

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 Ginsburg’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 seamliness 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).