Senator Grassley's Written Questions for Elena Kagan, to be an Associate Justice, United States Supreme Court

CONSTITUTIONALITY OF THE FALSE CLAIMS ACT

In 2000, the Court decided *Vermont Agency of Natural Resources v. United States*, holding that *qui tam* relators filing claims on behalf of the Government under the False Claims Act have Article 3 standing to sue on behalf of the United States or a State (or state agency) because of the Government's injury in fact. However, some continue to question whether *qui tam* statutes are constitutional under Article 2 because they interfere with the Executive Branch's ability to prosecute cases.

- **Are you familiar with these arguments?**

Response:

I am familiar with these arguments, although to the best of my recollection I have never written or spoken in my personal capacity on the constitutionality of the False Claims Act.

- **Do you agree with the Court's reasoning that a *qui tam* relator has Article 3 standing because of the United States' injury in fact? Why or why not?**

Response:

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a qui tam relator filing a claim under the False Claims Act has standing under "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," because the Act "can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id.* at 773. The Court concluded that "the United States' injury in fact suffices to confer standing on" the relator. *Id.* at 774. None of the Justices disagreed with that conclusion. *Vermont Agency of Natural Resources* is a precedent of the Court entitled to stare decisis effect.

- **Do you have an opinion on the arguments that the *qui tam* provisions are unconstitutional because they impede the Executive Branch? If so, what is your opinion and why?**

Response:

In its many cases involving the qui tam provisions of the False Claims Act, the Supreme Court has never suggested that these provisions are unconstitutional because they impermissibly interfere with the President's Article II powers. If a claim of this kind is ever brought to the Court, I would fairly consider all the briefs and arguments presented.

- **The Framers of the Constitution, in the First Congress, enacted several *qui tam* statutes. What deference do you give this fact when assessing the constitutionality of *qui tam* statutes in the present day?**

Response:

The practice of the First Congress is relevant to interpreting the Constitution. The enactment of qui tam statutes by the Framers of the Constitution would suggest that the Framers did not think that qui tam statutes were unconstitutional.

BACKGROUND AND INVOLVEMENT WITH FALSE CLAIMS ACT

It appears you have only been involved with one False Claims Act case in your brief tenure as Solicitor General, *Graham County Soil and Water Conservation District et al. v. United States ex rel. Wilson*.

- **Are you familiar with the False Claims Act?**

Response:

My familiarity with the False Claims Act is based mostly on my representation of the United States as Solicitor General. In that capacity, I have served as counsel of record in two Supreme Court cases concerning the False Claims Act: *Graham County Soil and Water Conservation District v. United States ex rel. Wilson* and *United States ex rel. Eisenstein v. City of New York*. I have also authorized filings in the following lower-court cases concerning the Act: *United States ex rel. Daniel Kirk v. Schindler Elevator Corp.* (2d Cir.); *United States ex rel. Jolene Lemmon v. Envirocare of Utah* (10th Cir.); *United States ex rel. Mark Radcliffe v. Purdue Pharma, L.P.* (4th Cir.); *United States v. Caremark* (W.D. Tex.); *United States ex rel. Roger L. Sanders v. Allison Engine Co.* (S.D. Ohio); *United States ex rel. Terri Dugan v. ADT Security Systems, Inc.* (4th Cir.); *United States ex rel. Dimitri Yannacopoulos v. General Dynamics and Lockheed Martin Corp.* (7th Cir.); *United States ex rel. Bahrani v. Conagra, Inc.* (10th Cir.); *United States ex rel. Sadek R. Ebeid, M.D. v. Theresa A. Lungwitz* (9th Cir.); *United States ex rel. Jerre Frazier v. IASIS Healthcare Corp.* (9th Cir.); *United States ex rel. Mary Cafasso v. General Dynamics C4 Systems, Inc.* (9th Cir.).

- **Have you ever written or spoken publicly about the False Claims Act?**

Response:

Other than in the briefs listed above, to the best of my recollection I have not written or spoken publicly about the False Claims Act.

- **What about the issue of the constitutionality of the *qui tam* or any other provisions of the False Claims Act? If so, please explain the circumstances and context and**

whether you wrote anything on the subject or provided anyone with your views on the subject.

Response:

To the best of my recollection, I have not written or spoken about the constitutionality of any provision of the False Claims Act.

- **Have you ever written about the constitutionality of *qui tam* provisions in any other federal law? If so, please explain the circumstances and the context and whether you wrote anything on the subject or provided anyone with your views on the subject.**

Response:

As Solicitor General, I have authorized filings in the following lower-court cases defending the constitutionality of the qui tam provision contained in 35 U.S.C. § 292(b): *Brule Research Associates Team, LLC v. A.O. Smith Corp.* (E.D. Wisc.); *Raymond E. Stauffer v. Brooks Brothers, Inc.* (S.D.N.Y.); *Public Patent Found., Inc. v. Glaxosmithkline Consumer Healthcare, L.P.* (S.D.N.Y.); and *Public Patent Found,, Inc. v. McNeil-PPC* (S.D.N.Y. and 2d Cir.). To the best of my recollection, I have not otherwise written or spoken about the constitutionality of any qui tam provision in any federal law.

- **Do you feel you have any bias against the False Claims Act that would impact on your ability to fairly decide a case involving the statute? If so, please explain.**

Response:

No.

WHISTLEBLOWER PROTECTIONS

Do you believe that the Legislative Branch has the constitutional authority to provide meaningful whistleblower protections for Executive Branch employees?

Response:

Congress has the constitutional authority to enact legislation providing meaningful whistleblower protections for Executive Branch employees, so long as the legislation is based on an enumerated power granted by Article I and does not violate any other constitutional provision.

Do you believe that Congress has the constitutional authority to restrict how the Executive Branch uses taxpayer dollars?

Response:

Congress has the power to appropriate taxpayer funds. Pursuant to that power, Congress may place limits on how the Executive Branch spends taxpayer funds, provided those limits do not violate any other constitutional provision.

Specifically, does Congress have the authority to limit appropriated funds from paying the salary of any Executive Branch employee that "prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct…communication or contact with any Member…of Congress?" If not, why not?

Response:

If a challenge to such a statutory provision were to come before the Supreme Court, I would fairly consider all the briefs and arguments presented.

WHISTLEBLOWERS AND THE FIRST AMENDMENT

In 2006, the Supreme Court issued a 5-4 decision in *Garcetti v. Ceballos*, which held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. This decision creates a different set of First Amendment rights for public employees and private employees. I'm concerned that the decision has created an incentive for public employees to go outside their chain of command and report wrong doing to the media or some other outside channel because an employer could retaliate against them for speaking up inside the government agency.

- **Do you agree with the Court that public employees that speak up pursuant to their employment responsibilities they should not be entitled to First Amendment protections?**

Response:

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties. *Garcetti* is a precedent of the Court entitled to stare decisis effect.

- **Do you believe that there should be two standards for First Amendment speech for public employees and private employees?**

Response:

In *Garcetti*, the Supreme Court recognized that "public employees do not surrender all their First Amendment rights by reason of their employment." Instead, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." 547 U.S. at 417. The Court's decisions in this area, including *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), establish the general proposition that a public employee is protected by the First Amendment from discipline based on speech made in the employee's private capacity, but is not protected from discipline based on speech made pursuant to the employee's official duties. The First Amendment does not apply to the actions of private employers. *Pickering*, *Connick*, and *Garcetti* are precedents of the Court entitled to stare decisis effect.

- **Do you agree with the Court that the limitation on First Amendment speech by Government employees acting pursuant to their employment responsibilities is necessary for providing "public services efficiently"?**

Response:

In *Garcetti*, the Court explained that its decisions "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." 547 U.S. at 420. The Court concluded that the plaintiff was not entitled to First Amendment protection for speech made pursuant to his duties as a prosecutor, on the ground that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. *Garcetti* is a precedent of the Court entitled to stare decisis effect.

- **Under *Garcetti*, the Court created a system where there are now two types of First Amendment analysis for Government employees. First, if they speak pursuant to their employment responsibilities to report wrongdoing, they are afforded no First Amendment protection. However, if they speak as a citizen, presumably to the media or some other outside source to relay the concerns, the possibility of First Amendment protection arises, subject to the Court's precedent in *Pickering v. Board of Ed. Of Township High School Dist. 205* and *Connick v. Myers*. Do you agree that this two-step approach creates an incentive for a public employee to report wrongdoing outside of the chain of command? If not, why not?**

Response:

The Ninth Circuit's decision in *Garcetti* noted this concern, stating, "To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason." *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004). The Supreme Court rejected this argument, reasoning that if "a government employer is troubled by" this state of affairs, "it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." 547 U.S. at 424. As noted above, *Garcetti* is a precedent of the Court entitled to stare decisis effect.

ADHERENCE TO FEDERAL SENTENCING GUIDELINES

The Federal Sentencing Commission and the Federal Sentencing Guidelines have faced a number of challenges that have come before the Supreme Court. The Supreme Court upheld the constitutionality of the Sentencing Commission in 1989.

In 2005, the Supreme Court held that the mandatory nature of the Federal Sentencing Guidelines violated defendant's sixth amendment right to a jury trial. As a result, the Court held that the guidelines are not to be considered mandatory and are instead merely advisory.

The Court has continued to find problems with the Sentencing Guidelines and recently stated in *Nelson v. United States*, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."

- **Do you agree with the Supreme Court that the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness? Why or why not?**

Response:

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that a mandatory Federal Sentencing Guidelines System violates the Sixth Amendment. The Court further held that the proper remedy was to sever the provision of the federal sentencing statute making the Guidelines mandatory and directing appellate courts to apply a de novo standard of review to departures from the Guidelines. As a result, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are reasonable. In *Rita v. United States*, 551 U.S. 338 (2007), the Court held that when a district judge imposes a sentence within the Guidelines range, the appellate court may presume that the sentence is reasonable. This presumption, said the Court, "reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the

Commission carried out that task." *Id.* at 347. As *Rita* made clear, this presumption applies to appellate review only; "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* at 351. Instead, the sentencing court should "make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007). In *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam), the Supreme Court summarily reversed a Fourth Circuit decision upholding a sentence imposed by a district judge who justified the sentence on the ground that "the Guidelines are considered presumptively reasonable." The *Nelson* Court reaffirmed the conclusion in *Rita* that "the Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." *Id.* at 892. *Rita* and *Nelson* are precedents of the Court entitled to stare decisis effect.

- **If the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness, in your view, is the Sentencing Commission necessary? Should we instead, just commission universities or academics to do statistical analysis of judicial sentences?**

Response:

In *Rita*, the Supreme Court described the Sentencing Commission's role as follows: "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly. . . . The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." 551 U.S. at 350. Whether the Sentencing Commission is still necessary is a policy judgment for Congress. Presumably, Congress will make that judgment based on its view of how the Commission is carrying out its remaining duties and what alternative mechanisms are available to do this work.

- **Do you believe that decisions by the Sentencing Commission to amend the Guidelines and impose them retroactively are healthy for the Courts? Why or why not?**

Response:

I am aware that the Sentencing Commission has on occasion decided to give retroactive effect to amendments to the Federal Sentencing Guidelines pursuant to its authority under 28 U.S.C. § 994(u). A federal district court then has the authority to modify a sentence based on the Commission's decision under 18 U.S.C. § 3582 (c)(2). The Court has recognized that retroactivity decisions fall within the discretion of the Commission. *Dillon v. United States*,

2010 WL 2400109, at *7 (June 17, 2010). Whether such decisions are healthy for the courts is a policy question for the Commission and ultimately for Congress.

TAXATION AND THE TAKINGS CLAUSE

The Fifth Amendment to the Constitution states that "private property [shall not] be taken for public use, without just compensation." What are your thoughts on what extent this may limit Congress' taxing power?

Response:

The Supreme Court has long recognized the power of the government to tax its citizens. *E.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice John Marshall noted that the "security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." *Id.* at 428. The Court has never held that the Fifth Amendment limits Congress's taxing power. Rather, the Court has said that a tax is generally not a constitutional "taking." *County of Mobile v. Kimball*, 102 U.S. 691 (1880).

Obviously, a tax always, in some sense, constitutes a "taking," but couldn't there be a situation where the tax was so onerous, and the benefit received by the taxpayer from the onerous tax was little-to-none, that such a tax would constitute a constitutionally-prohibited "takings"? Saul Levmore, dean of the University of Chicago Law School, has argued that expenditures from tax revenues must provide roughly commensurate reciprocal benefit to avoid a takings claim.[1] Do you agree? Please explain your answer.

Response:

The Supreme Court's precedents in this area have not recognized a Fifth Amendment limitation on Congress's taxing power. I am aware that some academics have urged the Court to do so, but I have never studied this scholarship. If a claim of this kind is ever brought to the Supreme Court, I will fairly consider all the briefs and arguments presented.

Professor Calvin Massey of the University of California Hastings College of the Law has written that "Surely an income tax of 100 percent imposed on a single individual – for example, Bill Gates – would violate the Takings Clause. If that is so, then the problem becomes a matter of degree."[2] Do you agree? If not, please explain. If you do agree, how would you think the line could be articulated between taxes that violate the takings clause, and taxes that do not?

[1] *See* Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 292 (1990).

[2] *See* Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 Harv. J. L. & Pub. Pol'y 85, 104 (1996).

Response:

Please see above.

16th AMENDMENT

Under Article I, Section 9 and the 16th Amendment, a direct tax must be apportioned according to the populations of the states, unless it's an income tax. If a tax purported to be an "income tax," but in fact were more akin to a property tax, and assuming it were not apportioned according to the populations of the states, then it would be unconstitutional. Do you agree? Please explain your answer.

Response:

The Supreme Court has explained that the Sixteenth Amendment "shall not be extended by loose construction . . . . Congress cannot by any definition [of income] it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). *Eisner* thus suggests that the Constitution does place limits on Congress's power to define a particular tax as an income tax rather than a property tax.

Generally, the income tax applies to the increase in value of an asset, recognized at the time of sale of the asset. That is, generally the income tax applies to the amount a taxpayer receives that exceeds his basis in the asset. However, Congress might decide to impose a tax on the entire amount the taxpayer receives upon sale of an asset – regardless of his basis. Would such a "gross proceeds" tax still be an income tax? Doesn't the very term "income" or "incomes" suggest profit or increase in wealth? Is the concept of basis constitutionally required?[3]

Response:

The income tax today generally applies to the increase in value of an asset, recognized at the time of sale. Any change to this system would require new federal legislation. If a constitutional challenge to such legislation were to come before the Court, I would fairly consider all the briefs and arguments presented.

[3] *See generally* Deborah A. Geier, Murphy *and the Evolution of 'Basis'*, 113 Tax Notes 576 (Nov. 6, 2006).