Senator Kyl
Questions for Elena Kagan

1. **You wrote an article in which you called Justice Marshall's "vision" a "thing of glory." During your testimony, you said that you were simply praising Justice Marshall's "vision" that "the courts are open to all people and will listen respectfully and with attention to all claims."**

   In the same paragraph of the article where you call Justice Marshall's "vision" a "thing of glory," you note that "some recent Justices have sniped at that vision."

   a. **Please identify which Justices had "sniped" at Justice Marshall's "vision" that "the courts are open to all people and will listen respectfully and with attention to all claims."**

   Response:

   The essay does not cite any particular Supreme Court Justice and I do not remember whether I had one in mind. It is likely that this was a catchall reference to people who criticized or mischaracterized Justice Marshall's view that the Supreme Court served in significant part to provide a fair forum for people who could not gain access to any other part of our governmental system.

   b. **If other Justices had not, in fact, "sniped" at the notion that the "the courts are open to all people and will listen respectfully and with attention to all claims," but had instead "sniped" at something else, please take this opportunity to correct your testimony and explain what you actually meant in your article when you referred to Justice Marshall's "vision."**

   Response:

   Please see above.

2. **As we discussed during the hearing, you approved a brief filed in *Chamber of Commerce v. Candelaria*. That brief was signed by the top two political appointees in the DOJ Civil Rights Division and two career lawyers in the Civil Rights Division Appellate Section. The brief was not signed by any lawyers from DHS (which operates the E-Verify program) or by any career attorneys from the DOJ Civil Division (the division with jurisdiction over immigration matters).**

   a. **The Arizona law at issue did not criminalize any behavior by employees (legal or illegal)—it was targeted exclusively at employers. In addition, the Arizona law did not in any way disturb existing Federal laws prohibiting national origin discrimination. Why was the Civil Rights Division so heavily involved in the process?**

Response:

On May 28, 2010, the United States filed an amicus curiae brief in *Chamber of Commerce v. Candelaria*. The brief was signed by lawyers from the Solicitor General's Office, the Civil Division, and the Civil Rights Division—that is, by all the components of the Justice Department that participated in the drafting of the brief. I do not believe it would be appropriate for me to comment on the internal deliberations of the Justice Department regarding this brief, including the extent of the Civil Rights Division's involvement in the case. I will note, however, that the federal legislation at issue in the case was designed to strike a balance between "ensuring that employers do not undermine enforcement of immigration laws by hiring unauthorized workers, while also ensuring that employers not discriminate against racial and ethnic minorities legally in the country." Br. for the United States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, No. 09-115, at 9. Indeed, another provision of the statute at issue in the case, 8 U.S.C. § 1324b, creates a civil rights remedy for victims of employment discrimination based on citizenship, immigration status, or national origin.

b. Why was DHS not represented on the brief?

Response:

Because the brief was filed after the President nominated me to the Supreme Court and I ceased doing sustained work as Solicitor General, I have no knowledge of discussions (if any) relating to whether names of DHS attorneys should appear on the brief.

c. Without divulging the substance of any deliberations, was Secretary Napolitano at any time asked about her views on the brief? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

As in all cases handled by the Office of the Solicitor General, all relevant agencies and Justice Department components were consulted in formulating the United States' position. As your question notes, DHS has substantial responsibility for the enforcement of federal immigration laws and, particularly, for operation of the E-Verify program. I do not believe it would be appropriate for me to comment further on any specific internal deliberations of the Executive Branch regarding this case. My response to Senator Coburn concerned whether I personally had participated in a particular matter, not whether I had consulted with particular government officials.

d. Without divulging the substance of any deliberations, were other officials at DHS asked about their views on the brief? (I would note that you answered

a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

Please see above.

3. **Although the Solicitor General's brief in *Candelaria* did not ask the Supreme Court to review the part of the Arizona law that requires all employers to participate in the E-Verify program, the brief spends considerable time criticizing this provision of state law and suggests that Congress also intended to preempt it. This section of the brief (Section B), however, fails to acknowledge that Congress has legislated in this area repeatedly—by reauthorizing the E-Verify program—after the Arizona law had been enacted. Thus, Congress was fully aware that states, like Arizona, were requiring employers to use E-Verify, yet it chose not to amend the law when it was reauthorized. This seems like a critical fact, one that undercuts your argument that Congress meant to preclude E-Verify requirements like Arizona's.**

   a. **Doesn't an advocate have a duty to bring relevant information or legal authority to a court's attention, even if it is adverse to her case?**[1]

   Response:

   Yes.

   b. **Isn't this duty of candor heightened when the advocate is the Solicitor General or someone from her office?**

   Response:

   The Solicitor General has a heightened duty of candor to the Supreme Court.

   c. **Why didn't your office raise these reauthorizations in its discussion of the E-Verify requirements?**

   Response:

   The brief specifically noted that, "Since 1996, Congress has on four occasions extended the program's term and scope," Br. for United States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, No. 09-115, at 3 (filed May 28, 2010). Further, Section B of the brief argued that the Court should not review the Ninth Circuit's decision upholding the provision of the Arizona law regarding E-Verify precisely because E-Verify is "a still-evolving federal program whose nature and

[1] Rule 3.3, Model Rules of Professional Conduct ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

scope have changed in numerous respects since its creation and which may change again in the near future." *Id.* at 20. The brief gave the Court a full and candid presentation of the relevant considerations to the petition for certiorari.

4. In *Lopez-Rodriguez v. Holder*, the Ninth Circuit held that the Exclusionary Rule applied to civil immigration proceedings. As five dissenting Ninth Circuit judges noted in a strongly worded dissent to denial of *en banc* review, this decision squarely conflicted with the controlling Supreme Court case which held that the Exclusionary Rule should not apply to immigration proceedings. It also created a circuit split with two other circuit courts of appeals.

5. This case presented an attractive opportunity to seek *certiorari*. The case created a split among the courts of appeals. It involved significant constitutional issues. There was a strong dissent, which was sure to catch the attention of the Justices. And the effect on the government's interest is very significant—the decision means that ordinary deportation hearings (which are civil, not criminal) can now be bogged down by long legal fights over the admissibility of clear evidence that a person is illegally here and should be deported.

a. Can you explain why you chose to not appeal this case when there were numerous factors supporting a successful grant of *certiorari*?

Response:

I do not believe it would be appropriate for me to comment on the internal deliberations of the Justice Department concerning whether to file a petition for certiorari in a particular case. In deciding whether to file a petition for certiorari in any case, one of the factors the government considers is whether the factual record and circumstances of the case increase or decrease the likelihood that the government will prevail on the legal issue in which the government has an interest. In *Lopez-Rodriguez*, for example, the Ninth Circuit's published opinion noted that the INS agents who conducted the search at issue were unavailable to testify before the Immigration Judge, and the IJ therefore fully credited the alien's description of the search. The opinion also placed some weight on the fact that the search at issue was a search of a home, which courts often view as central to the protections of the Fourth Amendment. Moreover, the circuit split noted in your question did not concern whether the exclusionary rule applies at all to civil immigration proceedings—all three circuits to consider the question have held that it does apply in egregious circumstances—but rather the standard that courts should use in deciding whether conduct counts as egregious such that the exclusionary rule should apply. *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1105 (9th Cir. 2009) (Bea, J., dissenting from denial of rehearing en banc) ("The Ninth Circuit is not alone in reading the *Mendoza* dicta as permitting the application of the exclusionary rule in cases of egregious Fourth Amendment violations. The First and Second Circuits have done so as well.")

b. During the hearing, I asked whether you at any point spoke with individuals at the White House—including staff in the Executive Office of the President—about the *Rodriquez* case. You declined to answer. Please take this opportunity to respond to my question.

Response:

I do not believe it would be appropriate for me to comment on the internal deliberations of the Executive Branch.

c. Did you at any point speak with an outside group— such as an advocacy or interest group—about the *Rodriquez* case?

Response:

No.

6. On April 1, 2009, the *Washington Post* reported that the Office of Legal Council at the Department of Justice issued a legal opinion that the DC voting rights legislation being considered by Congress was unconstitutional.[2]
The story further states that, upon getting this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General's office. According to the story, lawyers in the Solicitor General's office "told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment."

The story says that the Solicitor General's office was asked for the legal opinion before you were confirmed on March 19, 2009. But it does not say when the Solicitor General's office gave the Attorney General an answer to his question.

a. When did the Solicitor General's office inform the Attorney General of its legal opinion of the DC voting rights legislation?

Response:

All aspects of this event occurred before I became Solicitor General.

b. Without divulging the substance of any advice given, were you at any time asked to express an opinion on the DC voting rights legislation? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

[2] Carrie Johnson, *A Spit At Justice On D.C. Vote Bill: Holder Overrode Ruling That Measure Is Unconstitutional*, Wash. Post (Apr. 1, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html.

Response:

No.

c. Do you believe it was appropriate for the office of the Solicitor General to render an advisory opinion about a pending bill that was not even yet a law?

Response:

I was not yet Solicitor General when this matter occurred, and do not know the circumstances well enough to render an opinion. The Attorney General did not ask the Office of the Solicitor General for any opinion of this kind while I served as Solicitor General.

7. It has been reported that "a senior administration official [has said] that the federal government will . . . formally challenge . . . Arizona's immigration law [SB1070] when Justice Department lawyers are finished building the case."[3] More specifically, the Secretary of State said that the Justice Department "will be bringing a lawsuit" against the law. We also know that the Justice Department began considering such a challenge to SB1070 almost as soon as it became law on April 23, 2010.[4] This was more than two weeks before your nomination to Supreme Court.

a. Without divulging the substance of any advice given, were you at any time asked to express an opinion on SB1070? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

No.

8. Do you think that *Brandenburg v. Ohio* was correctly decided? Specifically, do you think that a call for violence falls outside the protections of the First Amendment only if it is likely to result in "imminent" violence?

Response:

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), the Court reversed the defendant's conviction under a statute that made it a crime to "advocate . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a

[3] Brian Montopoli, *Senior Official: Obama Administration Will Challenge Arizona Immigration Law*, CBS News (June 18, 2010), http://www.cbsnews.com/8301-503544_162-20008171-503544.html.

[4] *Holder: U.S. May Challenge Arizona Immigration Law*, Fox News (Apr. 27, 2010), http://www.foxnews.com/us/2010/04/27/lawsuits-set-fly-arizona-officials-defend-new-immigration-law/.

means of accomplishing industrial or political reform" and to "voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45. The Court explained that its precedents had established the proposition that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. *Brandenburg* is a precedent of the Court entitled to *stare decisis* effect.

9. Assume that a religious authority, like Sheikh Abdul Rahman (the Blind Sheikh) or Mufti Usmani, issues a fatwa calling for all Shariah adherent Muslims to either engage in violent jihad against the infidels of the West or to provide material support in the form of charity. In your view, can this "speech" be prosecuted, or is it protected under the First Amendment?

Response:

Whether any particular expression could be the basis for a criminal prosecution consistent with the First Amendment depends on the content and context of the expression, and the scope of the criminal statute. This Term, the Supreme Court upheld as against a First Amendment challenge the application of the federal criminal "material support" statute to expressive activity that facilitated the lawful, nonviolent purposes of terrorist organizations. *Holder v. Humanitarian Law Project*, 2010 WL 2471055 (2010). I argued this case on behalf of the United States before the Supreme Court.

10. In a recent *Washington Post* editorial, George Will suggested some questions that I would like you to answer.

a. Can you name a human endeavor that Congress could not regulate through the Commerce Clause, if it made some pretense that the endeavor has an effect on the national economy?

Response:

In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Court recognized that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds." *Morrison*, 529 U.S. at 608. In particular, the Court stressed that the activities regulated by the statutes at issue in *Lopez* and *Morrison* were not economic in nature. Under *Lopez* and *Morrison*, therefore, Congress could not regulate non-economic activity based on a mere "pretense that the endeavor has an effect on the national economy."

b. If courts reflexively defer to that congressional pretense, in what sense do we have limited government?

Response:

Lopez and *Morrison* make clear that the courts should not "reflexively defer" to "congressional pretense." Instead, courts must evaluate the nature of the activity that Congress seeks to regulate and the link between that activity and interstate commerce. In performing that evaluation, courts should be deferential to congressional fact-finding.

11. Again, I would like you to answer another question posed by George Will. In Federalist 45, James Madison said: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."

a. Does the doctrine of enumerated powers impose <u>any</u> limits on the federal government?

Response:

Yes. As the Supreme Court recognized just this past Term, "the Federal Government is acknowledged by all to be one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (internal quotation marks and citations omitted).

b. Can you cite some things that, <u>because of that doctrine</u>, the federal government has no constitutional power to do?

Response:

As noted above, *Lopez* and *Morrison* make clear that Congress does not have the constitutional authority under the Commerce Clause to regulate non-economic activity with no substantial effect on interstate commerce. Similarly, the Court has imposed limits on congressional action taken pursuant to Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*, the Court held that Congress's enumerated power under Section 5 is limited to enacting legislation that enforces constitutional rights previously recognized by the Court, and does not include the power to determine what is a constitutional violation. 521 U.S. 507, 519 (1997).