

Questions from Senator Orrin Hatch

1. At your hearing, I asked you about the case of *Knox v. United States*, in which the Bush Justice Department had obtained a conviction of Stephen Knox for receiving and possessing child pornography. The videotapes he possessed depicted young girls who were minimally clothed. On October 15, 1992, the U.S. Court of Appeals for the Third Circuit affirmed the conviction, holding that a “lascivious exhibition of the genitals or pubic area” in the definition of child pornography does not require nudity. On September 17, 1993, the Clinton Justice Department told the Supreme Court that the conviction should be reconsidered under a new construction of the statute that would require “substantial...genital or pubic visibility.” The Supreme Court remanded the case and the Third Circuit again held that “the federal child pornography statute, on its face, contains no nudity or discernibility requirement.” Along the way, the Senate voted 100-0 and the House voted 425-3 to reject the new construction of the statute and President Clinton wrote the Attorney General, stating that “I fully agree with the Senate about what the proper scope of the child pornography law should be.”

At your hearing, you properly affirmed that the Solicitor General must make every reasonable argument defending the constitutionality of federal statutes. In this case, the Solicitor General, on his own initiative, argued on appeal for a different construction of the statute than the one under which the conviction was obtained.

- Is this ever appropriate for the Solicitor General to do?
- Do you believe the Third Circuit’s construction of the child pornography definition in *Knox* was correct?

Answer: As I noted at my confirmation hearing, I am not familiar with the *Knox* case or the positions taken by the Solicitor General at its various stages. In general, the Solicitor General should argue on appeal for the construction of the statute under which a conviction is obtained. An exception might be if that construction of the statute were clearly unconstitutional; but as I have said on a number of occasions, the Solicitor General’s office should apply a presumption of constitutionality when dealing with federal statutes. I have not read the statutory provision at issue in *Knox* or the Third Circuit’s opinion interpreting that provision, so I do not have an independent view of the correctness of the Third Circuit’s construction. But I will say that however suspicious a court generally should be about subsequent legislative history, the subsequent votes of Congress in this case surely suggest that the Third Circuit, rather than the Solicitor General’s office, got the matter right.

2. At your hearing, I asked you about your review of Professor Stephen Carter’s book, *The Confirmation Mess*. Writing in the *University of Chicago Law Review*, you distinguished between a judicial nominee’s “judicial philosophy” and “her views on particular constitutional issues” and argued that Senators should ask about both. You wrote that the “critical inquiry as to any individual...concerns the votes she would cast...and the direction in which she would move the institution.” You suggested that failing to focus on such views and votes gives the confirmation process “an air of vacuity and farce” and renders the Senate “incapable of either properly evaluating nominees or appropriately educating the public.”

- How do you reconcile this view with Canon 5A of the Model Code of Judicial Conduct or the judicial oath of office which require judicial impartiality?
- At your hearing, you said: “I’m not sure that, sitting here today, I would agree with that statement.” Do you?
- Do you still believe that Senators who do not ask about particular issues, votes, and directions are contributing to a vacuous or farcical confirmation process?
- If you have changed your views on these questions, please explain why.

Answer: The review clearly stated, in accord with Canon 5A and the judicial oath of office, that judicial nominees cannot make pledges, promises, or commitments (whether explicit or implicit) as to a very wide range of matters; it argued, however, that some kinds of statements – “comment[s] on judicial methodology, on prior caselaw, on hypothetical cases, on general issues” – often do not fall within this prohibition (pp. 939-40). (In keeping with this distinction, I want to emphasize, because this question may appear to suggest otherwise, that I never suggested Senators should ask about particular “votes.”) I have not reviewed the caselaw or commentary on the Model Code of Judicial Conduct for many years and do not know whether my understanding of it was correct when I wrote this review in 1995 or, perhaps more importantly, is so today. I do think now, more than I did then, that significant considerations (even apart from specific rules of judicial conduct) support some real reticence from judicial nominees on these matters; I am also less convinced than I was in 1995 that substantive discussions of legal issues and views, in the context of nomination hearings, provide the great public benefits I suggested. Yet that leaves the question just what these hearings should be about – what matters Senators should explore with the nominee and how the nominee should be evaluated. I confess to finding these questions very difficult.

3. At your hearing, you said the view you expressed in your review of Professor Carter’s book resulted from your experience working on the Judiciary Committee staff and “feeling a little bit frustrated that I really wasn’t understanding completely what the judicial nominee in front of me meant and what she thought.” As Senator Cardin explained at the hearing, you were special counsel to then-Chairman Biden in the summer of 1993, working on the confirmation of Supreme Court Justice Ruth Bader Ginsburg. At her hearing, Justice Ginsburg said that “I must avoid giving any forecast or hint about how I might decide a question I have not yet addressed.” She also said: “A judge sworn to decide cases impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.”

- Were these examples of the response that you found frustrating?
- Was Justice Ginsburg correct in adopting that standard?
- Given your frustration at the time and the standards you wrote about in your review of Professor Carter’s book, what approach would you have taken instead had you been the nominee?

Answer: In the review, I wrote that I was frustrated by what I called Justice Ginsburg’s “pincer movement” – the tendency to say that questions were either too specific or too general to be able to answer, with little ground in between. Even at the time I wrote the review, I agreed with Justice Ginsburg that a judicial nominee should not forecast how she would decide a particular case; the question that seemed different to me, as noted above, was whether a nominee could answer

questions about “judicial methodology,” “prior caselaw,” “hypothetical cases,” and “general issues.” I think I made clear in the review that I would have done the same thing as Justice Ginsburg given prevailing conventions and standards. (I asked in the review, “Who would have done anything different?”.) The question I raised in the review was whether those conventions and standards were correct. As noted in my answer above, my views on this question have evolved in some ways, but I continue to think the question well worth exploring.

4. Do you believe that the Supreme Court’s decisions that material meeting the definition of obscenity in *Miller v. California* and its progeny lack any First Amendment protection were correctly decided? Do you believe that this definition, which relies on community standard, properly applies to the Internet? Or do you believe there should be a definition of obscenity based on a national standard applied to the Internet?

Answer: The Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. As I have noted in responding to several Senators’ questions, I do not think it would comport with this responsibility to state my own views of whether particular Supreme Court decisions are correctly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. The cases this question references are particularly well-settled. *Miller v. California*, 413 U.S. 15 (1973), established more than 35 years ago the definition of obscenity that continues in use today. And the Supreme Court has *always* understood obscenity to be entirely outside the scope of First Amendment protection. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (cataloguing speech restrictions at the time the Constitution was ratified and concluding that obscenity was “outside the protection intended for speech and press”). I have not thoroughly studied the questions whether and how the *Miller* standard, with its reliance on community standards, applies to the internet. The Court considered this question in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), holding that a federal statute (the Child Online Protection Act) regulating obscene material on the internet was not invalid on its face because it applies local community standards in determining whether particular material is obscene, but leaving unsettled whether certain as-applied challenges might be successful. I view the holding in this case as settled law, to which the Solicitor General owes respect. I do not know whether any as-applied challenges have been made to this statute since the decision in *Ashcroft v. ACLU*, so I cannot say anything further about the viability of these challenges. Of course, to the extent that a federal statute, whether the Child Online Protection Act or any other, provokes such challenges, I would apply the usual strong presumption of the Solicitor General’s office that the statute meets constitutional standards.