

WRITTEN QUESTIONS OF SENATOR CHUCK GRASSLEY TO ELENA KAGAN TO BE SOLICITOR GENERAL, U.S. DEPARTMENT OF JUSTICE

1. Many times an Administration will not agree with a particular statute, even though the language and intent of Congress are crystal clear. In addition, many times an individual who has been appointed to enforce the laws may not personally agree with a particular statute on the books. Yet, you will be called on to enforce and defend the laws as written by the legislative branch, regardless of your own personal and philosophical views. If you are confirmed, will you commit to enforce and defend the laws and the Constitution of the United States, regardless of your personal and philosophical views on a matter?

Answer: Yes, absolutely – in each and every case that comes before me.

2. I think everyone would agree that protecting children and families from obscenity is a worthwhile objective. Do you concur that the Justice Department must continue to aggressively pursue criminal and civil litigation against those who violate federal obscenity laws? Why or why not?

Answer: I agree that protecting children and families from obscenity is an important objective and that the Justice Department must continue to pursue individuals who violate federal obscenity laws. I understand the Attorney General and the nominee for Deputy Attorney General to agree with this policy as well. If I am confirmed as Solicitor General, I will have significant responsibility for the handling of obscenity cases in the appellate courts. I believe that obscenity causes significant harm in our society, especially to children and women, and I will pursue these cases with all the seriousness and determination they deserve.

3. This past year, the U.S. Supreme Court held in the *Heller* case that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." President-elect Obama stated that he supported an individual's right to possess a firearm and signaled his support for the *Heller* decision. What is your personal opinion of the rights afforded by the Second Amendment?

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. The Court granted this right the same status as other individual rights guaranteed by the Constitution, such as those protected in the First Amendment. Like other nominees to the Solicitor General position, I have refrained from providing my personal opinions of constitutional law (except in areas where I previously have stated opinions), both because those opinions will play no part in my official decisions and because such statements of opinion might be used to undermine the interests of the United States in litigation. I can say, however, that I understand the Solicitor General's obligations to include deep respect for Supreme Court precedents like *Heller* and for the principle of *stare decisis* generally. There is no question, after *Heller*, that the Second Amendment

guarantees Americans “the individual right to possess and carry weapons in case of confrontation.”

4. What is your personal opinion of the *Heller* case?

Answer: Please see my answer to question #3 above.

5. If you are confirmed, will you commit to protect an individual’s right to possess a firearm?

Answer: If I am confirmed, I will commit to show *Heller* and the principles articulated in it the full measure of respect that is due to all constitutional decisions of the Court. Only highly unusual circumstances can justify the Solicitor General’s office in asking the Court to reconsider a decision, especially one as thoroughly considered as *Heller*. Once again, there is no question, after *Heller*, that the Second Amendment guarantees individuals the right to keep and bear arms and that this right, like others in the Constitution, provides strong although not unlimited protection against governmental regulation.

6. Do you have any question as to the constitutionality of the False Claims Act and its *qui tam* provisions?

Answer: I have not studied the False Claims Act and its *qui tam* provisions, but I know that the Solicitor General’s office often has defended the constitutionality of these provisions in the past. This longstanding practice of defense of *qui tam* supports and reinforces the usual strong presumption of constitutionality that the Solicitor General’s office gives to all statutes. If confirmed as Solicitor General, I would apply this presumption to the False Claims Act’s *qui tam* provisions as well as give appropriate deference to the Solicitor General office’s prior practice regarding these provisions.

7. Recently, a lawsuit was filed alleging that the seal provision of the False Claims Act, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed in camera and remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I’ve been a critic of prolonged extensions of the seal. I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

Answer: Please see my answer to question # 7 directly above. I have not studied the seal provision of the False Claims Act and therefore cannot offer a firm opinion as to its constitutionality. If I am confirmed as Solicitor General, I would defend the seal provision of the False Claims Act, as I would defend any other provision of federal law, so long as there is any reasonable basis for doing so.

8. In 2007, the U.S. Supreme Court in *Gonzales v. Carhart*, by a vote of 5 to 4, rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act's application. Your role as Solicitor General would require you to defend the Act against such challenges. Do you believe that *Gonzales v. Carhart* was correctly decided? Why or why not?

Answer: *Gonzales v. Carhart* is settled law, entitled to deep respect from the Solicitor General under principles of *stare decisis*. In addition, as you note, the Solicitor General has the responsibility of defending federal statutes in this area whenever there is a reasonable ground to do so. If I am confirmed, I would apply these principles in a case involving the Federal Partial-Birth Abortion Act exactly as I would in a case involving any other statute. As Solicitor General, my role would be to represent the interests of the United States, not any personal views I might have (see my answer to question #3 above). In that capacity, I would provide *Gonzales v. Carhart* with all due respect and defend with any reasonable arguments the Partial-Birth Abortion Act against constitutional challenges.

9. Is it your belief that the U.S. Constitution confers a right to abortion? Why or why not?

Answer: Under prevailing law, the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy, subject to various permissible forms of state regulation. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.

10. Is it your belief that the U.S. Constitution compels taxpayer funding of abortion? Why or why not?

Answer: Under prevailing law, the U.S. Constitution does not compel taxpayer funding of abortion. The Court said in *Harris v. McRae*, 448 U.S. 297, 316 (1980), that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.

11. Is it your belief that the U.S. Constitution prohibits informed-consent and parental-involvement provisions for abortion? Why or why not?

Answer: Under prevailing law, a particular informed-consent or parental-involvement law will meet constitutional standards if it does not impose an “undue burden” on a woman’s right to terminate a pregnancy. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), upheld informed-consent and parental-consent provisions under this standard. As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.

12. You have been a staunch opponent of the Solomon Amendment, a law that requires colleges and universities to provide students access to military recruiters or lose federal funding. For example, you have characterized the Solomon Amendment as “immoral.” You also filed an *amicus* brief with the U.S. Supreme Court opposing the Solomon Amendment in the case *Rumsfeld v. FAIR*. Given your strong opposition to the Solomon Amendment, how can you reassure me that you will vigorously defend this law?

Answer: I would defend this law as vigorously as any other in the United States statute books. I deeply believe that different roles carry with them different responsibilities and demand different actions. My role and responsibilities as Solicitor General, should I be confirmed, would be utterly unlike my role and responsibilities as the dean of Harvard Law School to support the school’s longstanding nondiscrimination policy. As Solicitor General, my function would be to advance the interests of the United States, and the interests of the United States call for the defense of federal statutes against constitutional challenge whenever there is a reasonable basis for doing so. 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 the then-Solicitor General did. And now that the Supreme Court has upheld the statute, I would treat that decision with full respect and rely on it to defend the Solomon Amendment against any constitutional challenge.

13. Congress enacted PL 109-8, the bankruptcy reform law, in 2005. One of the provisions of this law forbids bankruptcy attorneys from counseling debtors from incurring debt in contemplation of filing for bankruptcy. Debtor attorneys have challenged this provision, arguing that it violates the First Amendment. The Fifth and Sixth Circuits have split on this question. So far, the Justice Department has defended the constitutionality of the law. If you are confirmed as the next Solicitor General, will you commit to continue to defend the constitutionality of this law?

Answer: As noted previously, the Solicitor General’s Office applies a strong presumption of constitutionality to all statutes. If I am confirmed, I will continue this practice of defending federal statutes (outside of a small category of cases involving impermissible infringement on the President’s Article II powers) whenever there is a reasonable basis for doing so. In addition, I recognize a significant interest in continuity in the Solicitor General’s positions. I am not

currently familiar with this provision of the bankruptcy reform law or the judicial decisions regarding it, but the presumption of the statute's constitutionality, the Solicitor General's prior decision to defend the statute, and the existence of a circuit court decision upholding the statute all would favor continued defense of the statute against constitutional challenge.