination policy did not sweep more broadly. The position I took does not entail a view on the exclusion of ROTC from college campuses, and I never expressed a position on the exclusion of ROTC from Harvard.

Other:

- Please discuss your view of the Second Amendment, in light of the recent *Heller* decision. I would like to better understand the lens through which you view this right, as you will surely be faced with related legislation as Solicitor General.

Answer: The Supreme Court held in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), that the Second Amendment guarantees an individual right to keep and bear arms. In light of this right, the Court invalidated a ban on handgun possession in the home. At the same time, the Court stated that "some measures regulating" firearms would comport with this constitutional right. Essentially, the Court made clear that the Second Amendment right to bear arms should be treated like any other constitutional right – the Court, for example, offered an analogy to the First Amendment – providing strong but not unlimited protection. As I indicated at my confirmation hearing, my concept of the Solicitor General's role includes respect for Supreme Court precedents such as *Heller* and for the principle of *stare decisis* generally.

- In the 109th Congress, both the Senate and the House passed legislation making it a federal crime to transport a minor across state lines to obtain an abortion. Despite bipartisan support in both bodies, such legislation never became law. Should we be so fortunate as to enact this legislation during President Obama's term, will you commit to supporting and defending it to the best of your ability?
 - o Do you believe the Constitution protects a woman's right to obtain an abortion?

- o If you do believe the Constitution protects a women's right to obtain an abortion, do you believe limitations such as the one described above would pass constitutional muster?

Answer: If I am confirmed as Solicitor General, I would commit to defending this statute, as I would defend any other, so long as there is any reasonable basis for doing so. I am not familiar with this statute's terms or the constitutional arguments that were made for or against it. The Court has held that the Due Process Clause protects a woman's right to terminate a pregnancy, subject to various permissible forms of state regulation. In most cases, the critical inquiry is whether a regulation imposes an "undue burden" on the exercise of the right – or otherwise stated, places a "substantial obstacle" in the path of a woman seeking an abortion. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As Solicitor General, I owe respect to this body of law and to the principle of *stare decisis*. If there were a reasonable basis for arguing that the statute comported with this body of law, I would defend the statute.

- President Obama has nominated Dawn Johnsen as Assistant Attorney General for the Office of Legal Counsel. As Solicitor General, you will most likely work closely with Ms. Johnsen. Ms. Johnsen is a prolific writer. I would like to ask you about some of the positions that she has taken on issues that may come before you if you are confirmed.
 - o In a law review article in the *Yale Law Journal*, Ms. Johnsen wrote, "In recent years, however, courts and state legislatures have increasingly granted fetuses rights traditionally enjoyed by persons. Some of these recent 'fetal rights' differ radically from the initial legal recognition of the fetus in that they view the fetus as an entity independent from the pregnant woman with interests that are potentially hostile to hers."^[1] Do agree with this statement?
 - o In another *Yale Law Journal* article she wrote, "Granting rights to fetuses in a manner that conflicts with women's autonomy reinforces the tradition of disadvantaging women on the basis of their reproductive capability. By subjecting women's decisions and actions during pregnancy to judicial review, the state simultaneously questions women's abilities and seizes women's rights to make decisions essential to their very personhood. The rationale behind using fetal rights laws to control the actions of women during pregnancy is strikingly similar to that used in the past to exclude women from the paid labor force and to confine them to the "private" sphere."^[2] Do you agree with this statement?

Answer: I have not read either of these articles, and I do not know what kind of legislation Professor Johnsen was discussing. For these reasons, I do not think I can sensibly comment on Professor Johnsen's observations or conclusions.

^[1] D. Johnsen, "The Creation of Fetal Rights:...", 95 YALE L.J. 599 (1986).

^[2] D. Johnsen, "The Creation of Fetal Rights:...", 95 YALE L.J. at 624-25.