Responses of William H. Orrick, III
Nominee to be United States District Judge for the Northern District of California
to the Written Questions of Senator Amy Klobuchar

1. **If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

   Response: I view my role as a judge, if I am confirmed, as enhancing respect for the rule of law. That means that I should be, as Federal Rule of Civil Procedure 1 suggests, just and speedy in decision-making. I should show respect to everyone in my courtroom. I should recognize that I am in a court of limited jurisdiction, and not attempt to exercise authority on issues over which I have no jurisdiction. Most importantly, I should insure a fair hearing so that I understand the facts and then apply controlling precedent and the law in an even-handed way to determine the result. I should explain my decision clearly so that the litigants understand the basis of my reasoning.

2. **What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

   Response: My varied legal background is evidence that I will treat all litigants fairly and with respect, and that I will not let my personal views interfere with the administration of justice. I started my career with Georgia Legal Services, where I represented poor people for more than four years, often as plaintiffs. For the following twenty five years, I was in private practice, primarily defending corporate entities and wealthy people in employment and commercial litigation, while also representing the Episcopal Diocese of California and many other types of clients in my pro bono work. In the last three years, I have represented the United States. I have great respect for every type of client I have represented. I have never let my political beliefs affect my legal judgment, and believe that politics have no place in the courtroom.

3. **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

   Response: District court judges must bind themselves tightly to precedent. So must judges in the Courts of Appeals, unless they are sitting en banc to review their own precedent. Without that commitment to stare decisis, the judiciary would properly be accused of merely being another political branch, with the whims of the individual judge rather than the rule of law controlling the outcome.

Senator Chuck Grassley
Questions for the Record

William H. Orrick, III
Nominee, U.S. District Judge for the Northern District of California

1. **You list *United States v. Alabama a*s one of your most significant cases and summarize your work on that case as "helped supervise the district court preemption litigation against the states of Arizona, Alabama, South Carolina and Utah concerning statutes passed by those states in 2010 and 2011 that related to immigration." Describe in detail the work you did on the lawsuits against Arizona, Alabama, South Carolina and Utah.**

   Response: I helped coordinate the state immigration-related preemption litigation in district court. Regarding Arizona, I attended meetings where the impact of SB 1070 on the operations of DHS and law enforcement was discussed. I attended meetings where the preemption analysis of the lawyers working on this issue was discussed. I reviewed pleadings and circulated them in the Department of Justice and to both the Departments of Homeland Security and State for comment. I helped coordinate obtaining declarations from those departments. I discussed litigation deadlines, both external and internal. Along with several others, I helped prepare Mr. Kneedler for argument in the district court and attended the hearing. Once the case was appealed, my involvement diminished considerably. I was a recipient of drafts of briefs that were circulated and I was one of many who attended preparation sessions for oral arguments. In South Carolina and Utah, my role was similar to what I did in Arizona. In Alabama, my role was similar except that I also argued the government's case for a preliminary injunction in district court.

2. **In late June 2012, the Supreme Court issued its decision in *Arizona v. United States*. In it, the Court addressed an Arizona stature known as S.B. 1070, which was enacted in 2010 to address pressing issues related to the large number of illegal aliens in the State. Arizona passed S.B. 1070 to complement federal law and to exercise its police powers under the tenth amendment since the Obama administration has refused to enforce the immigration laws.**

   In response to the enactment of S.B. 1070, the Obama Justice Department had sued Arizona and sought to enjoin the statute as pre-empted by the federal immigration laws. In particular, the DOJ challenged four sections of statute.

   The Court, in a 5-3 decision, agreed that three of the sections were pre-empted. Section 2(B), a central provision in the statute, was the one exception. Generally speaking, that section of the statute requires officers conducting a stop, detention, or arrest to make reasonable efforts, in some circumstances, to verify the person's immigration status with the federal government.

The Court unanimously rejected DOJ's pre-emption argument on § 2(B), by an 8-0 vote. (Justice Kagan recused herself from the case). There was no division among the justices on this point of law.

In sum, the Obama Justice Department argued that a state law is pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities.

The Obama administration failed to distinguish between its politically motivated policy, which it unilaterally declared and the immigration laws, which were duly enacted by Congress. The argument made by the Obama DOJ is particularly disturbing when one considers that what the administration calls its immigration priorities is in fact the President's unilateral decision not to enforce the laws passed by Congress.

Describe in detail your role in developing the Obama administration's pre-emption argument made in the *Arizona* case?

Response: My response to the first question describes in detail my role in the preemption litigation in the Arizona case. While I participated in discussions about our arguments, the arguments and analysis were developed and ultimately adopted by others.

3. **In his concurring/dissenting opinion in the *Arizona* case, Justice Scalia addressed the Obama administration's questionable claim that its pre-emption argument was supported by the need to allocate scarce immigration enforcement resources. Specifically, he wrote:**

> **The brief for the Government in this case asserted that 'the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.'**
>
> **…**
>
> **…. It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate 'scarce enforcement resources'—is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30.**
>
> **…**

The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement.

a. What is your reaction to Justice Scalia's analysis quoted above?

Response: As an employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any personal views on the Department of Homeland Security policies discussed in Justice Scalia's opinion.

b. The Obama administration justifies its immigration priorities and its refusal to deport illegal aliens due to the alleged need to allocate scarce enforcement resources. Please explain how scarce "enforcement" resources are utilized by DOJ and DHS employees reviewing files for the awarding of *de facto* amnesty under the prosecutorial discretion initiative, as opposed to enforcing the immigration laws as enacted by Congress.

Response: As an employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any views on the enforcement resource issues other than those related to the work of Office of Immigration Litigation, about which I have direct knowledge. Whether a case might warrant the exercise of prosecutorial discretion is always an issue when it is reviewed by the Office of Immigration Litigation, so the review that occurred as a result of the initiative sped up an analysis that would have occurred later. Therefore, it did not cause a material difference in the expenditure of OIL's resources, and to the extent ICE exercises prosecutorial discretion in any of those cases, OIL's law enforcement resources would be utilized in other, higher priority cases.

4. The Department of Justice has spent hundreds of thousands, if not millions, of taxpayers' dollars on its lawsuits against Arizona, Alabama, South Carolina and Utah. Meanwhile, some cities and local jurisdictions are enacting policies and practices that expressly prohibit law enforcement from cooperating with the federal government when it comes to illegal aliens. Cook County, Illinois, for example, is ignoring requests from ICE to hold individuals, letting criminals back into society and posing a threat to public safety.

a. Set forth in detail any role you have had in examining and/or responding to Cook County's policy.

Response: The Department of Justice does not confirm or deny that any particular matter is under investigation, and for that reason I cannot answer this question.

b. Why has the Obama administration failed to challenge localities like Cook County which have ordinances or policies that are contrary to federal law?

Response: I do not speak for the administration on this topic, and as a matter of policy the Department of Justice does not confirm or deny that any particular matter is under investigation.

5. On June 15, 2012 President Obama and Homeland Security Secretary Napolitano announced a program exempting from immigration enforcement 1.4 million or more illegal aliens under the age of 30. Ultimately, millions more may be exempted from enforcement. Did you have any role in the planning of the program or participate in any discussions on the program announced on June 15? If you had a role in planning the program, describe your role in detail. If you participated in discussions, identify those discussions and their content in detail.

Response: I did not have any role in developing this policy nor did I participate in any discussions concerning it prior to its announcement.

6. In 2011, President Obama acknowledged that he did not have the authority to unilaterally order a program such as the one he announced on June 15, 2012. Describe in detail the constitutional authority that allegedly authorizes the program announced by President Obama on June 15, 2012?

Response: As I indicated above, I did not have any role in developing this policy nor did I participate in any discussions concerning it prior to its announcement. Moreover, this issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

7. In a speech to ICE employees, you indicated that there are 320 attorneys in the Office of Immigration Litigation (OIL), the unit which you supervise. More specifically, you indicated that there are 270 attorneys in the court of appeals section and 50 attorneys in the district court section. In light of the prosecutorial discretion initiative announced by ICE Director Morton and the nonenforcement program announced by President Obama on June 15, 2012, wouldn't it be appropriate for there to be significant personnel and budget reductions at OIL? Are such reductions being planned? If you do not agree that significant personnel and budget reductions are appropriate, explain in detail why the size of the staff and budget should be maintained at its current levels.

Response: I do not agree that significant personnel and budget reductions are appropriate for OIL for a number of reasons. First, the caseload of the appellate section is driven by the cases which are appealed by aliens from the Board of Immigration Appeals directly to the courts of appeals. Appeals to the federal courts increased 5% last year, while the number of attorneys in the appellate section has decreased because of the hiring freeze currently in effect. Second, the caseload of the district court section (primarily cases involving the detention of aliens, class actions over immigration practices and processes, mandamus cases, cases which have a national security component, naturalization defenses, and so forth) is unaffected by the prosecutorial discretion initiative. Its caseload has been increasing as well, while the number of attorneys has decreased because of the freeze. Third, it seems unlikely that the initiatives described will lead to a significant long term drop in cases appealed from the BIA to the courts of appeal. As I understand it, the purpose of the prosecutorial discretion initiatives is to move detained cases faster through the system and to insure that ICE can focus on its enforcement priorities. It does not follow that appeals to the BIA would decrease. There is no shortage of immigration proceedings pending before the Executive Office of Immigration Review, so it would not be my expectation that the number of cases appealed from the BIA, or that OIL's workload, would decrease.

8. On February 6, 2012, the Ninth Circuit put five deportation cases on hold and asked the government how the illegal aliens in the cases fit into the Obama administration's immigration enforcement priorities.[1] In relevant part, the order in each case stated:

> **In light of ICE Director John Morton's June 17, 2011 memo regarding prosecutorial discretion, and the November 17, 2011 follow-up memo providing guidance to ICE Attorneys, the government shall advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in this case and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to Petitioner's pending petition for rehearing.**

On March 1, 2012, House Judiciary Committee Chairman Lamar Smith and I sent a letter to Attorney General Eric Holder and Secretary Janet Napolitano expressing concern about the Ninth Circuit's order. Moreover, the letter asked the Department of Justice and the Department of Homeland Security to respond to questions about how they were handling cases before immigration judges, the

[1]/ *Rodriguez v. Holder*, Nos. 06-74444, 06-75524, 2012 WL 360759, at *1 (9th Cir. Feb. 6, 2012); *San Agustin v. Holder*, No. 09-72910, 2012 WL 360761, at *1 (9th Cir. Feb. 6, 2012); *Jex v. Holder*, No. 09-74038, 2012 WL 360764, at *1 (9th Cir. Feb. 6, 2012); *Pocasangre v. Holder*, No. 10-70629, 2012 WL 360774, at *1 (9th Cir. Feb. 6, 2012); *Mata-Fasardo v. Holder*, No. 10-71869, 2012 WL 360776, at *1 (9th Cir. Feb. 6, 2012).

Board of Immigration Appeals (BIA) and the federal courts of appeals. In particular, the letter contained four specific questions.

According to some reports, there are at least 1.6 million immigration cases pending before immigration judges, the BIA and the federal courts of appeals. Also, according to reports, the DHS and/or DOJ are "reviewing" 300,000 or more cases under the so-called "prosecutorial discretion" initiative.

The DOJ and the DHS are supposed to be prosecuting these cases and seeking to have illegal aliens deported. As part of that effort, line attorneys from the DOJ and DHS spend thousands of hours working on these cases. Simultaneously, immigration judges and federal judges, assisted by court staff, spend thousands of hours adjudicating these cases. Tens of millions of taxpayer dollars, if not more, are spent to pay the salaries of those attorneys, judges and court staff.

The answer to the Ninth Circuit's question set forth in the government's pleadings was nonresponsive. The government's pleadings tell the Court that the government does not presently intend to use prosecutorial discretion with the cases, but that the matter is totally within the discretion of the Executive Branch. If the government decides to use prosecutorial discretion while any of the cases are pending, it will inform the Court. What is unwritten is that the Obama administration can still use prosecutorial discretion after a case is concluded, even if a Court has issued a deportation order and after all the time, effort and money has been expended.

The DHS responded to the March 1 letter with a one-page letter dated April 23, 2012 and signed by Nelson Peacock, the Assistant Secretary for Legislative Affairs. The April 23 letter does not answer the four specific questions or requests for information in the March 1 letter.

The DOJ responded to the March 1 letter with a two-page letter dated June 6, 2012 and signed by Acting Assistant Attorney General Judith Appelbaum. The letter also had a one-page attachment with some information about the five cases before the Ninth Circuit. The DOJ's June 6 letter partially answers questions 1(a)-(g) from the March 1 letter. It also states that it cannot provide an accurate estimate of the number of hours worked on the five cases by immigration judges and their staffs, which was asked about in question 1(h). The DOJ letter does not acknowledge, let alone answer, questions 2-4.

a. Have you worked on any of the five cases that were the subject of the Ninth Circuit's February 6, 2012 order? If so, identify each case you worked on and describe in detail your work on the case.

Response: I did not work on the merits of any of the five cases. I did review and edit the initial response OIL drafted to the February 6, 2012 order.

b. Have you seen the March 1 letter sent to Attorney General Holder and Secretary Napolitano? If so, describe the circumstance under which you saw the letter.

Response: Yes, the March 1 letter was forwarded to me and others in the Department of Justice.

c. Did you participate in preparing the DOJ's June 6 letter? If so, describe in detail your role in the preparation of the letter.

Response: I requested available information from OIL and EOIR in response to the questions asked, and I provided a description of OIL's work in responding to the February 6, 2012 order.

d. Does the government seek to have federal courts of appeals affirm immigration removal orders, even though those orders may subsequently be disregarded pursuant to prosecutorial discretion or some similar program? If so, how do you justify wasting taxpayer dollars and wasting the time of the government attorneys working to achieve removal orders and the time of the federal judges presiding over the cases?

Response: In any case in which OIL has a question about the applicability of prosecutorial discretion, it raises the issue at the earliest possible time with ICE. When OIL wins a petition for review, it expects that ICE will remove the alien if it can do so, absent a changed circumstance that warrants the exercise of discretion in the opinion of ICE.

e. Are you aware of any immigration case where the government obtained an affirmance of a removal order from a federal court only to subsequently allow the illegal alien to remain in the United States, under the prosecutorial discretion initiative or a similar program? If so, identify the number of cases you are aware of and the name and docket number of each such case. Also, identify the justification for the failure to enforce the removal order in each such case. Also, for each such case, how do you justify the waste of taxpayer dollars and the time of the government attorneys who worked to achieve removal orders and the time of the federal judges presiding over the cases?

Response: No. I am not aware of a case in which prosecutorial discretion was exercised after affirmance of a removal order from a federal court. Once a case is affirmed in the court of appeals, neither OIL nor the Department of Justice typically is involved in removal issues except in the case of detention litigation or the removal of aliens who may raise a particular national security concern.

f. Have you ever personally discontinued the government's effort to obtain the affirmance of a removal order? If so, identify the name and docket number

of each such case. Also, identify the justification for discontinuing the effort to enforce the removal order in each such case.

Response: No. I have not personally discontinued the government's effort to obtain the affirmance of a removal order.

g. Have you ever ordered a DOJ attorney to discontinue the effort to obtain the affirmance of a removal order? If so, identify the name and docket number for each such case. Also, identify the justification for discontinuing the effort to enforce the removal order in each such case.

Response: No, I have not.

9. The pleadings filed in four of the five cases (*Rodriguez, San Agustin, Jex* and *Mata-Fasardo*) before the Ninth Circuit are almost identical. At page four of those pleadings, it states as follows:

> **At the review petition stage of a removal case, ICE's consideration of prosecutorial discretion is supplemented by the Office of Immigration Litigation's (OIL's) internal review of such cases. OIL attorneys routinely review cases at various stages of the appellate briefing and pre-argument process for possible remand to the Board of Immigration Appeals and referral to ICE for consideration of its prosecutorial discretion. In addition, OIL undertook a comprehensive review of the majority of pending court-of-appeals review petitions on its docket between November 17, 2011 and January 13, 2012, in order to assess whether, in light of DHS's prosecutorial discretion initiative, those cases merit referral to DHS for consideration. OIL's review and referral of pending court-of-appeals cases will continue on a routine basis as circumstances may warrant.**

a. Isn't it the principal, if not exclusive, duty of a DOJ attorney representing the government in a court case to use his or her best efforts to ensure that the law at issue is enforced? Please explain your response.

Response: Yes, the duty of a DOJ attorney is to use best efforts to defend or enforce the law, decision and/or policy at issue in any case.

b. Why are DOJ attorneys reviewing court cases for referral to ICE for consideration of its prosecutorial discretion, as opposed to using their best efforts to see to it that removal orders are affirmed?

Response: Reviewing cases for prosecutorial discretion is consonant with an attorney's best effort to see that removal orders are affirmed, and it is part of the obligation of an attorney in the Department of Justice to do justice in every case.

As the Supreme Court has explained, "[an attorney representing the United States] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest…is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935).

OIL attorneys occasionally find problems in the record because of the reasoning of the BIA and the conduct of the hearing by the immigration judge (particularly in cases where valid justifications are not presented or alternative immigration benefits are not pursued because the alien is incompetent, unrepresented, or receives ineffective assistance of counsel, since those cases provide special challenges to affording a fair hearing). If an OIL attorney has such a concern, it is the responsible thing to do to talk about options with ICE, which holds the power to exercise discretion. If ICE chooses not to exercise discretion, DOJ attorneys should and do use best efforts to see that the removal orders are affirmed with respect to removals.

c. Who created or ordered the policy whereby DOJ attorneys are reviewing court cases for referral to ICE for consideration of its prosecutorial discretion?

Response: It is my understanding that DOJ attorneys have always reviewed their cases for the possible exercise of prosecutorial discretion.

d. Set forth in detail your role in reviewing court cases for referral to ICE for consideration of its prosecutorial discretion?

Response: I do not generally review cases for referral to ICE for consideration of its prosecutorial discretion. The exception is in the very small number of cases (less than ten) where ICE has decided not to exercise discretion but one of the OIL section directors has felt strongly that it should be elevated. Also, at the beginning of my tenure overseeing OIL's litigation I argued a handful of fully briefed petitions for review in the courts of appeals so that I would understand the challenges our attorneys face in the courts of appeals. I reviewed each of those cases for prosecutorial discretion. In one of those cases, involving the 71 year old asylum applicant from Iran to whom I referred in my speech to ICE attorneys, I asked the assistant director at OIL supervising the case whether it was an appropriate one for prosecutorial discretion. She then discussed it with ICE.

e. Since 2009, how many cases have been referred to ICE by the Office of Immigration Litigation's (OIL) for it to "exercise" prosecutorial discretion?

Response: I do not know the answer to this question. OIL does not keep statistics of this type.

f. As a result of the referrals to ICE by OIL, how many illegal aliens, who had removal orders entered against them, have been allowed to remain in the United States since 2009?

Response: None of OIL's referrals would have been in a case where there was a final order or removal from the court of appeals. With respect to administratively final orders that had been appealed to court of appeals, I do not know the answer.

g. Have you ever ordered a DOJ attorney to refer a case to ICE for consideration of prosecutorial discretion, despite his or her conclusion that the case should not be referred to ICE? If so, identify the name and docket number for each such case. Also, identify your justification for your order in each such case.

Response: No.

h. Have you ever referred a case to ICE for consideration of prosecutorial discretion, despite another attorney previously concluding that the case should not be referred to ICE? If so, identify the name and docket number for each such case. Also, identify your justification for overruling the other attorney in each such case.

Response: Not to my knowledge.

i. Who created or ordered the policy whereby the Office of Immigration Litigation (OIL) undertook a comprehensive review of the majority of pending court-of-appeals review petitions on its docket between November 17, 2011 and January 13, 2012, in order to assess whether, in light of DHS's prosecutorial discretion initiative, those cases merit referral to DHS for consideration?

Response: DHS developed the prosecutorial discretion initiative, which applied to pending judicial as well as administrative cases. To assist in the implementation of the initiative, I requested OIL's appellate section to review its cases in conformity with ICE's November guidance that provided additional interpretation of the June 2011 Morton memorandum for ICE attorneys.

j. As a result of the comprehensive review and the continuing review by OIL, how many cases have been referred to DHS?

Response: I do not know the answer to this question. OIL does not keep statistics of this type.

k. As a result of the comprehensive review and the continuing review by OIL, how many illegal aliens, who had removal orders entered against them, have been allowed to remain in the United States?

Response**:** I do not know the answer to this question. OIL does not keep this type of statistic. I also understand that some of the referrals were accepted, some were not, and some remain pending. Even if the referral was accepted, I do not know what type of discretion, if any, was exercised for the aliens (deferred action, remand to the BIA for administrative closure, or stay of proceedings, to name three alternatives).

l. Set forth in detail your role in (a) the comprehensive review and (b) the continuing review process.

Response: Besides requesting that the review take place to assist DHS in the implementation of the initiative, as set forth in (i) above, and occasionally discussing the initiative at OIL management meetings, I played no role in the comprehensive review or continuing review of pending OIL cases. That review was carried out by the appellate section of OIL.

m. Have you ever referred a court-of-appeals case to DHS for consideration, despite another attorney previously concluding that the case should not be referred? If so, identify the name and docket number for each such case. Also, identify your justification for overruling the other attorney in each such case.

Response: Not to my knowledge.

10. Did you have any role in the development of the prosecutorial discretion initiative discussed in Director John Morton's June 17, 2011 and November 17, 2011 memoranda? If so, describe your role in detail.

Response: No.

11. Describe in detail your role in implementing the prosecutorial discretion initiative.

Response: In addition to my actions described in response to question 9, above, I have participated in discussions with others in DHS and DOJ about the implementation of the initiative and have discussed its implementation in some weekly meetings with the OIL appellate section assistant directors.

12. For each year you have served at the Department of Justice, identify the percentage of your workload that was focused on immigration issues. For your immigration workload for each year, identify what percentage was devoted to enforcing removal orders, what percentage was devoted to having removal

orders disregarded via the so-called prosecutorial discretion initiative or similar programs and what percentage was devoted to suing States that enacted laws similar to Arizona's S.B. 1070.

Response: I do not keep time records, and therefore cannot answer this question numerically with any accuracy. I did no immigration work from June to September, 2009. Between September 2009 and May 2010, the percentage of my work devoted to immigration rose steadily. Since approximately May 2010 virtually all of my work has been focused on immigration issues.

I suspect I spend more time considering issues raised in OIL's district court section, which handles class actions concerning the processes used by the government to handle various detention and immigration proceeding matters, as well as detention litigation and matters involving national security in district court, than I do on the appellate section's petitions for review, which result in removal orders. As described above, there have only been a few occasions when I was called on to consider whether an exercise of prosecutorial discretion was appropriate concerning a specific administrative removal order, and none of those occasions involved judicially final orders. I did attend meetings on prosecutorial discretion generally, as I have previously described, but the overwhelming majority of my time dealing with OIL appellate issues has been spent on the legal issues arising in the cases themselves, not on any issues related to prosecutorial discretion. When we evaluated the Arizona statute and developed pleadings in the district court from April – July, 2010, a material portion of my time (but by no means the majority) was spent on that matter. Similarly, the Alabama case took a material portion of my time in the summer of 2011 but again not the majority of it except the two weeks prior to the hearing as I prepared for it. I spent less time on the lawsuits involving South Carolina and Utah.

13. For each year of your tenure at the Department of Justice, how many cases were pending in the federal courts of appeals where an alien was challenging a removal order? For each year, identify the number of cases where the removal order was affirmed, the number of cases where the removal order was reversed and the number of cases where the government discontinued its prosecution of the case under the prosecutorial discretion initiative or a similar program.

Response: I do not know how many petitions for review are or have been pending in the federal courts of appeals. According to the Administrative Office of the Courts, 7,111 immigration appeals were filed in the 12 months ending on March 31, 2010; 6,505 in the year ending March 31, 2011; and 6,821 in the year ending March 31, 2012. In all or virtually all of those cases, the alien would be challenging a removal order. OIL has estimated its win record in excess of 90% in each of those years. In any case that OIL did not win, the usual result is a remand to the BIA, and in many of those cases the matter is adjudicated again and returned to the court of appeals on another petition for review. As indicated earlier, I do not know the number of cases discontinued as a result of prosecutorial discretion as no such statistics are kept by

OIL on that question, but the number is not large in comparison with the number of appeals filed.

14. If a panel of a federal circuit court has affirmed a removal order in an immigration case, do you believe it would be a violation of the separation of powers for the Executive Branch to disregard the mandate and allow the illegal alien to remain in the United States? If not, explain your answer in detail.

Response: I am not aware that any case has raised this issue during my tenure with the Department of Justice and I have never researched it. This issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

15. If confirmed, what will be your recusal policy for cases involving the Department of Justice?

Response: If confirmed, I would recuse myself from cases which were pending in OIL while I was Deputy Assistant Attorney General, whether or not I was aware of them at the time, because of the appearance of a conflict. I would also recuse myself from any other case in which I had any involvement during my time with the Department, and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

16. If confirmed, what will be your recusal policy for cases involving other federal agencies?

Response: If confirmed, I would recuse myself from any case in which I had any involvement during my time with the Department, and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

17. If confirmed, what will be your recusal policy for cases involving immigration issues?

Response: If confirmed, I would recuse myself from any case that was pending in OIL while I was Deputy Assistant Attorney General and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

18. The materials you provided to the Committee include a speech that you gave to Immigration Customs and Enforcement (ICE). In that speech, you stated: "[w]hen I joined the Obama administration as senior counselor to the Assistant Attorney General for the Civil Division … the idea was that I'd help the Civil Division figure out how to bring more affirmative cases."

Describe in detail the "idea" that was the basis for your joining the Obama administration. Also, describe in detail what you mean by "affirmative cases," including the subject-matter and targets of these lawsuits and the justification for these individuals or entities being sued.

Response: The idea was to establish the Civil Division as the U.S. Government's primary affirmative civil enforcement litigation component for consumer protection and fraud. These cases were already within the purview of the Civil Division, and the goal of the Civil Division was to emphasize their importance.

19. **As part of your speech to ICE, you described attorneys at the Office of Immigration Litigation (OIL) speaking with ICE employees about pending cases. You said that the conversations "will go much better if [the OIL attorney] understands the institutional pressures and interests that put the individual into proceedings in the first place - the effort that has been expended on the individual and why prosecutorial discretion has not previously been exercised."**

Illegal aliens are in removal proceeding because they are unlawfully present in the United States and because they have violated the law. Your statements suggest that there is some other reason why illegal aliens are in removal proceedings.

a. **What did you mean when you referred to "institutional pressures and interests that put the individual into proceedings in the first place"?**

Response: I was referring to the panoply of reasons that individuals are put into proceedings. For example, it is mandatory for Customs and Border Patrol agents to issue a notice to appear to begin proceedings following their identification of an immigration violation, and when an asylum seeker is denied asylum it is mandatory that he or she be placed in removal proceedings, regardless of any other circumstances. OIL lawyers and courts sometimes forget that many of the cases in federal court are being pursued because the alien is seeking a benefit to which the BIA has concluded that he or she is not entitled, not necessarily because the alien is an enforcement priority for ICE.

b. **Are career ICE employees required to justify their decision not to discontinue removal proceedings under prosecutorial discretion or similar programs to OIL attorneys or anyone else? Please explain.**

Response: I am not aware of any such requirement.

c. **Do you believe that ICE employees should justify their decision not to discontinue removal proceedings under prosecutorial discretion or similar programs to OIL attorneys or anyone else? Please explain.**

Response: I do not think ICE employees have to justify their decisions to OIL attorneys, but I think it is good practice for them to explain their thinking. For the reasons described in my speech, I think that promoting communication between different agencies in the government on issues of common concern is a good idea. OIL attorneys are often asked during argument in the court of appeals whether prosecutorial discretion has been considered in a case, and it is helpful for OIL attorneys to know that it has in fact been considered so that they can answer the question.

20. As part of your speech to ICE, you stated that federal judges had asked you or asked DOJ "[w]hy is the rate of removals after we order removal so low? Does that say something about the failure to choose the right cases to bring to the Court's attention?"

a. Why is the rate of removals after a federal circuit court has ordered removal so low?

Response: DHS is responsible for removing aliens, and is better placed to answer this question than I am. ICE officials have explained, for example, that it can be difficult or impossible to remove aliens to some countries.

b. Why isn't the Department of Justice enforcing these court orders?

Response: The authority to remove aliens belongs to the Department of Homeland Security, not the Department of Justice.

c. After a federal circuit court issues a mandate and orders removal, do you maintain that the executive branch has the authority to effectively vacate that order or judgment by not deporting the individual?

Response: I am not aware that any case has raised this issue during my tenure with the Department of Justice and I have never researched it. This issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

d. Do you believe that there are "right" and "wrong" immigration cases to bring to court? If so, describe the "right" cases and the "wrong" cases.

Response: I do not know what a "right" or "wrong" immigration case is, and do not consider them in those terms.

21. As part of your speech to ICE, you stated "… we have to consider whether the technical application of the law will result in justice in the particular case. We need to do this because we have an ethical obligation to do justice."

a. Do you believe that you have an obligation to enforce the law enacted by Congress? If not, explain the basis for your belief that you do not have such an obligation.

Yes.

b. If you admit that you have an obligation to enforce the law, do you believe that your personal interpretation of what constitutes justice relieves you of that obligation? Please explain.

Response**:** No. I do believe that lawyers for the government have an obligation to do justice which is consonant with our obligation to enforce the law. For example, federal prosecutors carry out that obligation every day in deciding which criminal cases to bring. In the immigration context, it is necessary to understand the factual context of the case, how the case will be perceived by the judges who will hear it, whether it is consistent with the law enforcement priorities of the agency we represent and with other provisions of the INA, and whether a bad result could damage our ability to defend the INA in other matters.

c. Is it your position that the enforcement of the immigration laws which have been enacted by Congress does not constitute doing justice? Please explain.

Response: No. To the contrary, enforcement of the immigration laws does constitute doing justice. The immigration laws provide both enforcement provisions and benefits provisions, and provide a great deal of discretion to the Executive branch, now exercised through DHS. In order to enforce the INA properly, and do justice, a lawyer should consider the factors I discussed above.

22. As part of your speech to ICE, you stated as follows:

> **The question to ask before issuing the NTA, and at all times afterwards, is not whether we can win a case. Given quite favorable laws and less able advocates on the other side, if the non-citizen is even represented, we're always in a position to win. The question is, will we get a just result when we win the case? We need to do the right thing, and recognize when the Government's resources should be used more wisely.**

a. If an individual is in the United States in violation of our immigration laws and a court affirms a removal order, isn't the deportation of that individual a "just result"? If you do not believe so, explain your answer in detail.

Response: In virtually every case, the answer would be "Yes." There may be certain exceptions including, for example, a case where the alien failed to assert valid defenses or to seek alternative immigration benefits available because the

alien was incompetent or had ineffective assistance of counsel, and the court failed to address those issues.

b. Doesn't the enforcement of the immigration laws enacted by Congress result in a "just result"? Please explain.

Response: Yes, as described in my responses to questions 21 and 22 a.

23. As part of your speech to ICE, you stated as follows:

> **At the end of the day, the prosecutorial discretion decision is about doing justice and maintaining the credibility and integrity of the immigration system. And the better you know the implications of your decision from the perspective of others, like the lawyers at OIL, the more likely that you'll make the most informed, best choice.**

Career ICE agents and employees are attempting to enforce our immigration laws. Your statement suggests that they should second-guess their efforts and their decisions.

Do you believe that your decisions and the decisions of OIL attorneys about cases would be improved if you considered the perspectives of the ICE employees who are trying to enforce our immigration laws by removing illegal aliens? If so, what have you done to understand that perspective?

Response: Yes, absolutely. ICE employees attend weekly meetings at both the appellate and district court sections of OIL, which I attend, to discuss litigation issues. I also have met often on a variety of issues with various ICE employees. And I have lunch on occasion with ICE employees with no agenda in mind, in order to listen and learn about their perspectives. My speech to ICE attorneys was part of my effort to communicate about issues of common concern.

24. As part of your speech to ICE, you stated: "… shortly after I arrived [at DOJ], Juan Osuna, the DAAG for the Office of Immigration Litigation (OIL), started working full time on comprehensive immigration reform. I was drafted to help supervise OIL's litigation."

Have you had any role in developing a plan for or participated in any discussion regarding "comprehensive immigration reform"? If you have had a role in developing a plan, describe your role and that plan in detail. If you have participated in any discussions, describe the circumstances and content of those discussions in detail.

Response: No.

25. In *Lui v. Holder*, a challenge to the Defense of Marriage Act, you and the Department of Justice submitted a brief opposing a Motion to Dismiss. In that document, you summarized a key case from 1982, *Adams v. Howerton*, stating, "The Ninth Circuit Court of Appeals assumed that plaintiffs were parties to a valid same-sex marriage under state law."

That summary clearly misrepresents the *Adams* opinion. The Ninth Circuit actually stated, "It is not clear… whether Colorado would recognize a homosexual marriage.... While we might well make an educated guess as to how the Colorado courts would decide this issue, it is unnecessary for us to do so. We decide this case solely upon… the second step in our two-step analysis."

Moreover, the court indicates through *dicta* that it believed that Colorado state law and the Colorado state court system would likely decide the opposite: that a homosexual marriage would not be valid under existing Colorado state law.

a. In light of the language in *Adams*, why did you and the DOJ assert the opinion "assumed that plaintiffs were parties to a valid same-sex marriage?"

Response: I did not draft the brief or footnote in question, so I cannot speak to the intent of the language. After my hearing on July 11, I did review the *Adams* case again. The Ninth Circuit explained that "a two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the [Immigration and Nationality] Act. Both steps are required." 673 F.2d 1036, 1038 (9th Cir. 1982). Section III of the opinion, which discusses the constitutional holding in the case, begins, "Even if the Adams-Sullivan marriage were valid under Colorado law, the marriage might still be insufficient to confer spouse status for purposes of federal law." *Id*. at 1039. That language supports the sentence quoted in the first paragraph of this question because the court necessarily assumed, without deciding, that the marriage at issue was "state approved" in order to decide the case at the second step of the two-step inquiry—it would not have reached the constitutional issue if the case had been decided on the first step of the test described in *Adams*.

b. The *Adams* two-step test requires a plaintiff to show that a) they have a valid marriage under state law and b) that the marriage would "confer spouse status for purposes of federal immigration law." Why did you and the Department decide to include this distorted version of *Adams* when the plaintiffs in *Lui* met the first requirement of the test: that they had a valid marriage recognized by Massachusetts?

Response: Again, I did not draft this footnote, so I do not know the motivation of the author. However, as explained above, the footnote accurately describes *Adams*. Notably, it does not claim that the Ninth Circuit had decided that the

marriage at issue was valid under Colorado law, only that the court had assumed that proposition in order to decide the case at the second step of the two-step test.

c. Did you personally review this memorandum before it was submitted to the court or did you rely on trial counsel to properly cite check the brief?

Response: I did review at least one draft of the memorandum, although I do not know if I reviewed the final draft. I did not cite check the memorandum.

d. Please describe how you anticipate using law clerks if confirmed and what processes you will implement in order to ensure that their legal research is sound.

Response: If I am confirmed, I anticipate that my law clerks will review the pleadings submitted in a case and draft bench memoranda to explain their analysis. I expect to read the critical cases and declarations relied upon with respect to any given issue, in addition to the briefs and bench memoranda, prior to argument. Testing my clerks' analysis against the parties' arguments, and my own review will ensure that their research (and more importantly, my opinion) is sound.

26. During the hearing, you were asked by Sen. Coons to describe your judicial philosophy. You replied,

> **Senator, I am not sure I have a judicial philosophy. I revere the rule of law, and I believe it is my role to understand the facts and then apply the law to them. I would follow precedent directly.**

I later asked you about the District Court's decision in *Lui v. Holder* to uphold the binding precedent set by the Ninth Circuit *Adams v. Howerton*. Specifically, I asked "If confirmed would you [Mr. Orrick] follow the *Adams* precedent?"

You responded, "I will follow controlling precedent wherever it exists."

a. Do you believe that *Adams* is the controlling case in the Ninth Circuit involving challenges to the government's refusal to grant a I-130 petition, even when plaintiffs are challenging the definition of marriage as defined by DOMA? Please explain why or why not.

Response: I am reluctant to comment on this question as this is a matter which may come before me if I am fortunate enough to be confirmed. As I indicated in my testimony, if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

b. If faced with a similar case, as a district court judge in the Northern District of California, would you follow the *Adams* precedent, deferring to the parties to appeal to the Ninth Circuit, as did Judge Wilson in *Lui*? Please explain why or why not.

Response: I am reluctant to comment on this question as this is a matter which may come before me if I am fortunate enough to be confirmed. As I indicated in my testimony, if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

27. Federal Judges hold a public trust and are responsible for being good stewards of public resources made available to them. In this regard, I have publicly expressed concern about the costs of a planned Ninth Circuit Judicial Conference planned for Maui, Hawaii in August 2012.

a. Have you attended Ninth Circuit Judicial Conferences in the past and do you plan to attend this Conference or similar conferences in the future?

Response: I have not attended a Ninth Circuit Judicial Conference in the past and I do not plan to attend the one in Hawaii this year. I have no plans concerning future conferences if they occur and I am invited to attend.

b. Given the fiscal crisis facing our nation, do you think it is appropriate that this conference go forward as planned?

Response: I do not know enough about the purpose, goals and cost of this conference to respond to this question.

c. If confirmed, what influence would you bring to bear on your colleagues planning future conferences to ensure that taxpayer funds are used in a prudent manner?

Response: I am frugal by nature, and I have experience being in government during a period of belt-tightening. I expect my actions if I am confirmed will continue to reflect my character and experience in this regard.

d. As a public officer, what will be your general approach to the management of public resources?

Response: As indicated above, my general approach to the management of public resources is one of frugality and restraint.

28. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge needs to be respectful of, courteous to and patient with everyone in the courtroom. At the same time, he should move his docket with dispatch and make clear his expectations, particularly regarding the quality of advocacy. Treating others the way I would wish to be treated if I was in their shoes is important. I do (and will) meet that standard.

29. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

30. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: The starting point for deciding cases of first impression is the language of the statute involved. If it is unambiguous, the inquiry is at an end. If it is ambiguous, I would look to the structure of the entire statute in which the challenged provision occurs, apply canons of statutory construction, and look to see if there is similar or analogous precedent from the Supreme Court, Ninth Circuit and other circuits (in that order). I would also consider looking at the legislative history of the statute, although I am leery of putting much emphasis on legislative history since it is seldom complete and can be misleading.

31. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: I would be bound to apply the applicable precedent, regardless of whether I agree with it.

32. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A federal court is not supposed to reach the constitutionality of a statute if there is a statutory basis for deciding the case. If the constitutionality of the statute must be decided, a federal court must apply a heavy presumption in favor of constitutionality. Only if there is no constitutional basis for the statute would I be duty-bound to strike it down.

33. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: I intend to be an active manager of my caseload if I am confirmed. That means promptly holding initial case management conferences, staying involved in the case with periodic case management sessions, urging counsel to narrow the issues and utilize alternative dispute resolution when appropriate, setting firm deadlines and ruling quickly on motions that are filed.

34. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Judges should control the pace and conduct of litigation. If I am confirmed, at the initial case management conference I will set realistic and firm deadlines for the completion of trial preparation matters and dispositive motions. Absent unforeseen circumstances, I will not vary from those dates. Deadlines focus parties on dispute resolution. I will remain actively involved in the resolution of issues that arise in the course of the case in an effort to move it along. I will encourage mediation and other forms of alternative dispute resolution.

35. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you reach a decision in cases that come before you and to what sources of information will you look for guidance. What do expect to be most difficult part of this transition for you?

Response: I will start my decision-making process by gaining a thorough understanding of the facts of the case. I will diligently review the arguments of the parties and apply controlling precedent from the Supreme Court and Ninth Circuit. If there is none, I will look to similar cases in other circuits, and to analogous cases in the Supreme Court and the Ninth Circuit. If the case is a matter of first impression, I would proceed as described in answer to question 30.

I expect the most challenging part of this transition (and the most interesting) would be becoming fully conversant with criminal law and procedure. While I had some exposure to criminal work from 1984 – 1996, it was never a major staple of my practice. I intend to read deeply in this area and if I am fortunate enough to be confirmed, I will work closely with mentors on the bench.

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

Response: I worked on the answers to these questions on July 19 and 21, 2012, and provided them to the Department of Justice. I put them into final form and authorized their submission to the Senate Judiciary Committee on July 23, 2012.

37. Do these answers reflect your true and personal views?

Response: Yes.

Senator Chuck Grassley

Follow-up Questions for the Record

William H. Orrick III

Nominee, U.S. District Judge for the Northern District of California

You did not provide responsive answers to a number of my questions. The questions at issue and your responses to them are set forth below.

A. Question 3(a) and (b)

In his concurring/dissenting opinion in the *Arizona* case, Justice Scalia addressed the Obama administration's questionable claim that its pre-emption argument was supported by the need to allocate scarce immigration enforcement resources. Specifically, he wrote:

> The brief for the Government in this case asserted that 'the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.'
>
> …
>
> …. It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate 'scarce enforcement resources'—is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30.
>
> …
>
> The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement.

a. What is your reaction to Justice Scalia's analysis quoted above?

Response: As an employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any personal views on the Department of Homeland Security policies discussed in Justice Scalia's opinion.

b. The Obama administration justifies its immigration priorities and its refusal to deport illegal aliens due to the alleged need to allocate scarce enforcement

resources. Please explain how scarce "enforcement" resources are utilized by DOJ and DHS employees reviewing files for the awarding of *de facto* amnesty under the prosecutorial discretion initiative, as opposed to enforcing the immigration laws as enacted by Congress.

Response: As an employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any views on the enforcement resource issues other than those related to the work of Office of Immigration Litigation, about which I have direct knowledge. Whether a case might warrant the exercise of prosecutorial discretion is always an issue when it is reviewed by the Office of Immigration Litigation, so the review that occurred as a result of the initiative sped up an analysis that would have occurred later. Therefore, it did not cause a material difference in the expenditure of OIL's resources, and to the extent ICE exercises prosecutorial discretion in any of those cases, OIL's law enforcement resources would be utilized in other, higher priority cases.

B. Question 6

In 2011, President Obama acknowledged that he did not have the authority to unilaterally order a program such as the one he announced on June 15, 2012. Describe in detail the constitutional authority that allegedly authorizes the program announced by President Obama on June 15, 2012?

Response: As I indicated above, I did not have any role in developing this policy nor did I participate in any discussions concerning it prior to its announcement. Moreover, this issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

C. Question 14

If a panel of a federal circuit court has affirmed a removal order in an immigration case, do you believe it would be a violation of the separation of powers for the Executive Branch to disregard the mandate and allow the illegal alien to remain in the United States? If not, explain your answer in detail.

Response: I am not aware that any case has raised this issue during my tenure with the Department of Justice and I have never researched it. This issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

D. Question 15

If confirmed, what will be your recusal policy for cases involving the Department of Justice?

Response: If confirmed, I would recuse myself from cases which were pending in OIL while I was Deputy Assistant Attorney General, whether or not I was aware of them at the time, because of the appearance of a conflict. I would also recuse myself from any other case in which I had any involvement during my time with the Department, and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

E. Question 16

If confirmed, what will be your recusal policy for cases involving other federal agencies?

Response: If confirmed, I would recuse myself from any case in which I had any involvement during my time with the Department, and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

F. Question 17

If confirmed, what will be your recusal policy for cases involving immigration issues?

Response: If confirmed, I would recuse myself from any case that was pending in OIL while I was Deputy Assistant Attorney General and from any other case as required by the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

G. Question 20(c)

As part of your speech to ICE, you stated that federal judges had asked you or asked DOJ "[w]hy is the rate of removals after we order removal so low? Does that say something about the failure to choose the right cases to bring to the Court's attention?"

c. After a federal circuit court issues a mandate and orders removal, do you maintain that the executive branch has the authority to effectively vacate that order or judgment by not deporting the individual?

Response: I am not aware that any case has raised this issue during my tenure with the Department of Justice and I have never researched it. This issue is one which could come before me in court, if I am confirmed. As a result, I am hesitant to comment. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

H. Question 26

During the hearing, you were asked by Sen. Coons to describe your judicial philosophy. You replied,

> Senator, I am not sure I have a judicial philosophy. I revere the rule of law, and I believe it is my role to understand the facts and then apply the law to them. I would follow precedent directly.

I later asked you about the District Court's decision in *Lui v. Holder* to uphold the binding precedent set by the Ninth Circuit in *Adams v. Howerton*. Specifically, I asked "If confirmed would you [Mr. Orrick] follow the *Adams* precedent?"

You responded, "I will follow controlling precedent wherever it exists."

a. Do you believe that *Adams* is the controlling case in the Ninth Circuit involving challenges to the government's refusal to grant a I-130 petition, even when plaintiffs are challenging the definition of marriage as defined by DOMA? Please explain why or why not.

Response: I am reluctant to comment on this question as this is a matter which may come before me if I am fortunate enough to be confirmed. As I indicated in my testimony, if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

b. If faced with a similar case, as a district court judge in the Northern District of California, would you follow the *Adams* precedent, deferring to the parties to appeal to the Ninth Circuit, as did Judge Wilson in *Lui*? Please explain why or why not.

Response: I am reluctant to comment on this question as this is a matter which may come before me if I am fortunate enough to be confirmed. As I indicated in my testimony, if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

FOLLOW-UP and SUPPLEMENTAL QUESTIONS:

1. **Your involvement with the enforcement of the Obama administration's immigration policies via lawsuits against Arizona, Alabama, South Carolina and Utah and your involvement with the implementation of the so-called prosecutorial discretion initiative, gives you personal knowledge of the issues which are the subject of the question. Accordingly, please provide a responsive answer to question 3(a).**

Response: In announcing the deferred action policy discussed by Justice Scalia, the Department of Homeland Security stated that its action would "further enhance[] the Department's ability to focus on…priority removals," such as "individuals who pose a

national security or public safety risk, including immigrants convicted of crimes, violent criminals, felons, and repeat immigration law offenders." I did not have any role in developing this policy nor do I have any knowledge of the associated costs to which Justice Scalia referred. As a result, I am not in a position to express an opinion on Justice Scalia's comments.

2. **Question 3(b) was a reasonable question. It calls for a common sense answer. Contrary to your response, your employment by the Department of Justice does not immunize you from having to answer the question. Indeed, as a result of your involvement with the enforcement of the Obama administration's immigration policies via lawsuits against Arizona, Alabama, South Carolina and Utah and your involvement with the implementation of the so-called prosecutorial discretion initiative, you have personal knowledge of the issues which are the subject of the question. Similarly, your status as a nominee for a federal judgeship does not immunize you from having to answer questions, especially about a policy you were involved in implementing. Accordingly, provide a detailed answer to question 3(b).**

   Response: It is my understanding that the purpose of the review of the pending immigration cases at the Executive Office for Immigration Review is to remove low priority cases from the active dockets of the immigration courts so that the higher priority cases on the detained docket will move more quickly and that ICE will be able to concentrate its law enforcement resources on the higher priority aliens. As explained above, however, I do not have any personal knowledge of the costs associated with the prosecutorial discretion initiative at the Department of Homeland Security or Department of Justice, except for the impact on OIL that I previously described.

3. **As noted above, your responses to questions 6, 14, and 20(c) suggest that you believe that, if confirmed, you can hear cases involving issues related to the Obama Administration's immigration policies.**

   You are a senior political appointee in the Obama Justice Department. Indeed, you are the head of the Office of Immigration Litigation and have been handling immigration issues since at least May 2010. Given your involvement with the enforcement of the Obama administration's immigration policies via lawsuits against Arizona, Alabama, South Carolina and Utah and your involvement with the implementation of the so-called prosecutorial discretion initiative, common sense and an objective analysis would dictate that, if confirmed, you should be disqualified from hearing any case that involved the Obama administration's immigration policies. This should be so regardless of whether you were personally involved in the case or whether it was commenced after you left the Department of Justice.

   a. **Contrary to your response, Question 6 does not involve an issue that could come before you as a judge. And any purported concern you might have is not a basis for refusing to answer the question. Accordingly, provide a detailed answer to Question 6.**

Response: As I indicated before, I was not involved in developing this policy in any manner and I have not researched the President's constitutional authority with respect to it. I am aware that litigation has recently been filed concerning the Obama administration's policy, and although the Office of Immigration Litigation is not responsible for it, I agree that in the event I were confirmed and similar litigation would be initiated in my court, I would be obligated to recuse myself. But the same issue could also arise in a challenge to a different administration's immigration policies, and related issues concerning the scope of the Executive Branch's prosecutorial discretion could also arise in non-immigration contexts. Because I would not necessarily be recused in such cases, I believe it would be inappropriate for me to express any personal views on these matters.

b. Question 14 does not involve an issue that could come before you as a judge. And any purported concern you might have is not a basis for refusing to answer the question. Accordingly, provide a detailed answer to question 14.

Response: It is a violation of the separation of powers for the United States to refuse to comply with the final order of a federal court. This is not a question that I have researched, but in the context of deportations, the answer to the question would depend on what the court ordered and what DHS did in response to it. Broad discretion on how to allocate resources to effectuate removals is vested in the Secretary of the Department of Homeland Security, and it can be difficult or impossible to remove some aliens to their home countries. The presence of an alien in the country after a final order does not necessarily evidence a disregard of the court's order, no matter how the order is phrased.

c. Please provide a responsive answer to Question 20(c).

Response: My answer is the same as to the question above.

4. Your answer to question 15 is incomplete. While you discuss recusing yourself from "cases which were pending in OIL while [you were] Deputy Assistant Attorney General," you do not address cases from other units of the Justice Department. Nor do you address cases that were in the planning stages while you were at the Department or cases which involve issues, policies or initiatives developed by the Justice Department while you were employed by the Department. Accordingly, provide a complete answer to question 15.

Response: As I explained in my original answer, I would recuse myself from cases in which I had any involvement--direct or indirect--while I was employed at the Department of Justice. There would be no distinction based on the branch or division in which such a case arose. This would be true for cases in the planning stages, and cases involving issues, policies or initiatives in which I had a direct or indirect involvement. I would also

recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

5. **Your answer to question 16 is incomplete. You do not address cases which involve issues, policies or initiatives developed by the Obama administration while you were employed by the Department of Justice as a senior political appointee. Accordingly, provide a complete answer to question 16. In particular, do you maintain that you could preside over a case involving the Obama administration's prosecutorial discretion initiative or another one of the administration's immigration policies?**

   Response: I would recuse myself from cases involving issues, policies or initiatives developed by the Obama administration while I was employed at the Department of Justice in which I had direct or indirect involvement. This would include cases challenging the prosecutorial discretion initiative and recent deferred action policy discussed earlier. I would also recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

6. **With regard to Question 17 – If confirmed to be a United States Judge, would you be disqualified or would you recuse yourself from hearing a case that involved the Obama administration's immigration policies? If you maintain that you could hear a case involving the Obama administration's immigration policies, explain in detail how you could preside over such a case in compliance with the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.**

   Response: As I stated above, I would recuse myself from cases in which I had direct or indirect involvement, including those involving immigration policies developed by the Obama administration while I was employed in the Department of Justice and any other policies that may have been in the discussion stage during my employment of which I was aware. I would also recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

7. **Your involvement with the administration's refusal to enforce the Defense of Marriage Act (DOMA), common sense and an objective analysis would dictate that, if confirmed, you should be disqualified from hearing any case that involved the Obama administration's immigration policies or DOMA. This should be so regardless of whether you were personally involved in the case or whether it was commenced after you left the Department of Justice.**

   a. **Thus, contrary to your response, Question 26(a) does not involve an issue that could come before you as a judge. And any purported concern you might have is not a basis for refusing to answer the question. Accordingly, provide a detailed answer to Question 26(a).**

Response: Under my oversight and supervision, lawyers at the Office of Immigration Litigation have argued in support of the constitutionality of Section 3 of DOMA, and against it. They have argued that *Adams* is controlling, and that it is not. I agree with the observation that I should recuse myself from cases challenging the constitutionality of Section 3 of DOMA but it is also possible that a question about the precedential effect of the *Adams* case could arise in a different context in which I would not be recused, and for that reason I do not think it would be appropriate for me to express any personal opinion on this question.

b. Please provide a responsive answer to Question 26(b). Would you or would you not follow the *Adams* precedent? Explain your response.

Response: Please see my response to question 7a, above.

c. In addition, please confirm that you agree that, if confirmed as a judge, you would be disqualified from hearing a case that involved the Obama administration's immigration policies or DOMA. If you maintain that you could hear a case involving the Obama administration's immigration policies or DOMA, explain that position in detail.

Response: I would recuse myself from challenges to the immigration policies developed in the Obama administration while I have been employed by the Department of Justice in which I had direct or indirect involvement, and I would recuse myself from cases in which the constitutionality of Section 3 of DOMA is at issue. I would also recuse myself from any other case as required by the Code of Conduct for United States Judges as well as other relevant canons and other statutory provisions.

Senator Jeff Sessions
Questions for the Record
William Orrick, III

1. **Do you agree that federal law is clear that state and local law enforcement can initiate requests to the Department of Homeland Security to verify the immigration status of individuals for any purpose authorized by law and that no agreement between state and local law enforcement and the federal government is required for a state or local officer or employee to communicate with the Attorney General regarding the immigration status of any individual?**

   Response: I agree.

2. **In your opinion, what determines whether a state law is preempted, laws passed by Congress or the policy of a particular administration? Please explain your answer.**

   Response: Case law is clear that the Constitution, laws passed by Congress, and federal regulations implementing those laws, not a particular administration's policy, determine whether a state law is preempted.

3. **If a state chooses to assist in enforcing federal laws using its own resources and Congress has not expressly stated whether it states to assist in enforcing those federal laws, is the state preempted from assisting?**

   Response: In the immigration context, *Arizona v. United States* makes clear that there are certain areas where the state is preempted from acting. In other areas, the same preemption concerns may not apply.

   a. **Do you agree that the doctrines of federalism and dual sovereignty ensure that states are empowered to enforce federal laws unless Congress expressly prohibits them from doing so? Please explain your answer.**

   Response: Again, in the immigration context, *Arizona v. United States* makes clear that there are certain areas where the state is preempted from acting to enforce federal laws. In other areas, the same preemption concerns may not apply. I have never researched this question outside of the immigration context, and since this is an issue which may come before me if I am fortunate enough to be confirmed, I am hesitant to comment further. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

4. **In your view, under what circumstances is it acceptable for state and local governments to enforce immigration laws?**

   Response: In *Arizona v. United States*, the Supreme Court explained that with respect to immigration, as in other matters, state and local enforcement measures are preempted only where Congress has "withdraw[n] specific powers from the states by enacting a

statute containing an express preemption provision"; where states or localities seek to regulate "a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance"; or where the state or local laws "conflict with federal law." 132 S. Ct. 2492, 2500 – 2504 (2012).

5. What limits are there on the executive's discretion in deciding whether to enforce the law?

Response: I have never researched this question and do not have an answer to it.

a. Do you believe the President's prosecutorial discretion authority gives him the power to exempt whole classes of individuals from application of the law?

Response: This is an issue which might come before me if I am confirmed and as a result I am reluctant to express any views on this topic. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

b. Do you agree that the "faithfully execute" clause in Article II of the Constitution requires that a President enforce the laws passed by previous Congresses and signed by previous Presidents?

Response: I am not aware of any precedent suggesting that the President's duty to faithfully execute the laws of the United States varies depending on which Congress enacted, or which President signed, the statute at issue.

c. Do you agree that the Constitution grants Congress plenary authority over immigration policy?

Response: In *Arizona v. United States*, the Supreme Court stated that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." 132 S. Ct. 2492, 2498 (2012). If confirmed as a judge and presented with a case raising a question about the extent of Congress's authority over immigration, I would follow all applicable precedents of the Supreme Court and the Ninth Circuit.

6. **In a speech at the Immigration and Customs Enforcement Office Principal Legal Advisors Conference, you defended the President's authority to choose not to prosecute certain illegal aliens because "the judges before whom we argue our cases will do their best to do justice, and that may mean that they'll be tempted to interpret the law in a results-oriented way."**

a. Do you believe it is ever proper for a judge to engage in results-oriented decisionmaking? If so, under what circumstances?

Response: No. I do not believe it is ever proper for a judge to engage in results-oriented decisionmaking.

b. Does this statement accurately reflect your judicial philosophy?

Response: No. As stated above, it is not proper for a judge to engage in results-oriented decisionmaking. In my speech, I was actually criticizing the unfortunate reality that immigration cases can be particularly susceptible to judges who try to find a way not supported by the law to help sympathetic petitioners. If judges do so, they damage the INA and the government's ability to enforce the law as Congress intended. This risk of adverse decisions in sympathetic cases is one reason why, in order to fulfill their responsibility to enforce the INA effectively, government lawyers must be aware of the entire context of a case in determining whether the exercise of prosecutorial discretion is appropriate.

c. **Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances**?

Response: No.

7. **When Attorney General Holder announced the Justice Department would sue Utah over the provision of its immigration law that requires law enforcement to check individuals' immigration status, he also stated that the Department would not challenge the state's guest worker laws, even though they were – according to the Attorney General – "clearly preempted by federal law." The Attorney General stated that "in light of the constructive conversations the Department continues to have with Utah officials about these provisions pursuant to the Justice Department's long-standing policy of exploring resolution short of litigation before filing suit against a state, the department is not challenging these provisions today."**

a. To your knowledge, did the Justice Department ever provide Arizona, Alabama, or South Carolina the opportunity to "explore a resolution short of litigation" before suing them?

Response: Yes, to my knowledge then Assistant Attorney General West and Assistant Attorney General Perez met with the Attorneys General of Arizona, Alabama and South Carolina prior to filing suit in order to explore resolution short of litigation, just as they met with the Attorney General of Utah.

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b. What specific differences between the enforcement law and the guest worker law led to the decision to challenge one but not the other?

Response: The Attorney General has been unequivocal that the guest worker provision is preempted and will be challenged unless it is repealed or modified in a way that comports with federal law. As the Attorney General has indicated in public

statements, however, the guest worker law does not go into effect until July 2013, whereas the enforcement laws would have gone into effect in 2011 unless they were enjoined.

c. To what extent did political considerations influence the decision not to challenge Utah's guest worker law?

Response: To my knowledge, none.

d. What was your role in determining whether the Justice Department would challenge Utah's guest worker law and the state's enforcement law?

Response: I helped supervise the review of Utah's immigration statutes. I reviewed the work of the team assigned to the analysis of those statutes, helped coordinate the necessary fact-gathering with the Departments of Homeland Security and State and disseminated the litigation team's analysis to those Departments as well as internally at the Department of Justice. I was a member of groups that met with Utah Attorney General Shurtleff on two occasions. I met several times with others within the Department, as well as with attorneys from DHS and the State Department, to discuss the possible litigation scenarios.

e. Do you believe that a State should be able to issue work permits to illegal aliens?

Response: This is an issue that might come before me in the future if I am confirmed, and I am reluctant to express any views on it. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

8. **In *Liu v. Holder*, you are listed as counsel of record along with Assistant Attorney General of the Civil Division Tony West. In that case, the Justice Department argued that the court should apply heightened scrutiny, rather than rational basis review, to classifications based on sexual orientation, and hold Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. It is my understanding that the courts have rejected your arguments.**

a. Do you agree that the Executive Branch has a clear and unwavering duty to vigorously defend the constitutionality of any law for which a reasonable defense may be made?

Response: I agree generally with the proposition espoused above, except in the rare instances where a determination by the President and Attorney General has been made that the law is unconstitutional or where the law represents an inappropriate legislative interference with the Executive Branch.

b. Do you agree that there is a difference between refusing to defend a law that the administration regards as unconstitutional and refusing to defend a law that the administration opposes on policy grounds?

Response: Yes.

c. Do you agree that if an administration refuses to defend clearly constitutional laws based on its own policy views, it is a violation of the oath to protect and defend the Constitution and the laws of the United States?

Response: Yes.

d. Would you characterize the Justice Department's brief in *Liu v. Holder* as a "vigorous" defense of the law?

Response: I would characterize the brief as a vigorous assertion of the United States government's position in light of the President's and Attorney General's determination regarding the constitutionality of Section 3 of DOMA.

e. Do you agree that there are several reasonable arguments in defense of DOMA, including that the law is rationally related to legitimate government interests in procreation and childrearing, or do you agree with the administration that it is not rationally related to those ends?

Response: As this is an issue which may come before me if I am fortunate enough to be confirmed, I am hesitant to express any views on it. I can assure you that if I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

f. Do you acknowledge that the Bush administration successfully defended DOMA using precisely the foregoing arguments?

Response: Yes.

g. Do you acknowledge that those same arguments have been widely relied on by federal and state courts in upholding states' traditional marriage laws?

Response: Yes, some courts have upheld states' marriage laws using the same or similar arguments.

9. **Do you believe there is a federal constitutional right to same-sex marriage?**

Response: Neither the Supreme Court nor the Ninth Circuit has recognized a federal constitutional right to same-sex marriage. If I were presented with a case raising this issue, I would follow all applicable legal authorities and precedents.

a. Have you ever expressed an opinion as to whether there is a federal constitutional right to same-sex marriage? If so, what was that opinion?

Response: I have taken litigation positions both for and against DOMA's constitutionality while representing the United States. I do not recall expressing an opinion outside the context of those cases regarding DOMA's constitutionality or whether there is or is not a federal constitutional right to same-sex marriage.

10. **In your questionnaire, you stated that part of your duties at the Justice Department include "spearhead[ing] or participat[ing] in a wide range of projects, including matters related to… tobacco litigation." Please explain in detail the work you have done with respect to tobacco litigation matters.**

Response: When I arrived at the Department, I was asked to join the team in the Civil Division that was considering whether to recommend to the Solicitor General to seek en banc review or certiorari in the *United States v. Philip Morris* tobacco litigation. I attended several meetings on that topic. Once certiorari was denied, the case was remanded to district court and I had no material further involvement in tobacco litigation matters after that time.

11. **Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.**

Response: It is settled law that the death penalty does not constitute cruel and unusual punishment under the Constitution. I will have no difficulty applying controlling precedent on this issue.

12. **Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

Response: Again, Supreme Court precedent establishes that the death penalty is a constitutional form of punishment and I will have no difficulty applying controlling precedent in this regard.

Questions for the Record

July 11, 2012 Nominations Hearing

Senator Mike Lee

Questions for Mr. Orrick

1. **You supervised the Department of Justice's district court litigation against Utah, Arizona, Alabama, and South Carolina for implementing immigration enforcement provisions. In a speech at a conference for the ICE Office of Principal Legal Advisors, you said, "We have relied on cooperation from state and local law enforcement to do our job. But cooperation with the preeminent authority means that the states have to act in concert with federal priorities."**

    a. **Who determines what the federal priorities for immigration enforcement are?**

    Response: Federal priorities for immigration enforcement are set pursuant to Congressional enactments, such as the Immigration and Nationality Act, the relevant implementing regulations, and the Department of Homeland Security, which is vested with significant discretion in the aforementioned laws and regulations.

    b. **If Congress passed legislation outlining enforcement priorities, would the President be authorized to ignore that legislation and create priorities of his own?**

    Response: This is an issue which may come before me if I am fortunate enough to be confirmed, and I am reluctant to comment on it. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

    c. **If the President attempted and failed to pass legislation establishing enforcement priorities, should he be authorized to establish an enforcement scheme adopting those priorities?**

    Response: Again, this is an issue which may come before me if I am fortunate enough to be confirmed, and I am reluctant to comment on it. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.

2. **In the speech at the ICE conference you said that "the prosecutorial discretion decision is about doing justice and maintaining the credibility and integrity of the immigration system."**

a. To what decision were you referring?

Response: I was referring to the decision made by ICE to exercise or not exercise prosecutorial discretion in an individual immigration proceeding.

b. Do you believe the prosecutorial discretion directives outlined in the recent ICE memorandum, allowing for deferred action on the "Dream Act" population, maintains the credibility and integrity of the immigration system?

Response: As a current employee of the Department of Justice and a prospective federal judge, I do not believe it would be appropriate for me to express any personal views on Secretary Napolitano's recent memorandum entitled "Exercising Prosecutorial Discretion With Respect To Individuals Who Came To The United States As Children."

c. Do you believe that a President should be able to enact under the label of prosecutorial discretion that which he could not pass through Congress?

Response: As I indicated above, this is an issue which may come before me if I am fortunate enough to be confirmed, and I am reluctant to comment on it. If I were presented with a case raising this issue, my decision would be based solely on the applicable legal authorities and precedents, which I would follow unreservedly.