Written Questions of Senator Tom Coburn, M.D.
Solicitor General Elena Kagan
Nominee, U.S. Supreme Court
U.S. Senate Committee on the Judiciary
July 2, 2010

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1. **You were dean of Harvard Law School when Professor Mark Tushnet was hired. Like you, Professor Tushnet also clerked for Justice Thurgood Marshall, and when he received an endowed chair position at Harvard, you introduced him and called him as "one of the world's leading law scholars, particularly one of the world's leading constitutional law scholars" and praised his "contributions to the world of scholarship."**

   In a 1981 law review article entitled "The Dilemmas of Liberal Constitutionalism, Professor Tushnet asserted that, if he were a judge, he "would decide what decision in a case was most likely to advance the cause of socialism."

   a. Is this one of Professor Tushnet's "contributions to the world of scholarship?"

   Response:

   My introduction for Professor Tushnet was not intended to suggest my agreement with any particular aspect of his scholarship or any particular article. It was intended to recognize his general standing in the sphere of constitutional law scholarship.

   b. How would you characterize such an approach to the law?

   Response:

   If Professor Tushnet meant that a judge should decide cases based on her own policy views about the best result, then I would characterize that approach as contrary to the rule of law.

   c. Would you endorse it? Why or why not?

   Response:

   No. Judges should decide cases based on legal sources, not on policy or political views.

2. **As an undergraduate, you wrote a thesis entitled: "To The Final Conflict: Socialism in New York City, 1900-1933," and so I assume you are familiar with the tenets and beliefs of socialists. Please explain what the limits of government are in a socialist state.**

   a. What is the role of government in a socialist state?

Response:

Other than writing an undergraduate thesis on a single aspect of the history of the American Socialist Party, I have not explored in any significant way the tenets or beliefs of socialists. My general view is that the role of government in a socialist state is more extensive than in a state based on free markets.

b. Can you explain what a socialist's views on the role of corporations under the Constitution would be?

Response:

Please see above. The role of a judge in interpreting the Constitution is to analyze cases based on legal sources, not political beliefs.

3. **According to Harvard Law's website, the Critical Legal Studies movement seeks to demonstrate the indeterminacy of legal doctrine and show how any given set of legal principles can be used to yield contradictory results. Proponents of this movement are convinced that law and politics cannot be separated; they focus on the ways that law contributed to illegitimate social hierarchies and claim that neutral language and institutions, operated through law, mask relationships of power and control. They also adapt ideas drawn from Marxist and socialist theories to demonstrate how economic power relationships influence legal practices and consciousness.**

a. Do you agree with the views of the Critical Legal Studies movement?

Response:

No.

b. If not, with which of their views do you disagree?

Response:

I do not agree with any of the ways of understanding law and the legal system that are described above.

4. **According to Harvard Law's website, "Legal Realists call into question three related ideals cherished by most Americans: the notion that, in the United States, the people select the rules by which they are governed; the conviction that the institution of judicial review reinforces rather than undermines representative democracy; and the faith that ours is a government of laws, not of men." Realists suggest that judges often come to a decision first, then work backward to locate legal rules and construct legal arguments in support of the decision. Urging greater candor, the Realists wanted this process to occur openly, the better to evaluate judges' decisions. Do you ascribe to that theory?**

Response:

No.

5. **Professor Tushnet has recommended reconsidering the 1883 Civil Rights cases in which the Supreme Court held that the 14th Amendment prohibited only the abridgement of individual rights by the *state*, rather than by private individuals and institutions. The Supreme Court has stated: "It is state action of a particular character that is prohibited. … The wrongful act of an individual is simply a private wrong and if not sanctioned in some way by the state, or not done under state authority, the [individual's] rights remain in full force." Professor Tushnet stated: "The state-action doctrine contributes nothing but obfuscation to constitutional analysis. It works as a bogeyman because it appeals to a vague libertarian sense that Americans have about the proper relation between them and their government. It seems to suggest that there is a domain of freedom into which the Constitution doesn't reach. We would be well rid of the doctrine."**

    a. **Do you agree with Professor Tushnet's desire to be rid of the state action doctrine? Why or why not?**

    Response:

    No. The state-action doctrine has been repeatedly reaffirmed by the Supreme Court, and the decisions adopting and applying the state action doctrine are entitled to stare decisis effect. These decisions, indeed, function as a basic postulate of our constitutional system.

6. **Last year, the Oklahoma Legislature passed a resolution that provides for a public referendum on whether to make English the official language of the state. The resolution, which will appear on the election ballot in November, makes English the official language of the State of Oklahoma, and requires all official actions be conducted in English. In the past, states such as Missouri and Arizona have passed official English referendums via statewide ballot by 86% and 74%, respectively.**

    During your time in the Clinton Administration, you advised the president that the administration should stay out of a case, *Arizonans for Official English v. Arizona*, in which the Ninth Circuit struck down an Arizona constitutional amendment mandating that state officials use only English in documents and state business. You stated "all in all, it seems that the best course here is to do nothing. From a political standpoint, we don't want to highlight this issue. From a legal standpoint, we don't want to defend the Ninth Circuit's decision." From these comments, I assume you believe the Ninth Circuit made the wrong decision.

    a. **Why do you believe the court's decision was something the federal government should not defend?**

Response:

My comments were meant to indicate that the filing of an amicus brief defending the Ninth Circuit's decision would not advance President Clinton's legal views or policy objectives.

b. If adopted, Oklahoma will become the 31st state to declare English as its official language. Do you believe states have the right under the 10th Amendment to declare English as their official language? Why or why not?

Response:

If Oklahoma adopts this resolution and a challenge to it comes before the Court, I would fairly consider all the briefs and arguments presented.

7. In response to a question from Senator Feinstein asking whether you believe the Constitution requires that the health of the mother be protected in any statute restricting access to abortion, you responded that "with respect to abortion generally, putting that [partial birth abortion] procedure aside, I think that the continuing holdings of the Court are that the woman's life and the woman's health must be protected in any abortion regulation."

a. Please explain what you meant by "any abortion regulation."

Response:

I meant to refer to statutes or regulations that restrict a woman's access to an abortion generally, rather than restricting the procedure specified in the Federal Partial-Birth Abortion Ban Act. My statement was meant to conform to the Court's statement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 878 (plurality opinion) (citation omitted). The Court has reaffirmed this principle in recent decisions. *See, e.g.*, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327 (2006) ("New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'") (citing *Casey*); *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (noting that "[t]he prohibition in the [Federal Partial-Birth Abortion] Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks,'" but "whether the Act creates significant health risks for women has been a contested factual question" with respect to the procedure at issue in that case) (citing *Casey*).

b. Do you believe there must be a health exception included in abortion funding restrictions?

Response:

The Supreme Court has held that there is no constitutional right to abortion funding and has not subjected abortion funding regulations to heightened constitutional scrutiny. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). My statement to Senator Feinstein, which was intended to reflect my understanding of the prevailing law, was not meant to suggest that abortion funding regulations must contain a life or health exception.

c. Do you believe there must be a health exception included in parental involvement laws?

Response:

The Supreme Court has held that a parental involvement statute is constitutional provided it contains a provision to protect the health of the minor in medical emergencies. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). My statement to Senator Feinstein was meant to be consistent with this holding.

d. Do you believe there must be a health exception included in informed consent laws?

Response:

As noted above, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed the holding of *Roe v. Wade* that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," *id.* at 878 (plurality opinion) (citation omitted), and the Court has reaffirmed this principle in recent decisions. But the Court has not considered how this principle would apply to an informed consent statute that did not contain an exception for a medical emergency. (The informed consent statute upheld in *Casey* did contain such an exception. *Id.* at 881.) My statement to Senator Feinstein was not intended to state any view on this question.

8. I believe each profession has an obligation to serve the less fortunate. I take that belief personally and apply it in my career as a physician. While I am not a lawyer, I do know the legal profession encourages and actively promotes, as does my medical profession, *pro bono* services. In fact, Rule 6.1 of the ABA Model Rules of Professional Conduct, which governs the behavior of attorneys, states "[e]very lawyer has a *professional responsibility* to provide legal services to those unable to pay. A lawyer should aspire to render *at least* 50 hours of pro bono public legal services per year." It goes on to note the various ways that responsibility should be fulfilled, stating the lawyer should provide those services to "persons of limited means or charitable, religious, civic, community, governmental and educational

organizations in matters that are designed primarily to address the needs of persons of limited means."

Comment 1 of Rule 6.1 reinforces the importance of *pro bono* services when it states, "[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay…" Comment 9 goes even further by stating, "[b]ecause the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer."

Based on the Model Rules and your comments in the committee-required questionnaire for your nomination as solicitor general, which merely notes Harvard Law School's institution of a tuition-free third year and loan forgiveness for students engaged in public service, I am concerned by your personal lack of *pro bono* legal services.

a. **In your Supreme Court questionnaire, you note that you have "served on the boards of numerous non-profit organizations" and "promoted public service and pro bono work" while Dean at Harvard. But, you "did not engage in any individual representation of clients." In fact, your *pro bono* work appears to be far less than prior Supreme Court nominees, despite some of those nominees' restrictions on providing these services due to their careers as judges. Both Chief Justice John Roberts and Harriet Miers listed extensive *pro bono* activities, including representing indigent clients, in their questionnaires. Even Justices Sotomayor and Alito, who had spent most of their careers as judges and were prohibited from representing clients in *pro bono* work, had more meaningful volunteer work for the underprivileged and indigent.**

    i. **Since graduating from law school, have you ever volunteered your time for *pro bono* legal services that would qualify you to fulfill the yearly requirements of Rule 6.1 of the Model Rules of Professional Conduct? Why or why not?**

    Response:

    My pro bono work as a lawyer is listed in my questionnaire response except that I may have done some pro bono work at Williams and Connolly that I do not now recall. My general practice as both a government lawyer and an academic was not to represent individual clients (whether for pay or pro bono). I do not know whether my efforts to expand pro bono opportunities as Dean of Harvard Law School or my service on the boards of several organizations devoted to representation of needy persons falls within Rule 6.1.

    ii. **Please list the cases or clients you have participated in or in which you have represented a client *pro bono*.**

Response:

Please see above.

b. While I realize the legal profession does not institute disciplinary measures for those who do not provide at least 50 hours of *pro bono* services, Rule 6.1 and its commentary very clearly states the provision of these services is a "professional responsibility" and the "individual ethical commitment of each lawyer." Do you believe you have failed in your responsibilities and ethical commitments to the legal profession by choosing not to provide *pro bono* services? Why or why not?

Response:

No. As noted above, my general practice as a government lawyer and academic was not to represent individual clients (whether for pay or pro bono). I therefore undertook other efforts to promote pro bono service. As Dean of Harvard Law School one of my highest priorities was expanding the pro bono service opportunities available to students. In particular, I oversaw a significant expansion on the Law School's clinical programs, which provide needed representation to indigent clients, in areas ranging from housing and employment to child advocacy to gender violence. In addition, I have served on the boards of several organizations devoted to increasing public interest and pro bono opportunities for lawyers. I have tried to make a difference in this sphere by devoting substantial time and energy to these activities.

9. Please identify specifically all legislation and executive orders on which you or someone under your supervision were consulted by anyone in the current administration, including any Executive Branch Agency or the Office of the President, while you were serving as the Solicitor General.

Response:

The primary function of the Office of the Solicitor General is to represent the United States before the Supreme Court and to oversee the representation of the federal government in the courts of appeals. In the normal course, the Office does not review draft legislation or executive orders. In some circumstances, a lawyer in the Office may be consulted on such matters—as when a draft legislative provision concerns Supreme Court review or some other topic within the lawyer's expertise. For example, I recall that I was consulted, along with several other lawyers in the Office, about a draft executive order regarding preemption and a draft statutory provision concerning Supreme Court review of cases arising under financial regulatory reform legislation. These consultations are usually informal and are often performed as a courtesy to Justice Department colleagues in other divisions that have primary responsibility over the matters. Because these consultations are usually informal, the Office does not keep records of them.

10. Please identify specifically all cases, motions, policies, regulations, and other matters in which you or someone under your supervision were consulted by an Executive

Branch Agency or the Office of the President while you were serving as the Solicitor General.

Response:

Lawyers in the Solicitor General's Office frequently consult with lawyers in executive agencies. These contacts ensure that all relevant agencies participate in formulating the position taken by the United States before the Supreme Court in a particular case. They occur on a daily basis, and the Office does not keep records of them. Contacts with the Office of the President are governed by Justice Department policy and are more limited. The Office also does not keep records of these contacts. I do not believe that it would be appropriate for me to disclose the executive branch entities consulted in a particular case, or to describe the content of the communications.