Written Questions of Chairman Patrick Leahy
For Elena Kagan
Nominee to be Solicitor General of the United States
Submitted February 10, 2009

In a civil case before the 9th Circuit Court of Appeals yesterday, *Mohamed et al v. Jeppesen Dataplan, Inc*., the Department of Justice adhered to its claim that the "state secrets" privilege required the dismissal of a lawsuit claiming that a unit of Boeing Company provided aircraft to fly people to foreign countries where they were tortured. Last year I chaired a hearing where we explored how the "state secrets" privilege had been greatly expanded and abused by the Bush administration. The privilege should be limited to protecting our national security and not used to avoid accountability.

1. If confirmed, will you review the invocation of the privilege in this case and consider whether through use of CIPA or other procedures there is a way to allow this case to proceed on the merits?

   Answer: My understanding is that the Attorney General has directed a review of all litigation in which the United States Government has asserted the state secrets privilege, including the case you cite. If I am fortunate enough to be confirmed, I will work with the Attorney General and others at the Department of Justice and across the agencies to ensure that the United States invokes the state secrets privilege only in legally appropriate situations.

2. Will you provide the Judiciary Committee with briefings on the basis for the invocation of the privilege in this and other cases?

   Answer: Although I have a good deal to learn about the Solicitor General's responsibilities, my current understanding is that the Solicitor General is not the primary person responsible for invoking the state secrets doctrine in litigation. I certainly will work with the Attorney General to ensure that the most appropriate official in the Justice Department provides such a briefing.

Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter

At your hearing, Senator Hatch asked you about a statement you made on senatorial inquiry into a nominee's judicial philosophy and views on specific issues in your review of Stephen Carter's book, *The Confirmation Mess*. You wrote: "The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues." In response to Senator Hatch's question, you stated, "I'm not sure that, sitting here today, I would agree with that statement;" however, you agreed that there "has to be a balance" and the "Senate has to get the information that it needs … [from] the nominee, for any particular position -- whether it's judicial or otherwise." In light of your acknowledgement, I would like to have your views on the following constitutional issues.

Answer: I appreciate this comment and stand by what I said at my hearing. I would note only that the information the Senate needs is related to the position that the nominee hopes to perform. So, for example, information that is relevant to one executive branch position may not be relevant to another, and information that is relevant to a judicial position may not be relevant to either (or vice versa).

The Death Penalty

1. Justice Marshall, the justice for whom you clerked, maintained that the death penalty was always unconstitutional. Do you think that Justice Marshall had it right?

    a. Do you support the death penalty?

    b. Do you believe it is constitutional as applied in the United States?

    c. If your answer is no, are you prepared to argue in favor of the constitutionality of the death penalty before the Supreme Court?

    Answer: I am fully prepared to argue, consistent with Supreme Court precedents, that the death penalty is constitutional. As Solicitor General, I would represent the interests of the United States, as expressed in legislation and executive policy. Like other nominees to the Solicitor General position, I have refrained from providing my personal opinions (except where I previously have disclosed them), both because these opinions will play no part in my official decisions and because such statements of opinion might be used to undermine the interests of the United States in litigation. But I can say that nothing about my personal views regarding the death penalty (relating either to policy or law) would make it difficult for me to carry out the Solicitor General's responsibilities in this area.

2. Last year, in *Kennedy v. Louisiana*, the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Justice Kennedy based his opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of

capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006, as reported first by Col. Dwight H. Sullivan in his blog and later by the *New York Times*.

a. Given the heinousness of the crime, as well as the new information on the federal government's codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?

b. Following the Supreme Court's decision, President Obama announced at a press conference: "I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime." Do you agree with that statement?

c. Would you, as Solicitor General, encourage the Court to reconsider its decision?

Answer: I do not think it comports with the responsibilities and role of the Solicitor General for me to say whether I view particular decisions as wrongly decided or whether I agree with criticisms of those decisions. The Solicitor General must show respect for the Court's precedents and for the general principle of *stare decisis*. If I am confirmed as Solicitor General, I could not frequently or lightly ask the Court to reverse one of its precedents, and I certainly could not do so because I thought the case wrongly decided. There are circumstances, however, in which the Solicitor General properly can petition the Court to reconsider a decision. Relevant to this inquiry are whether a rule of law has been found unworkable, whether subsequent legal developments have left the rule an anachronism, or whether premises of fact are so far different from those initially assumed as to render the rule irrelevant or unjustifiable. The last of these factors would seem the one most potentially relevant to the *Kennedy v. Louisiana* decision. But I currently do not know enough about this decision or the facts and circumstances surrounding it to say whether I would ask the Court to reconsider it if I were confirmed as Solicitor General; nor would I make this determination without going through the extensive process that the Solicitor General's office typically uses in such cases.

Constitutional and Statutory Interpretation

3. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution?

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

b. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

c. Would you ever give weight to other nations' restrictions on gun rights when interpreting the Second Amendment?

Answer: This set of questions appears different when viewed from the perspective of an advocate than when viewed from the perspective of a judge. At least some members of

the Court find foreign law relevant in at least some contexts. When this is the case, I think the Solicitor General's office should offer reasonable foreign law arguments to attract these Justices' support for the positions that the office is taking. Even the Justices most sympathetic to the use of foreign law would agree that the degree of its relevance depends on the constitutional provision at issue. A number of the Justices have considered foreign law in the Eighth Amendment context, where the Court's inquiry often focuses on "evolving standards of decency" and then on the level of consensus favoring or disfavoring certain practices. By contrast, none of the Justices relied on other nations' restrictions on gun rights in their opinions in *District of Columbia v. Heller*, 554 U.S. ___ (2008), and the grounded historical approach adopted in that case (and echoed even in the dissents) would grant no relevance to arguments from comparative law in defining the scope of the Second Amendment right.

4. What are your views on judicial activism?

    a. Do you agree with the view that the courts, rather than the elected branches, should take the lead in creating a more just society?

Answer: I do not agree with this view. I think it is a great deal better for the elected branches to take the lead in creating a more just society than for courts to do so.

    b. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the Supreme Court held that a right to assistance in committing suicide was not protected by the Due Process Clause, the Court reasoned: "we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."

        i. Do you agree with the Court's assessment of the importance of public debate and legislative action?

        ii. The *Glucksberg* decision has proven to be a case that stimulated healthy debate amongst the states. As Solicitor General, will you argue for more reserved rulings such as the *Glucksberg*, which support the states' efforts and legislative action as the proper way to effect change?

Answer: I do agree with the Court's assessment of the importance of public debate and legislative action. If I am confirmed as Solicitor General, I expect I would make this point to the Court with some frequency, because it is likely to be relevant in any case in which a congressional statute is subject to constitutional challenge. In cases involving state legislation, the Solicitor General's office of course has more discretion regarding the appropriate position (if any) to take. But in these cases as well, I think an important consideration for the office to take into account is the degree to which the courts, by

staying their hand, can encourage experimentation and healthy debate among the states and their citizens.

5. What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?

    a. Is there any room in constitutional interpretation for the judge's own values or beliefs?

Answer: I think a judge should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs. In order to accomplish this result, the judge should look to constitutional text, history, structure, and precedent. Relating these views to the position for which I am nominated, I think these kinds of arguments also are most successful in advocacy before the courts in constitutional cases.

    b. Do you believe that the Constitution, properly interpreted, confers a right to a minimum level of welfare?

Answer: The Constitution has never been held to confer a right to a minimum level of welfare. For a very short period of time around 1970, some courts and commentators suggested that welfare counted as a fundamental interest for purposes of equal protection review. This period of constitutional thought, however, came to a close very quickly, as the courts determined that welfare policy was not best made by the judicial branch. This determination comported with this nation's traditional understanding that the Constitution generally imposes limitations on government rather than establishes affirmative rights and thus has what might be thought of as a libertarian slant. I fully accept this traditional understanding, and if I am confirmed as Solicitor General, I would expect to make arguments consistent with it.

    c. Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?

Answer: The Constitution has never been held to confer a right to engage in obscene speech. To the contrary, the Court long has considered obscenity a category of "low-value" speech that is unprotected by the First Amendment. *Miller v. California*, 43 U.S. 15 (1973), sets out the basic test for what material counts as obscene. I fully accept this longstanding body of law, and if I am confirmed as Solicitor General, I would expect to make arguments consistent with it.

6. Do you believe the President has the constitutional authority as commander-in-chief to override laws enacted by Congress and to immunize people under his command from prosecution if they violate these laws passed by Congress?

    a. Do you believe the President has the authority to circumvent the Foreign Intelligence Surveillance Act (FISA), and bypass the FISA court to conduct warrantless electronic surveillance that may include spying on Americans?

Answer: The appropriate analysis in considering any question of this kind derives from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that opinion, Justice Jackson describes three situations: the first where executive power is exercised pursuant to a congressional authorization; the second where executive power is exercised in the absence of any congressional action; and the third "when the President takes measures incompatible with the expressed or implied will of Congress." In the last situation, Justice Jackson notes, presidential "power is at its lowest ebb" and "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." This does not mean the President *never* has power to act in such a situation, for on some occasions, as Justice Jackson recognizes, Congress is indeed "disabl[ed]" from acting upon a subject. But these occasions are rare and cannot be created or justified merely by a general invocation of the commander-in-chief power. These principles are the ones I would apply to the consideration of any executive action, including any action relating to FISA.

7. How would you determine Congressional intent in cases of statutory interpretation?

    a. Should presidential signing statements be considered by a court in construing Congressional intent?

    b. What weight would you give foreign law in statutory interpretation?

Answer: By far the best way of determining Congressional intent in cases of statutory interpretation is to look at what *Congress* intended – not what either the President or foreign law says about the language in dispute. There may be exceptional occasions when non-Congressional sources can provide clues to meaning – for example, when Congress itself has indicated that it is looking to foreign law or when a Presidential signing statement makes note of a particular piece of legislative history. In general, however, such sources have far less weight than the actual language of the statutory provision in question and the legislative history (if any) surrounding it.

8. In 1993, you worked on Justice Ginsburg's confirmation hearing. Prior to Justice Ginsburg's confirmation to the Supreme Court, she wrote on a number of women's issue. She had written that the age of consent for women should be 12, that prisons should house men and women together in order to have gender equality, that Mother's and Father's Day should be abolished because they stereotype men and women, and that there is a constitutional right to prostitution. In a 1995 book review, you called Justice Ginsburg a "moderate." Do you believe these are moderate positions?

    a. Do you agree with these positions? If not, with which ones do you disagree?

    b. Justice Ginsburg said that there should be Federal funding for abortion. Do you believe that is a moderate position?

c. Do you think Justice Ginsburg's record on the Supreme Court demonstrates that she is a "moderate?"

Answer: My statement in 1995 that Justice Ginsburg was a "moderate" (meaning something like "in the middle") was based on her record on the Court of Appeals for the D.C. Circuit, not on any of the positions you cite. I do not recall (or perhaps never knew) what Justice Ginsburg said about the women's issues you cite, but as these positions are presented here, I do not agree with them and would not characterize them as moderate. Similarly, on the assumption that Justice Ginsburg once advocated a constitutional right to funding for abortion, that position has been decisively rejected. The Supreme Court held several decades ago that such funding is not a matter of constitutional right, *see Harris v. McRae*, 448 U.S. 297 (1980), and that holding has not since been seriously challenged. Given that I hope to be arguing before her one day soon, I hope you will let me decline to characterize Justice Ginsberg's record on the Court; I am concerned that applying any label to her, or to any other Justice, would compromise my ability to be the best advocate possible for the interests of the United States.

9. In *Boumediene v. Bush*, the Supreme Court held that the detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, "are entitled to the privilege of habeas corpus to challenge the legality of their detention." Slip Op. at 42. The Court based its holding on Article I, Section 9, Clause 2, of the Constitution (the Suspension Clause), which allows for suspension of habeas corpus rights only in cases of rebellion or invasion. Currently, a federal judge is exploring whether *Boumediene*'s result reaches another military prison where the U.S. now holds perhaps three times the number of detainees still left at Guantanamo Bay — the "Bagram Theater Internment Facility" at an airfield some 40 miles outside of Kabul, Afghanistan.

    a. Do you believe that the detainees imprisoned at Bagram are entitled to the writ of habeas corpus?

    b. Since both prisons are under the total control of the U.S., and both prisons may be used to imprison these men for an unlimited duration (although the President has vowed to close Guantanamo), how do you distinguish them?

Answer: On February 20, the Department of Justice filed papers in a case in the U.S. District Court for the District of Columbia stating that "the Government adheres to its previously articulated position" that the court lacks jurisdiction "over habeas petitions filed by detainees held at the United States military base in Bagram, Afghanistan." I played no role in this decision, but if I am confirmed as Solicitor General, I might well be called on to represent the position of the United States in this matter. Accordingly, I think I should refrain from saying anything more than the government previously has argued on the questions you raise.

Particular Cases

10. Do you believe that the Supreme Court's Second Amendment decision in *District of Columbia v. Heller* was rightly decided?

11. Do you believe that the Supreme Court's Takings Clause decision in *Kelo v. New London* was correctly decided?

12. Do you believe that the Supreme Court's decision in *Zelman v. Simmons-Harris*, which ruled that school-choice programs that include religious schools don't violate the Establishment Clause, was correctly decided?

13. Do you believe that the Supreme Court's decision in *Morrison v. Olson*, which ruled that the independent-counsel statute did not violate the constitutional separation of powers, was correctly decided?

Answer: For questions 10 through 13, my answer is the same. As noted earlier, the Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. I do not think it would comport with this responsibility to state my own views of whether particular Supreme Court decisions were rightly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. In that position, I would not frequently or lightly ask the Court to reverse one of its precedents, and I certainly would not do so because I thought the case wrongly decided.

Defense of Statutes and Regulations as Solicitor General

14. You have been outspoken in your opposition to the military's "Don't Ask, Don't Tell" policy and the Solomon Amendment, which requires college campuses to permit military recruiters or forgo government funding. In fact, you have called it "a profound wrong – a moral injustice of the first order." In our private meeting and at your hearing, you said that that you thought you could overlook your strongly held personal views with regard to the Solomon Amendment and "Don't Ask, Don't Tell" and defend these statutes if needed. While I respect your position, I think that such an action may not be quite so easy when it concerns a matter you believe is a "moral injustice of the first order."

    a. What other "moral injustices of the first order" do you see in our society?

    b. Would you be able to defend laws that arguably perpetuate such injustices with equal vigor?

    c. If not, what makes the "moral injustice" with regards to "Don't Ask, Don't Tell" different?

d. According to a December 1, 2004, *Boston Globe* article, Harvard was the first major law school to reinstate its ban against military recruiters on campus following the Third Circuit's decision enjoining the enforcement of the Solomon Amendment. At the time, you wrote an email to students stating "This return to our prior policy will allow [the Office of Career Services] to enforce the law school's policy of nondiscrimination without exception, including to the military services. I am gratified by this result, and I look forward to the time when all law students will have the opportunity to pursue any legal career they desire." The article further notes that "Leaders at most of the law schools reached … said they have no immediate plans to change their policies." Why didn't you wait to see what the Supreme Court decided before reinstating the ban?

e. Will you decline to seek appellate review for cases which depart from the principles the Supreme Court articulated in *Rumsfeld v. FAIR*?

f. Will you seek appellate review of cases that challenge the "Don't Ask, Don't Tell" policy?

Answer: I view as unjust the exclusion of individuals from basic economic, civic, and political opportunities of our society on the basis of race, nationality, sex, religion, and sexual orientation. My role as Solicitor General, however, would be to advance not my own views, but the interests of the United States, as principally expressed in legislative enactments and executive policy. I am fully convinced that I could represent all of these interests with vigor, even when they conflict with my own opinions. I believe deeply that specific roles carry with them specific responsibilities and that the ethical performance of a role demands carrying out these responsibilities as well and completely as possible. The Solicitor General's role is to defend and advance the interests of the United States, and I would carry out those responsibilities, and those responsibilities alone, if I am fortunate enough to be confirmed to the position.

The Solomon Amendment provides a good illustration of the point I am making. As the dean of a law school with a general nondiscrimination policy – meant to protect each of our students regardless of such factors as race, religion, sex, or sexual orientation – I thought the right thing to do was to defend that policy and to do so vigorously. For that reason, when the Third Circuit held the Solomon Amendment unconstitutional, I reinstated the school's policy pending the Supreme Court's decision in *Rumsfeld v. FAIR*. (Of course, Harvard Law School has been in full compliance with the Supreme Court's decision since the day it was issued.) As Solicitor General, I would have a wholly different role and set of responsibilities. As I said at my hearing, I know well the procedural posture, facts, and arguments in the case, and I am sure that had I been Solicitor General at the time the Third Circuit decision came down, I would have asked the Supreme Court to review the decision. (Similarly, I would have sought appellate review in the Third Circuit had the district court held the Solomon amendment unconstitutional.) Indeed, this would have struck me as an easy case: a federal statute had been invalidated on constitutional grounds and there were clearly reasonable arguments that could be made in its defense. Those arguments, of course, would only be stronger

today, in any future challenge to the Solomon Amendment, given the Supreme Court's emphatic decision upholding that statute's constitutionality. My approach to cases involving challenges to 10 U.S.C. § 654, the statute involving the don't-ask-don't-tell policy, would be the same. In this context, unlike in *Rumsfeld v. FAIR*, I do not know and cannot discuss the facts, procedural posture, and arguments associated with any particular case. But I can say that in any case attacking the constitutionality of 10 U.S.C. § 654, I would apply the usual strong presumption of constitutionality and give full weight to the factors supporting this presumption, such as the prior appellate court decisions upholding the statute and the doctrine of judicial deference to legislation involving military matters.

15. In late 2008, the Department of Health and Human Services issued the "Conscience Rule" to end discrimination against health care providers who decline to participate in abortion because of their moral or religious beliefs. At your hearing, you pledged to defend any federal statute or regulation "in whose support any reasonable argument can be made." Do you believe a reasonable argument can be made to support the "Conscience Rule?"

a. Do you support a right of health care providers to decline to participate in abortions because of their moral or religious beliefs?

b. Will you defend federal laws and regulations protecting health care providers who decline to participate in abortions because of their moral or religious beliefs?

c. What is your definition of a "reasonable argument?"

d. Can you list any cases that a Solicitor General has defended with an unreasonable argument?

Answer: I have not read and do not know anything about the "Conscience Rule" so cannot hazard a view about it. But I think I can answer most of this question in the following way. If the "Conscience Rule" were instead a statute and if it were attacked on constitutional grounds, the question I would ask would be a simple one: is there a reasonable defense to be offered in support of the statute? If so, I would make that defense. This standard is a very low bar: it is and should be highly unusual for the Solicitor General to decline to defend a statute. (I do not know of any cases that the Solicitor General has defended with an unreasonable argument.) That the Conscience Rule is in fact not a statute but a regulation potentially adds an additional element to the analysis. Here, the Solicitor General's Office typically would consult with the relevant agency regarding the regulation. If the agency stands behind the regulation, the Solicitor General's course of action is clear: the Office will defend the regulation against legal challenge assuming there is a reasonable basis to do so. But if the agency wishes to repeal or modify the regulation, a different question would be presented. The Solicitor General, after all, defends existing executive policy; if and as executive policy changes, the Solicitor General's course of action likely will change as well.

16. At your hearing, Senator Klobuchar asked what you would change in the Solicitor General's Office. You responded, "If it ain't broke, don't fix it." You called the office "extraordinary" and could not identify anything that you would change. The new administration, however, may have some changes it would like to make to the office or to positions the office took during the previous administration. On February 6, 2009, for example, Acting Solicitor General Edwin Kneedler filed a motion informing the Supreme Court that the government no longer wished to appeal the D.C. Circuit's ruling in *Environmental Protection Agency v. New Jersey*. The Bush Administration had filed a petition for a writ of certiorari with the Supreme Court in that case after the D.C. Circuit vacated the EPA's rules regarding mercury and other hazardous air pollutant emissions from power plants under the Clean Air Act.

a. What role if any did you play in the Acting Solicitor's General's decision to withdraw the appeal in *EPA v. New Jersey*?

b. Will you continue the position of Acting Solicitor General Kneedler and not appeal the ruling in *EPA v. New Jersey*?

Answer: I did not play any role in the Acting Solicitor's General's decision to withdraw the appeal in *EPA v. New Jersey*. I would expect to continue this position for two reasons. First, my general approach will be to defer to decisions made by the Acting Solicitor General in this period. Second, although I have not at all consulted with him on the case, my understanding is that he made the decision not to appeal because the agency involved (the EPA) materially changed its position regarding the regulation of mercury. This is an example of the kind of situation to which I referred in my answer to question #15: when executive policy itself changes, the Solicitor General's litigating decisions also may change. Said another way, if the agency repudiates the executive policy that the Solicitor General is defending, then the Solicitor General has nothing left to defend.

17. Under what circumstances would it be appropriate for the Solicitor General to change the position taken by the previous Administration on a case pending before a federal court or the Supreme Court?

a. Have you discussed with anyone in the current Administration any positions of previous Administrations that should be changed?

Answer: The clearest cases in which such changes are appropriate are the ones described in my answer to the last two questions: where executive policy itself changes, the Solicitor General's defense of the original policy likely will change as well. Another category of cases in which such change may occur relates to discretionary positions taken by the Solicitor General's office. For example, if the Solicitor General has filed an amicus brief in a case not involving the government as a party, and the views of the executive branch change with respect to that filing, a change in litigating position may be appropriate. Counting against any such change, however, are important interests in continuity and stability, as well as a certain kind of seemliness in presenting matters to

the Supreme Court. In the end, a balance must be struck in such cases between these countervailing interests, and I would not expect many changes of this kind to occur. The cases in which a change between Administrations is least justified are those in which the Solicitor General is defending a federal statute. Here interests in continuity and stability combine with the usual strong presumption in favor of defending statutes to produce a situation in which a change should almost never be made.

I am not sure whether this matter falls within the scope of the question, but I have discussed very generally with a person in the current Administration the department's consideration of the al Marri case pursuant to President Obama's executive order. I have played no part in any decisionmaking in this review.

18. What will be your practice if you personally disagree with the President or the Attorney General on the position to take in a case for which you or your office is responsible?

a. What if the President or the Attorney General advocates for a position that you believe is unconstitutional?

b. President Obama, in an interview with *Christianity Today*, stated that he believed states could ban partial birth abortion. Would you, as Solicitor General, intervene in such a case?

c. President Obama has said that he does not support same sex marriage; however, on the White House website, the President has posted a civil rights agenda, which calls for the repeal of the Defense of Marriage Act. The Defense of Marriage Act defines marriage as between a man and a woman. It passed Congress overwhelmingly. Would you defend the constitutionality of the Defense of Marriage Act before the Supreme Court?

d. Last year in passing the FISA Amendments Act of 2008, Congress approved retroactive immunity for telephone companies that may have broken the law by assisting the government in warrantless surveillance. President Obama initially opposed retroactive immunity for telephone companies, although he ultimately voted in favor of the FISA Amendments Act. Plaintiffs have challenged the immunity provision. Will you defend the immunity provision?

Answer: If I am confirmed and I disagree with the President on the position to take in a case for which the Solicitor General's office is responsible, I would do my best to persuade him of the correctness of the office's views or the appropriateness of deferring to the office. (I believe that if the disagreement were with the Attorney General, a natural step would be to appeal to the President.) If the disagreement were to continue, I would consider the nature of the case, the nature of the disagreement, and the full range of ways to deal with the disagreement. I should clarify here that the critical question is not what would happen if I "personally" disagree with the President, because my personal views would be irrelevant; the critical question is what would happen if the President and I were to disagree on the position that will advance the long-term interests of the United States, which is the Solicitor General's client. That is the only basis on which I would act as

Solicitor General, and so that is the only ground on which disagreement between myself and the President might present itself. If I believe this disagreement goes to a highly material matter – a matter, for example, that would involve me in failing to fulfill my essential obligations to the Court or Congress – I would have to resign my office. Needless to say, I do not foresee any significant likelihood that this will happen. But I believe the Solicitor General needs to be able to walk away from the job when her assessment of her role and the obligations attendant on that role differs significantly from those of the President.

I cannot say with so little in the way of information whether, if confirmed as Solicitor General, I would intervene in a case involving a state ban on partial birth abortion. I would need to know more about the legislation and the challenge to it. In addition, I would want to take full advantage of the processes of consultation and deliberation that the Solicitor General's office follows in such cases, involving interested parties, other components of the Department of Justice, and other agencies.

I would apply the same standard to defending the Defense of Marriage Act and the FISA Amendments Act as to any other legislation: I would defend the Acts if there is any reasonable basis to do so. As I noted above, this is a low bar for a statute to climb over. It is very unusual for a Solicitor General to decline to defend a statute. Indeed, I have no present belief that *any* federal statute now on the books is clearly unconstitutional (such that a reasonable defense of the statute could not be offered).

Questions from Senator Orrin Hatch

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: The Supreme Court held in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), that the Second Amendment guarantees an individual right to keep and bear arms. The Court granted this right the same status as other individual rights guaranteed by the Constitution, such as those protected in the First Amendment. Like other nominees to the Solicitor General position, I have refrained from providing my personal opinions of constitutional law (except in areas where I previously have stated opinions), both because those opinions will play no part in my official decisions and because such statements of opinion might be used to undermine the interests of the United States in litigation. I can say, however, that I understand the Solicitor General's obligations to include deep respect for Supreme Court precedents like *Heller* and for the principle of *stare decisis* generally. There is no question, after *Heller*, that the Second Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: I would defend this law as vigorously as any other in the United States statute books. I deeply believe that different roles carry with them different responsibilities and demand different actions. My role and responsibilities as Solicitor General, should I be confirmed, would be utterly unlike my role and responsibilities as the dean of Harvard Law School to support the school's longstanding nondiscrimination policy. As Solicitor General, my function would be to advance the interests of the United States, and the interests of the United States call for the defense of federal statutes against constitutional challenge whenever there is a reasonable basis for doing so. As I stated at my confirmation hearing, I know well the facts and issues involved in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and I feel confident in saying that had I been Solicitor General at the time that the 3rd Circuit held the Solomon Amendment unconstitutional, I would have sought certiorari in the Supreme Court, exactly as the then-Solicitor General did. And now that the Supreme Court has upheld the statute, I would treat that decision with full respect and rely on it to defend the Solomon Amendment against any constitutional challenge.

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

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

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

QUESTIONS FOR THE RECORD FOR ELENA KAGAN
SUBMITTED BY SENATOR JEFF SESSIONS

1. Do you believe moral and ethical principles can provide a rational basis to support a law?

   Answer: Yes. I believe that many laws are grounded in moral and ethical principles and that those principles can provide a rational basis to support such laws.

2. In his famous *Lochner* dissent, Justice Holmes wrote:

   > It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.
   >
   > . . .
   >
   > **I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.**[1]

   A. Do you agree or disagree with Justice Holmes's view of judicial restraint when it comes to second-guessing the legislature on morally inspired legislation, as articulated in *Lochner?* How would you articulate your own view in this area, especially as it relates to your likely future role as the chief federal advocate before the Court?

   Answer: I agree generally with Justice Holmes's observation that courts should be restrained in second-guessing legislative action, including all the kinds of legislation that Justice Holmes cites. As the chief advocate for the United States before the Supreme Court, I will frequently be in the position

[1] *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

of defending federal statutes and therefore expect often to urge this restraint on the Court.

B. Do you believe the federal government has a rational basis for the military's recruiting policy – whether embodied in "Don't Ask/Don't Tell" or the statute that policy supplements – 10 U.S.C. § 654? How would you analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?

Answer: I have never stated a position on the constitutionality of 10 U.S.C. § 654, and I am mindful of the established practice of the Solicitor General's office not to express views or take positions in advance of the presentation of a concrete case. I can, however, say the following. If I am confirmed as Solicitor General, I would apply the same strong presumption of constitutionality to 10 U.S.C. § 654 as I would to every other statute, irrespective of my personal views of the policy articulated in that statute. I know that courts have upheld this statute against constitutional attack under the rational basis standard, *see, e.g. Able v. U.S.*, 155 F.3d 628 (2nd Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), that the rational basis standard is generally easy to satisfy, and that courts frequently grant Congress special deference in military matters, *see, e.g., Rostker v. Godberg*, 453 U.S. 57 (1981). All of these precedents and principles would support, in a suit challenging 10 U.S.C. § 654, the usual strong presumption of constitutionality that the Solicitor General's office applies to all federal statutes.

C. Do you believe 10 U.S.C. § 654 violates the Equal Protection Clause of the Fourteenth Amendment, as incorporated by the Fifth Amendment? Please explain your views.

Answer: Please see my answer directly above. If I am confirmed as Solicitor General, one of my principal responsibilities would be to defend statutes as long as there is any reasonable basis to do so. In the context of the usual process that the Solicitor General's office follows when considering the positions it will adopt in litigation, I would take into account as I carried out this responsibility the various precedents and principles noted above, all of which support the constitutionality of 10 USC § 654.

3. In a *Kentucky Law Journal* article, Clinton-era Solicitor General Drew Days wrote "the Solicitor General has the power to decide whether to defend the constitutionality of the acts of Congress or even to affirmatively challenge them." What federal statutes now on the books do you believe are unconstitutional?

Answer: If I am confirmed as Solicitor General, I would follow the traditions of the office and defend the constitutionality of each and every statute except when there is no reasonable basis to do so or the statute impermissibly curtails Article II powers. I do not now know of any federal statute that could not be defended under this standard (although I am of course not fully knowledgeable about the great mass of federal statutes).

4. In your 1996 law review article, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," you take to task what you call "[l]aws 'equalizing' the speech market."[2] You question whether a politician or policy-maker could check his or her views in deciding whether speech needed to be balanced by another viewpoint. You write:

> **It is the rare person who can determine whether there is 'too much' of some speech (or speakers), 'too little' of other speech (or speakers), without regard to whether she agrees or disagrees with – or whether her position is helped or hurt by – the speech (or speakers) in question."**[3] You further wrote that "the goal of equalization often and well conceals what does conflict with the First Amendment: the passage of laws tainted with ideological, and especially with self-interested, motivations.[4]

Do you still believe that "[i]t is the rare person who can determine whether there is 'too much' of some speech (or speakers), 'too little' of other speech (or speakers), without regard to whether she agrees or disagrees with – or whether her position is helped or hurt by – the speech (or speakers) in question[?]"

Answer: In this part of my article, "Private Speech, Public Purpose," I ask what accounts for the Supreme Court's frequent (though not universal) suspicion of laws designed to "equalize" the speech market – otherwise put, to promote balance or diversity of opinion. The question I set out to answer, after establishing that the Court indeed tends to be suspicious of such laws, is: "what view of the First Amendment accounts for the Court's refusal to allow, by means of

[2] Elena Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 U. Chi. L. Rev. 413, 464 (1996).
[3] *Id.* at 469-70.
[4] *Id.* at 471.

restrictions, the redistribution of expression?" (p. 466). I explain the Court's doctrine in part by noting that views on laws designed to promote balance in the "speech market" often (though again not always) are influenced by views on the content of the speech that such laws predictably tend to favor (or disfavor). I continue to find this account of the Court's doctrine generally persuasive, although I should note that I have not fully explored whether the Court's doctrine today is as it was in 1996, when I wrote this article.

5. The section of your article addressing "laws equalizing the speech market" states in its conclusion: "Laws directed at equalizing speech thus join the list of laws that, although facially content neutral, demand strict scrutiny because of the heightened concerns relating to improper purpose."[5] Do you believe the "Fairness Doctrine," if revived, should be subject to strict scrutiny under the First Amendment?

Answer: The sentence quoted above is what I might call a sympathetic description of the Court's general approach to laws attempting to promote balance in the expressive arena. (Another sentence in the same paragraph echoes: "The Court thus treats these laws in a strict manner – presuming improper taint though giving the government a chance to rebut this presumption." (p. 472)). Earlier in the same section, I note that the Court departed from this general approach in approving the FCC's then-existing fairness doctrine (p.465). The article does not state any view, nor do I recall having one at the time, of whether the Court was right to craft this exception, and I have not considered the matter any further in the years since.

6. During your confirmation hearing, you were asked about a memorandum you wrote in 1987 as law clerk to Justice Thurgood Marshall in *Bowen v. Kendrick*. In *Bowen*, the Supreme Court reversed a lower court's ruling that federal grants to religious and other organizations under the Adolescent Family Life Act (AFLA) violated the Establishment Clause of the First Amendment. The Supreme Court, in a 5-4 opinion written by Chief Justice Rehnquist, declared that AFLA's funding mechanism did <u>not</u> violate the Establishment Clause. The Court noted "[t]here is no requirement in the Act that grantees be affiliated with any religious denominations, although the Act clearly does not rule out grants to religious organizations." *Id.* at 604. Although the Court remanded for consideration of whether the Act had been applied correctly in individual grants, the Court made clear: "The facially

[5] *Id.* at 472

neutral projects authorized by the AFLA-including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc., are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." *Id*. at 613.

Your memo suggested a different approach and made clear your view – at the time – that AFLA violated the Establishment Clause:

> "I think the [district court] got the case right. The funding here is to be used to support projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. It would be difficult for <u>any</u> religious organization to participate in such projects without injecting some kind of religious teaching. The government is of course right that religious organizations are different and that these differences are sometimes relevant for the purposes of government funding. The government, for example, may give educational subsidies to religious universities, but not to parochial schools. But when the government funding is to be used for projects so close to the central concerns of religion, <u>all</u> religious organizations should be off limits."

Kagan Bowen Mem. at 3 (emphasis in original).

When asked about your memo during your hearing, you described it as "the dumbest thing I've ever read." You appeared to want to explain further why your 22 year-old memorandum was "the dumbest thing," but time constraints and further questioning did not allow your explanation. I would like to give you the opportunity to provide your explanation and clarify your current position. Why do you believe the legal position described in your memorandum is so incorrect you now view it as "the dumbest thing[?]" Further, what is your current view of the constitutionality of faith-based funding under the Establishment Clause?

> **Answer:** I indeed believe that my 22-year-old analysis, written for Justice Marshall, was deeply mistaken. It seems now utterly wrong to me to say that religious organizations generally should be precluded from receiving funds for providing the kinds of services contemplated by the Adolescent Family Life Act. I instead agree with the *Bowen* Court's statement that "[t]he facially neutral projects authorized by the AFLA-including pregnancy testing, adoption counseling and

referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.- are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." As that Court recognized, the use of a grant in a particular way by a particular religious organization might constitute a violation of the Establishment Clause – for example, if the organization used the grant to fund what the Court called "specifically religious activity." But I think it incorrect (or, as I more colorfully said at the hearing, "the dumbest thing I ever heard") essentially to presume that a religious organization will use a grant of this kind in an impermissible manner.

Questions from Senator Cornyn

1. As Solicitor General, you would be charged with defending the Defense of Marriage Act. That law, as you may know, was enacted by overwhelming majorities of both houses of Congress (85-14 in the Senate and 342-67 in the House) in 1996 and signed into law by President Clinton.

   a. Given your rhetoric about the Don't Ask, Don't Tell policy—you called it "a profound wrong—a moral injustice of the first order"—let me ask this basic question: Do you believe that there is a federal constitutional right to same-sex marriage?

   Answer: There is no federal constitutional right to same-sex marriage.

   b. Have you ever expressed your opinion whether the federal Constitution should be read to confer a right to same-sex marriage? If so, please provide details.

   Answer: I do not recall ever expressing an opinion on this question.

2. In 2003, the Massachusetts supreme court ruled that there is a constitutional right to same-sex marriage under the Massachusetts constitution. Do you agree with that ruling? Have you ever discussed it with anyone? What did you say?

   Answer: I have never studied the Massachusetts Constitution, judicial interpretations of that document, or the SJC's decision, so I do not have an informed view. I moderated a panel on the SJC's decision at Harvard Law School on February 5, 2004, but do not recall stating any views of my own at this event. (I have provided a tape of this event to the Judiciary Committee.) I suspect I participated in informal conversation about the decision when it came out, but I cannot remember anything that I said.

3. Do you believe that the Supreme Court's decision in *Boumediene v. Bush*, which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?

   Answer: The Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. I do not think it would comport with this responsibility to state my own views of whether particular Supreme Court decisions were correctly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. In the position of Solicitor General, I would not frequently or lightly ask the Court to reverse one of its precedents, and I certainly would not do so just because I thought the case wrongly decided.

4. Do you believe that the Supreme Court's decision in *Lee v. Weisman*, which held that a nonsectarian invocation at a public school graduation violated the Establishment Clause, was correctly decided?

   Answer: My answer to this question is the same as my answer to question #3.

5. Do you believe that the Supreme Court's decision in *Zelman v. Simmons-Harris*, which ruled that school-choice programs that include religious schools don't violate the Establishment Clause, was correctly decided?

   Answer: My answer to this question is the same as my answer to question #3.

6. In *Kennedy v. Louisiana*, a case in which the Supreme Court ultimately struck down a Louisiana statute that allowed the death penalty for the aggravated rape of a child, a group of former law lords of the United Kingdom submitted an amicus brief. This brief cited the American Convention on Human Rights and statements of the United Nations Commission on Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights to argue that international law required that nations that retain the death penalty may not extend the death penalty to crimes to which it does not presently apply.

   a. Do you believe that international law forbids federal and state governments from broadening the application of the death penalty? Please explain your answer.

   Answer: I do not believe that international law (assuming it has not been incorporated into domestic federal law) can prevent federal and state governments from broadening the application of the death penalty should they wish to do so. In a case like *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the appropriate question is whether the Eighth Amendment of the U.S. Constitution forbids the application of the death penalty to a particular kind of crime, not whether international law does so.

Follow-up Questions of Senator Tom Coburn, M.D.
Hearing: "*Nomination of Elena Kagan to be Solicitor General of the United States*"
United States Senate Committee on the Judiciary
February 10, 2009

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

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

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

Solomon Amendment — Amelioration
The Association of American Law Schools (AALS) requires that law schools "ameliorate" the "presence of the military on campus." This guide, produced by the Association of Legal Career

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

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

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

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

ROTC:

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

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

Other:

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

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

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

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

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

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

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

[1] D. Johnsen, "The Creation of Fetal Rights:…", 95 YALE L.J. 599 (1986).
[2] D. Johnsen, "The Creation of Fetal Rights:…", 95 YALE L.J. at 624-25.