QUESTIONS FOR THE RECORD FOR DAWN JOHNSEN
SUBMITTED BY SENATOR JEFF SESSIONS

Presidential War Powers

Two of the deputies within the Office of Legal Counsel, Marty Lederman and David Barron, have already been hired.

Before they were hired, then-Professors Lederman and Barron published two law review articles in the *Harvard Law Review* in January 2008 in which they questioned the exclusivity of the President's Commander in Chief powers relative to the legislature. In their articles, they expressly reject as "unwarranted" the "view expressed by most contemporary war scholars — namely that our constitutional tradition has long established that the Commander in Chief enjoys substantive powers that are preclusive of congressional control, especially with respect to the command of forces and the conduct of [military] campaigns[.]"

- Do you share the views of Mr. Barron and Mr. Lederman regarding the limited power of the Executive Branch in wartime?

- Do you agree with Mr. Lederman and Mr. Barron's rejection of "the argument that tactical matters [in wartime] are for the President alone[?]"

  o Do you believe Congress has the constitutional authority to prescribe legislatively the military's tactics during wartime?

  o Setting aside the constitutional considerations, do you believe Congress has the ability - both in terms of information and nimbleness - to legislate tactics during a military campaign?

Mr. Lederman and Mr. Barron conclude their second article, *The Commander in Chief at the Lowest Ebb - A Constitutional History,* with advice to future Executive Branch lawyers. They write that such lawyers "should resist the urge to continue to press the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war."

- Do you believe you should resist the urge to give President Obama discretion to conduct military operations in Afghanistan? In Iraq?

Answer: I have not carefully studied these very lengthy articles, so cannot answer questions regarding their specific content. My recollection of these articles is that their inquiry is directed at a specific question, namely whether there is a firm

historical basis for the contention that Congress lacks all authority to determine specific uses of America's war powers. In that regard, I believe that Steven Bradbury was correct when he wrote in an OLC memorandum two months ago that although the President has broad authority as Commander in Chief to take military actions in defense of the country, Article I, section 8 of the Constitution grants significant war powers to Congress, as well. *See* Memorandum for the Files, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*(Jan. 15, 2009), available at http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf. When Congress enacts a statute pursuant to its Article I war powers, it is generally the case that that the law limits what the President could otherwise do as Commander in Chief (which is not to say there may not be exceptions). As best I can recall their articles, Professors Barron and Lederman demonstrate that this has been the consistent understanding of both political branches throughout most of our Nation's history. Thus, I agree with President Obama, who wrote during the campaign that "[t]he President is not above the law, and the Commander-in-Chief power does not entitle him to use techniques that Congress has specifically banned as torture." *See* Charlie Savage, *Barack Obama's Q&A,* The Boston Globe (Dec. 20, 2007), available at http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/. I also agree that there are many cases in which Congress does not have sufficient information or dispatch to try to regulate tactics by statute in the midst of war—which is why Congress does not often try to do so.

Al Qaeda

At his confirmation hearing, Attorney General Holder stated that not only is the U.S. at war with al Qaeda, but that the nation was probably late in recognizing the existence of that state of war. In response to a question from Senator Graham, Attorney General Holder stated: "I think our nation didn't realize that we were at war when, in fact, we were. When I look back at the '90s and the Tanzanian -- the embassy bombings, the bombing of the Cole, I think we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination."

- Do you agree with Attorney General Holder's statement? In your view, what is the earliest period prior to 2001 (if any) that President Clinton would have been justified in using military force against al Qaeda?

The U.S. military frequently undertakes military action, including detention measures, against persons and organizations associated with, but not members of, al Qaeda.

- In your view, are members of terrorist organizations other than al Qaeda that threaten or have attacked U.S. interests (including through association with al Qaeda) lawfully subject to U.S. military action?

During Attorney General Holder's confirmation proceedings, I asked him about an account from Jack Goldsmith's book, *The Terror Presidency.* Mr. Goldsmith describes how "White House and Department [of Justice] lawyers opposed an unrestricted lethal operation against Bin Laden, and would authorize his killing only if it were necessary for self-defense in the course of legitimately arresting him." *Id.* at 95. This opposition came despite the fact "[t]he CIA had Bin Laden in its sights," and after the Office of Legal Counsel (OLC) had decreed that Executive Order 12333's assassination ban "did not apply to a military target, like Osama Bin Laden, who posed an imminent threat to the United States." *Id.* at 94-95. Mr. Goldsmith concludes by noting, "[f]ear of retroactive discipline, induced by cautious legal authorizations, led the CIA to forego the covert operation." *Id.* at 95.

- Did you advance any argument with regard to the legality of the CIA Operation against bin Laden described in Mr. Goldsmith's book? I would like to know whether you counseled in favor of a broad authorization consistent with the OLC opinion or backed the opposing view described in Mr. Goldsmith's book. I would also like to know your current view on this question.

Answer: I agree that al Qaeda engaged in hostilities against the United States prior to September 11, 2001, and that therefore that President Clinton was justified in concluding that he could use military force in response, as he did. I also believe that the President can take military action against other terrorist groups that have attacked U.S. interests and, in some cases, when they threaten to do so. Whether and under what circumstances the law allows the United States to engage in military action against groups based on their associations with al Qaeda is a complex, fact-intensive question that depends in large measure on the proper interpretation of Congress's Authorization for Use of Military Force against those organizations responsible for the 9/11 attacks, and on the longstanding law-of-war principles that the plurality decision in *Hamdi* indicated should inform interpretation of that law.

With respect to the question about the excerpt from Prof. Goldsmith's book regarding a CIA operation against Osama bin Laden, it would be inappropriate for me to answer that question to the extent it asks me to disclose nonpublic legal advice that I provided during the course of my service at OLC. The subject matter is such that, if such advice occurred, it likely would have been classified.

Executive Power

Do you agree that the Supreme Court's decision in *Medellin v. Texas*, 552

U.S. __ (2008), confirms that the President and the Executive Branch are not bound, as a matter of U.S. law, by provisions of treaties that are not self-executing, and that such treaties are not part of the "law" subject to Article II's Take Care Clause?

Answer: I am generally aware of *Medellin* and the issue that you have identified, but I have not had any occasion to study the implications of this decision. If I am confirmed, I will treat *Medellin*, and other Supreme Court cases involving treaty interpretation, as binding law when construing treaties.

FISA

In your view, does the Fourth Amendment's warrant requirement apply to surveillance activities directed toward non-U.S. persons overseas and designed to secure foreign intelligence and other national security information, including when non-U. S. persons subject to surveillance communicate with U.S. citizens in the United States? Do you believe that any provision of the FISA Amendments Act of 2008 is unconstitutional?

Answer: I have not studied the question in detail, but I am aware that last August, the Foreign Intelligence Surveillance Court of Review held that there is an exception to the Fourth Amendment's Warrant Clause with respect to at least certain forms of foreign intelligence surveillance directed at foreign powers and agents of foreign powers located abroad. The court further held that such surveillance remains subject to the Fourth Amendment's reasonableness test and that reasonableness will depend on the totality of the circumstances. I have not studied the FISA Amendments Act sufficiently to reach a judgment whether it is constitutional as applied in all possible circumstances.

Senator Specter's Written Questions for Dawn E. Johnsen,
Nominee to be Assistant Attorney General, Office of Legal Counsel

1. You were featured in a 2006 Alliance for Justice advocacy film entitled "Quiet Revolution," which asserted that Republicans were engaging in a "stealth revolution" to appoint judges who would "rob Congress of its power to enact federal legislation that it believes it necessary to protect the American people." In that film, you asserted that judges such as Chief Justice Roberts and Justices Thomas and Alito are the instruments by which the "radical right" intends to implement its "incredibly extreme" agenda. Then, at a panel discussion introducing the film, you criticized Republicans and their judicial nominees, accusing them of "a stealth attempt to radically remake constitutional law." You added: "[O]ne of our main objectives has to be the object of this film, to unmask what is really going on and to show them for the hypocrites they are." You further stated that the appointment of conservative judges is a "strategy for implementing radicalism."

    a. Do you believe Chief Justice Roberts and Justice Alito are "radical" nominees bent on implementing an "incredibly extreme" agenda?

Answer: No, I do not. I would also point out that I have reviewed *Quiet Revolution* and nowhere in that film do I make any assertion at all about Chief Justice Roberts or Justice Alito, or even mention them. The film does include comments of mine, along with comments of many other lawyers and officials critical of some opinions of the Court and of President Bush's view of executive power, including then-Senator Barack Obama, Senator Lindsey Graham, and many prominent law professors.

2. In your notes for the panel discussion of that same film, you state: "Remember in roberts and alito hearings ... Took to a new level. Worse than not answering-suggest ethical viol ...." When I asked you about these notes at your hearing, you stated that you "believe what was at issue was alot of back-and-forth about whether it would be inappropriate and somehow an ethics violation for a nominee to answer questions at a certain degree of specificity."

    a. Why do you believe it is "worse than not answering" for a nominee to "suggest" that it might violate the Judicial Canons of Ethics for him or her to answer a question about an issue that might come before the court to which he or she is nominated?

    b. Do you think it is appropriate for a judicial nominee who is a current judge to comment about a case that is currently pending before the Court to which he or she is nominated?

Answer: I do not believe that it is appropriate for a judicial nominee to comment on a pending case. I have written, and do believe, that it is appropriate for

Senators to ask a judicial nominee to address his or her judicial philosophy and legal views. This will from time to time involve a delicate balance, but I believe it is the correct one in that it allows the Senate to fulfill its constitutional role of providing meaningful advice and consent. My point in the statement you quote was that some Supreme Court nominees who preceded Chief Justice Roberts and Justice Alito have spoken quite expansively about their judicial philosophy and their legal views, and not inappropriately so. I believed it was harmful and wrong to suggest that by doing so, those nominees may have violated an ethical obligation.

3. You stated during a panel discussion of the film "Quiet Revolution:" "I think the recent Supreme Court confirmation hearings were tremendously disappointing. And we saw in the film clip after clip where they were able - the nominees - to get away with saying over and over again the same exact phrases, and nobody effectively called them on it. You know, they certainly are disciplined. The phrase 'I have no quarrel with' must mean something very different than any of us think it means." Are you suggesting Chief Justice Roberts and Justice Alito misled this Committee with their testimony?

   a. To what extent should judicial nominees be required to explain their views and positions on constitutional issues to the Senate to ensure we do not confirm "stealth" nominees?

   b. Do you agree with the statement: "The kind of inquiry that would contribute most to understanding and evaluating a nomination is . . . discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues?"

   c. Following the first President Bush's nomination of David Souter to the Supreme Court, you were quoted as demanding that the White House reveal the nominee's views "on the issue of privacy." You asserted, "We are telling senators that [President Bush] ought not to be able to use this process to hide this information from the Senate and the American people." Do you believe that nominees to the Supreme Court should disclose their views to the Senate on the issue of privacy?

Answer: I will first mention that OLC has no role in judicial nominations or appointments. I do believe that the Senate is entitled to examine the judicial philosophy and legal views of a Supreme Court nominee as a component of its constitutional advice-and-consent role. I believe that as part of that process, Senators may ask nominees about their views on the issue of the constitutional right to privacy, and nominees should answer those inquiries. I noted at the time of Justice Souter's confirmation that there was a special reason for asking for his views on this issue: the Republican Party Platform had called for the appointment of judges who would overrule *Roe*, and the balance on the Court was such that it seemed the next appointment might determine that outcome. In contrast, it would

never be appropriate for a Senator to seek to extract any kind of commitment as to how a nominee would decide a particular case or specific question that might come before the Court.

4. During the Presidential campaign at a Planned Parenthood conference, then-Senator Obama said: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges." Do you agree with these criteria for selection of judges?

    a. Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means? If so, under what circumstances?

Answer: I do not believe that judges ever should be guided only by a sense of empathy, nor should such empathy ever interfere with their interpretation of what the law requires.

5. In a 2007 speech before the Indiana Civil Liberties Union, you discussed some of the decisions of the "Roberts Court" and focused on some of the dissents to those opinions. In your notes for that speech, you state that the authors of those dissents are Justices who are "left of center-I hesitate to call them liberal, [because] they only are relative to the rest of the Court." You then proceeded to discuss Justice Ginsburg's dissent in the Lilly Ledbetter case. Do you include Justice Ginsburg as a "left of center" Justice who is only liberal "relative to the rest of the court?"

    a. 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. Do you believe these are merely "left of center" positions?

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

    c. Justice Ginsburg said that there should be Federal funding for abortion. Do you agree? Is that a merely "left of center" position?

Answer: I do not recall ever hearing that Justice Ginsburg expressed any of the positions you describe. I am reluctant to comment on them without knowing more, but as you describe them in section (a), I do not agree with any of them. I continue to believe that Justice Ginsburg has been a centrist or left-of-center Justice, regardless of how one might characterize the views she expressed before

becoming a judge. If confirmed, I will follow the decisions of the Supreme Court and not views I expressed as an academic or advocate. For example, I support public funding of abortion services as part of general programs providing the poor with medical care, but I fully recognize and would absolutely apply Supreme Court precedent upholding policy choices not to fund abortions. Indeed, during my prior five years of service at OLC, I applied just such precedent.

6. In response to a question from Senator Sessions, you testified at your hearing, that you gave certain Senate staffers "guidance to form their questioning" of Supreme Court nominees John Roberts and Samuel Alito. To the best of your knowledge, information and belief, and to the best of your ability to reconstruct the facts, to whom did you volunteer guidance and what questions did you advise them to ask?

   Answer: I recall receiving questions and requests from senior staff working for four Senators who served on the Senate Judiciary Committee in connection with one or both of those nominations. They involved questions of constitutional law and government practices about which I had some knowledge based on my teaching, study, and work in the government. I believe that most of the questions related to issues of presidential power and more generally separation of powers; some related to congressional authority to enact legislation; some related to the right to privacy; and there may have been other areas as well. I do not recall that I ever advised any Senator to ask any particular question; I may have reviewed some draft questions prepared by senior staff, but am almost certain I did not draft any questions myself. I believe these conversations should be viewed as confidential, as comparable conversations with senior advisors to the President would be, and that disclosing them without a Senator's specific approval might chill the ability of Senators to solicit valuable advice in the discharge of their constitutional advice-and-consent responsibilities.

7. In an article you wrote last year, you asserted that "Progressives need to rethink the theoretical underpinnings of *Roe*—and what is left of *Roe* after [*Planned Parenthood v.*] *Casey* and [*Gonzales v.*] *Carhart*—and also situate access to abortion, contraception and reproductive health care within a broader progressive constitutional vision." What about the Supreme Court's current jurisprudence in this area do you feel is deficient?

   a. You also made several references to "the progressive agenda" and remarked in the area of abortion jurisprudence that "the progressive agenda would focus on the courts as the vehicles for desired change." On what basis do you believe that courts are an appropriate vehicle to enact a "progressive agenda?"

   b. In what areas other than abortion do you believe the courts should be vehicles for change?

Answer: I believe that clearly courts should not be driven by the pursuit of an ideological agenda. That said, the Constitution specifically enshrines principles of liberty and equality, and it is proper for the judiciary to vindicate these principles. For example, the Supreme Court rendered significant constitutional change in deciding *Brown v. Board of Education* and overruling its decisions accepting of the doctrine of "separate but equal." I do believe it is appropriate for advocates to work on litigation that vindicates constitutional principles in a way that is consonant with their own conceptions of how those principles should be applied. I have exhorted progressive groups to this task. My response below to question ten describes why I recommend situating abortion within a broader conception of reproductive liberty and health.

8. In your notes from "Talk at Planned Parenthood Midwest Conference, Indianapolis, IN, 11/8/08" you state "OLC does range of issues . . . to domestic issues such as const of fed funding to faith based entities to affirm action. Several abortion issues when I was there." To which abortion issues were you referring?

    a. What abortion issues do you anticipate the Office of Legal Counsel could handle in the next four years?

Answer: It would be inappropriate for me to reveal the specifics of nonpublic legal advice that I provided during the course of my service at OLC. It is public knowledge that, as a general matter, OLC reviews pending legislation for constitutional compliance and assists in the preparation of the Executive Branch's views on legislation, with an eye toward working with Congress to correct any constitutional defects prior to passage. In that capacity, bills regulating abortion have comprised, and I would expect would continue to comprise, a very small percentage of the numerous bills sent to OLC for review each year. For example, restrictions on federal funding for abortion have been included in appropriations bills. When presented with any issue, I would (as I was during my five years of prior service at OLC) be guided by Supreme Court precedent, including those upholding abortion restrictions.

9. In your writings and speeches, you have argued for the highest level of scrutiny for abortion regulations and opposed what some would call mild regulations as failing to meet that standard. For instance, you were quoted during the litigation of *Planned Parenthood v. Casey* as analogizing Pennsylvania's 24-hour waiting period prior to having an abortion to "a law saying newspapers have to wait 24 hours before publishing a story." As you know, the Court sustained that waiting period and has sustained other regulations on abortion under a different standard of scrutiny-the "undue burden" test.

    a. Do you believe the Court erred by adopting something less than a strict scrutiny standard?

    b. Given your statement implying that a restriction on the right to abortion is

analogous to a restriction on a newspaper exercising its First Amendment rights, do you believe the Court should apply strict scrutiny to other restrictions on specifically enumerated rights such as the Second Amendment? Why or why not?

Answer: Although I personally have criticized the change in standard from *Roe*'s "strict scrutiny," if confirmed and if the issue arises, I of course will apply the *Casey* "undue burden" standard in evaluating the constitutionality of abortion restrictions. The undue burden standard has been the governing standard for more than fifteen years. I understand that in *Heller* the Supreme Court held that the right to bear arms protected under the Second Amendment is an individual right, but that the Court did not identify the level of scrutiny to be applied to gun restrictions. However, I have not ever studied or written about the Second Amendment and do not have a personal opinion on the appropriate standard of review. If confirmed, I would apply *Heller* whenever it is relevant to an issue presented to OLC.

10. In your 2006 article entitled "How *Roe* Will Go," you had sharp criticism for the notion that abortion should be "safe, legal, and rare." You wrote, "The notion of legal restrictions as some kind of reasonable 'compromise' — perhaps to help make abortion 'safe, legal, and rare' — proves nonsensical." Yet both of the last two pro-choice presidents, Clinton and Obama, asserted that the goal should be to keep abortion rare. Do you agree with the goal of striving to keep abortion rare?

    a. Your article decried the "incremental evisceration of *Roe*" which has manifested itself through "such benign-sounding requirements as waiting periods, informed consent, physical specifications for buildings . . . , and special hospital privileges" which are "designed to sound reasonable while also limiting the number of abortions performed." Other than perhaps requiring doctors to perform the procedure, you seem to oppose virtually every regulation of abortion, no matter how reasonable and benign many of us find them (including many of us who are pro-choice), as a matter of constitutional law. Is that correct?

Answer: I would note first that issues of policy will be no part of my work if I am confirmed to head OLC. While people of good will disagree on abortion, I believe we can all agree that it is desirable to reduce the number of abortions, and I believe that reducing the number of unintended pregnancies is an important way to achieve that goal. I have always strongly favored common-ground approaches that reduce the number of abortions by reducing the rate of unintended pregnancy and by supporting women who decide to bear children by giving them the resources necessary to bear healthy babies. In the quotation to which you refer, I was criticizing certain abortion restrictions, not the phrase "safe, legal, and rare." In my writings as an academic and an advocate, I have criticized abortion restrictions that are designed to look like reasonable compromises, but that have the effect of disproportionately harming the most vulnerable of women, in

particular poor and low-income women who suffer most from the dramatically decreasing availability of abortion services. I do not personally oppose laws that regulate providers of abortion services just as the government does other providers of medical services, when the purpose and effect is truly to protect the health of patients and the safety of the procedure. The Supreme Court has upheld many restrictions on abortion as constitutional, including parental notice and consent laws, funding restrictions, a federal ban on partial birth abortions, and waiting periods. If confirmed as the head of OLC, if ever asked to provide legal advice about the constitutionality of abortion restrictions, my advice would of course be based upon those Supreme Court decisions.

b. According to William Saletan, your opposition to requiring parents' involvement in the abortion decisions of their teenage daughters was strong enough that you urged NARAL: "Do not, as part of an affirmative legislative strategy, introduce even a liberalized version of a parental consent or notification law." Do you remain opposed to such laws?

Answer: I was speaking there, in my position as an advocate, of what was best as a matter of legislative strategy: in particular the appropriate strategic response to the risk of bad amendments substantially changing a bill once a particular subject was raised. It has been a long time since I have been involved in such legislative work and I do not have a judgment about what should be done now with respect to the same issues of legislative strategy. I do remain opposed to laws that mandate parental consent or notice, though I believe minors generally should involve their parents. This is all, of course, a matter of policy, which would not be my role at OLC. If I were to be confirmed to head OLC, I would in giving legal advice adhere to all Supreme Court decisions, including those that upheld parental notice and consent requirements.

11. In your 2006 Slate article "The Outer Shell," you wrote that the "conventional wisdom now counsels" that the demise of *Roe* and the "likely backlash" could "cause Republicans political harm-possibly severe harm. In the long run, this could benefit many women." Would you explain what that conventional wisdom is and how exactly the demise of the Republican party will "benefit many women?"

Answer: The "conventional wisdom" to which I alluded was not that the demise of the Republican party would benefit women. I in no way meant to suggest any such thing, either as an expression of the "conventional wisdom" or my own views. It was, rather, the "conventional wisdom" that an overruling of *Roe* would mobilize pro-choice voters which in turn would both harm the Republican Party and benefit women, because voters would be more likely then to vote for Democrats and to more likely protect womens right to choose through political action. In the article you quote, I then took issue with this scenario, saying "I would hesitate to suggest that possibility. The ultimate political and practical consequences are unknowable."

12. Do you believe the United States has the power to preventively detain terrorist suspects?

    a. Must such detentions occur in the United States?

    b. Does the United States have no authority to detain except after Article III court determinations?

        i. What in your view constitutes the minimum of due process that should be required for tribunals that authorize or affirm detentions?

        ii. Would detainees before those tribunals enjoy a presumption of innocence or of guilt?

        iii. What evidentiary threshold would have to be met in those tribunals that review such cases? A preponderance of the evidence? Clear and convincing evidence? Beyond a reasonable doubt?

        iv. Would you authorize the admission of evidence in such tribunals not admissible in civilian courts? How would you go about departing from the evidentiary rules that govern civilian courts?

        v. Would detainees have to be either released or brought to the United States?

    Answer: Some of the important questions you raise concern matters of policy, as to which OLC would not be the decision-maker. With respect to the legal questions, I have not studied them sufficiently to form an opinion. If the questions were presented to OLC for resolution, I would follow OLC's traditional methods of interagency consultation before rendering an opinion. I would note that in a January 22, 2009 Executive Order, President Obama established an interagency Special Task Force on Detainee Disposition "to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism." The Special Task Force is co-chaired by the Attorney General. The Task Force has been directed to report to the President on these issues within 180 days of its establishment. Through its work, the Task Force may provide answers to some of the questions you raise.

13. You also had this to say in *Change for America* regarding the Bush Administration's policies regarding detainees and the war on terror: "Notwithstanding the Court's repudiation of some unlawful and harmful policies, many others remain in need of correction." What other policies do you feel are in need of correction, and how do you think they should be corrected?

Answer: As a former Deputy Assistant Attorney General and then Acting Assistant Attorney General, my concern about the Bush Administration's actions in the war on terror has focused on OLC and rule-of-law, not policy, issues. My principal criticism has been the failure of the Bush Administration, most notably on issues of torture and domestic surveillance, to comply with valid laws enacted by Congress pursuant to its ample authority under Article I of the Constitution. My strongest objections were aimed at those occasions when the Bush Administration failed to notify Congress when it asserted the authority not to comply fully with a statutory requirement. That was the impetus for my development of the "Principles to Guide the Office of Legal Counsel," as well as my work last summer with former Associate Counsel to President George W. Bush, Brad Berenson, at the request of Senators Feingold and Brownback, to draft legislation that resulted in the introduction of the "OLC Reporting Act of 2008."

14. In your notes for a 2004 panel discussion hosted by the American Constitution Society, you wrote about the war on terror: "Because this is a different kind of war, if war at all, and war has a long history of specific constitutional meaning, I think it is better to describe more precisely just what we are talking about, rather than use an imperfect analogy." (emphasis added)

    a. In your view, are we at war?

Answer: Yes.

    b. What do you mean by the "specific constitutional meaning" of war? Does the war on terror fail to meet this definition?

Answer: As I testified at my hearing, there is no question that we are at war. The remarks to which you refer above addressed the broader question whether it was useful to speak generally of a "War on Terror." Specifically, I recounted hearing Lee Hamilton speak about the findings of the 9-11 Commission, which he had just finished co-chairing. I noted his explanation that our nation was caught unprepared by the 9-11 attacks because we had not adjusted our understanding of national security to the new demands and threats we were (and are) facing. I further noted that the Commission had recommended several urgently needed changes to our national security apparatus, including in the areas of threat identification, intelligence, and international relations. And I emphasized the Commission's bottom-line conclusion—namely, that the radically changed nature of the threat we face as a nation demands a dramatically different understanding of the requirements of our national security. It was in this context that I pointed out that, despite their direct and serious engagement with these issues, neither Representative Hamilton nor the Commission's Report had generally used the language of "war" or a "War on Terror." I suggested that—following the Commission's lead—it might be a wise choice not to use this language when talking about constitutional questions related to the new national security threats we face, because war has a long history of specialized constitutional meaning. It

might be better, I suggested, to try to describe more precisely the radical new national security threats our nation faces. With respect to our conflict with Al Qaeda, or our conflicts in Iraq and Afghanistan, however, there is no question that we are at war.

15. In *Guidelines for the President's Legal Advisors, an introduction to Principles to Guide the Office of Legal Counsel*, you stated that, among other things, OLC opinions should account for "the institutional traditions and competences of the executive branch as well as the views of the President who currently holds office." The OLC under President Clinton held that the president can go to war on his own authority; he can conduct the war as he sees fit; a war can exist between the United States and a non-state entity such as a1 Qaida; and Congress's ability to interfere is limited by the president's constitutional powers, including his Commander-in-Chief power.

    a. In your view, do traditions that encompass broad war-making powers, as the Clinton OLC repeatedly noted, fall under the "institutional traditions" that you mention?

Answer: The "institutional traditions and competences of the executive branch" to which I referred would include the body of OLC precedents from earlier Administrations, including the Clinton Administration, and including opinions about the President's Commander in Chief powers.

    b. The Obama Administration's position on several war-on-terror related legal issues so far (e.g., the state secrets privilege, extraordinary rendition, and targeted killing) has been in line with the Bush administration's position. Even on the largest issue of apparent difference - interrogation of terror suspects - the Obama Administration has left the door open to authorizing interrogation techniques beyond those in the Army Field Manual. As an outspoken critic of the Bush Administration, how will you reconcile your views with the present administration's positions if confirmed?

    c. Do you still hold to all of your criticisms of the Bush Administration's conduct of the war on terror?

Answer: I am not currently aware of any views I hold in this area that differ from those of the Administration, but in any event, if I am confirmed my job will be to offer legal opinions as to what the law is or requires regardless of my personal views of the policies in question. As indicated in my answer to Question 13, my criticism of Bush Administration policies in the war on terror has consistently focused on the inappropriate methods used by OLC in rendering opinions on certain legal issues and on the deficient reasoning in those opinions. In particular, my criticism has focused on opinions concerning torture and the terrorist surveillance program and especially the administration's failure to comply—in

some cases in secret—with valid federal statutes that limited executive branch action. The Bush Administration itself has withdrawn or disavowed many of the opinions I criticized. Yes, I still hold to those criticisms.

d. What criticisms, if any, do you have of the Clinton Administration's practices or policies regarding the same issues?

Answer: Again, my criticisms have been limited to matters of institutional procedure and legal reasoning, not policy. I do not have any specific criticisms of the Clinton Administration in these regards.

16. In *Change for America*, you also argued in criticizing Bush Administration policy that "extraordinary renditions to countries known to use torture" should "immediately end." Yet former officials of the Clinton Administration have stated that the practice known as extraordinary rendition was regularly practiced during that administration. Richard Clarke, the counterterrorism coordinator for the National Security Council, wrote that renditions-which he defined as "operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government"—"were becoming routine" by "the mid-1990s." He added that "[s]ometimes FBI arrest teams, sometimes CIA personnel, had been regularly dragging terrorists back to stand trial in the United States or flying them to incarceration in other countries." Michael Scheuer, former chief of the CIA'S Bin Laden Unit, testified that when the CIA initiated a rendition program in 1995, President Clinton and several of his top advisors "made it clear that they did not want to bring those captured to the U.S. and hold them in U.S. custody." Mr. Clarke stated that "President Clinton approved every snatch" — another tern for rendition — "that he was asked to review. Every snatch CIA, Justice, or Defense proposed during my tenure as [Counterterrorism Security Group] chairman, from 1992 to 2001, was approved." Former CIA Director George Tenet asserted the following in 2002: "In conjunction with the FBI, CIA had rendered 70 terrorists to justice around the world" prior to September 11. "Al-Qa'ida might have been able to operate freely in Afghanistan, but the terrorists knew they were fair game elsewhere."

Moreover, in a March 11, 2005 op-ed in the *New York Times* entitled "A Fine Rendition," Mr. Scheuer asserted that officials in the Clinton White House and Justice Department:

> [K]new that taking detainees to Egypt or elsewhere might yield treatment not consonant with United States legal practice. How did they know? Well, several senior C.I.A. officers, myself included, were confident that common sense would elude that bunch, and so we told them - again and again and again. Each time a decision to do a rendition was made, we reminded the lawyers and policy makers that Egypt was Egypt, and that Jimmy Stewart never starred in a movie called 'Mr. Smith Goes to Cairo.' They usually listened, nodded, and then inserted a legal nicety by insisting

that each country to which the agency delivered a detainee would have to pledge it would treat him according to the rules of its own legal system.

a. Ms. Johnsen, you served in the Office of Legal Counsel during this period. To what extent were you aware of participation in the practice of extraordinary rendition by the Clinton Administration generally, and by the FBI or other components of the Justice Department specifically?

b. Did you ever authorize the practice of rendition or otherwise express an opinion endorsing the legality of the practice? If so, do you believe you made the correct decision?

c. In retrospect, do you believe that the Clinton Administration's practices with respect to rendition were lawful? Do you believe they were otherwise consistent with American values?

Answer: I know that the practice of rendition did not begin with the Bush Administration and my belief is that it is not in all cases unlawful. I have not engaged in any study of the Clinton Administration's rendition practices that would allow me to comment on their legality or advisability. President Obama has ordered reviews of detention and rendition policies. It would be inappropriate for me to answer those questions that would require me to disclose nonpublic legal advice that I provided during the course of my service at OLC. Moreover, the subject matter is such that, if such advice was given, it likely would have been classified.

17. In November 1994, President Clinton's Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, signed an opinion letter to the White House Counsel in which he said the following:

> The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment.

a. Did you participate in the preparation of this statement?
b. Do you currently agree with this statement?
c. Were you aware of this position during your tenure in the Justice Department?

Answer: Yes, I believe that all of the OLC leadership (as well as a few line attorneys) participated in the preparation of this memorandum, which has been publicly released. It involved a core question of presidential power and the separation of powers that OLC considered throughout my tenure there, and with which Congress and the Executive Branch continue to wrestle. I have continued

to think and write about this issue. I generally agree with the statement as a whole, as well as with the way in which Attorney General Eric Holder and Deputy Attorney General-nominee David Ogden recently put it: "[T]he President's power is at its lowest ebb when he acts contrary to a statute duly enacted by Congress, but the Constitution is the supreme law of the land. There are circumstances where a President can refuse to comply with a statutory provision. These include a legislative veto, see INS v. Chadha, 462 U.S. 919 (1983), or a statute purporting to limit the President's removal power in certain circumstances, see Myers v. United States, 272 U.S. 52 (1926)." I further believe, consistent with past practice, that nonenforcement is appropriate only in relatively rare circumstances, and that the President should work with Congress to avoid the enactment of unconstitutional provisions and to repeal any that are enacted. Finally, as I have written and testified, I believe it is critical for the President to notify Congress whenever he determines not to comply fully with a statute (subject to protections for national security information).

18. A few months earlier, in July 1994, Deputy Attorney General Jamie Gorelick argued before the House Select Committee on Intelligence that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. The Committee at the time was considering legislation to subject such searches to approval from the FISA court. That issue arose when attention was drawn to the practice of intelligence agents conducting clandestine searches within the United States. Such searches extended not only to foreign embassies, but to U.S. citizens within our borders. The warrantless searches of the office and home of Aldrich Ames, a U.S. citizen, in June and October 1993 gave rise to concerns that courts might strike down this practice. Deputy Attorney General Gorelick's testimony before the Senate Intelligence Committee maintained, "the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General." She stated further, "it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities." In the Justice Department's view, she testified, it did not matter whether searches were "conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. . . . [w]e believe that the warrant clause of the Fourth Amendment is inapplicable to such searches."

    a. Do you agree with this statement?

    b. Were you aware of this position during your tenure in the Justice Department?

    c. Do you believe the warrantless searches of the office and home of Aldrich Ames were legal?

Answer: I was generally aware of this issue and of Deputy Attorney General Gorelick's position. Although I had not and still have not carefully studied the question, I had no disagreement with her position and understood it to be the position of the majority of federal courts that had addressed the issue in a related context. I do not know enough about the facts of the Ames case to have a view on whether the searches were legal.

19. In 2000, Assistant Attorney General Randolph D. Moss issued an opinion letter to the Office of Intelligence Policy and Review entitled "Sharing Title III Electronic Surveillance Material with the Intelligence Community," which addressed the statutory provisions governing wiretaps in criminal investigations. That opinion included the following language:

> [I]n extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III. . . . Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.

a. Do you agree with this statement?

Answer. I do not recall ever reviewing this particular opinion by Assistant Attorney General Moss. As a general proposition, though, and consistent with my answer to question 17, there are circumstances where a statute might be unconstitutional as applied. The President's authority would, however, be at its lowest ebb, as described by Justice Jackson in his important *Youngstown* opinion. If such circumstances arise, the Executive Branch should notify Congress of that fact and seek to obtain an appropriate statutory change. Communication with Congress is critical in such circumstances: It may well be that Congress simply did not contemplate that application, and where national security truly is endangered Congress and the President should work together to develop an appropriate statutory framework.

20. You stated in a posting on Slate.com that Indiana's voter identification law was "excessive and indefensible" and an effort by Republicans to suppress votes. The Supreme Court upheld Indiana's law as constitutional. There was no finding whatsoever that this law was an attempt to suppress votes as you claimed. In fact,

according to an article in the *Wall Street Journal* on January 30, 2009, Indiana had the largest increase in turnout of Democratic voters of any state in the country at 8.32 percentage points in the November election.

a. Do you acknowledge that your claims about voter suppression were proven wrong?

b. If confirmed, will you pledge to comply with the Supreme Court's holding in *Crawford* and acknowledge that state voter identification laws such as Indiana's are constitutional and not "excessive and indefensible?"

Answer. If confirmed I will of course apply the Supreme Court's decision in *Crawford* whenever it is relevant to an issue before the office. It seems to me that the high overall Democratic voter turnout in Indiana or elsewhere does not necessarily prove any particular effect of voter ID requirements, though that is certainly a subject for study.

Questions from Senator Orrin Hatch

1. Your career has devoted to using the judicial system to pursue a specific agenda. In your writings, you have mapped out what you call a "progressive constitutional agenda." And yet the Department of Justice in general, and the Office of Legal Counsel in particular, must be free from political or ideological agendas or influence. What can you offer to satisfy me that with your long record of advocacy and politically-driven decision making you are fit for a position that must be completely non-political?

Answer: I completely agree that the Office of Legal Counsel must be protected from harmful political or ideological agendas or influences. Maintaining the independence of the office—protecting its analysis and advice from corrupting influences—is the single most important responsibility of those who lead OLC. I believe that my five years of service in a leadership position at OLC—three and a half years as Deputy Assistant Attorney General and a year and a half as acting Assistant Attorney General—demonstrate my commitment to the independence and integrity of the office.

Since leaving OLC, much of my scholarship has examined the importance of keeping the office free from harmful political or ideological behavior, and has explored concrete ways of preventing such harm. I would cite in particular to my work developing and promoting the "Principles to Guide the Office of Legal Counsel," the first principle of which essentially captures the spirit of your question: "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering . . . inadequately promotes the President's constitutional obligation to ensure the legality of executive action.'" Dawn Johnsen, 54 UCLA Law Review 1559 (2007) (quoting the Principles).

I believe all my work in the leadership of the Office of Legal Counsel from 1993 until 1998 demonstrate that I made decisions not according to any political or ideological preferences, but according to the law. Letters written on behalf of my nomination by the people with whom I worked closely during those years attest to my commitment to the rule of law, including from throughout the Department of Justice and also top lawyers and officials from the CIA, the National Security Council, the Secret Service, and the Departments of Defense, Education, and Health and Human Services. To cite just one specific example, clearly counter to the policy preferences of all involved, I advised that the Clinton Administration could not unilaterally waive a congressionally enacted statute of limitations in order to pay what it viewed as meritorious claims against the government for racial discrimination against African-American farmers. My opinion also pointed out that new legislation would be required to authorize the expenditure, and Congress in response enacted such legislation. I pledge to this Committee that I will continue to honor the critical independence from policy preferences and party politics that is indispensable to the Office of Legal Counsel.

2. In that same vein, in your article titled *Lessons from the Right,* you include the Republican Party and the Federalist Society in *the Right.* I am a member of both. You accuse the Right of hypocrisy and "insidious rhetoric designed to mislead and obfuscate." You have denounced the "utter hypocrisy of the radical right," accused previous Republican administrations of arrogance and the "complete disrespect" for either Congress or the courts, and elsewhere have used similar rhetoric to make similar accusations. Much of your work exhibits a disturbing degree of animosity toward approaches, viewpoints, or arguments with which you might not agree. What can you offer to satisfy me that you will not lead the OLC with the approach you frequently take in your writings and speeches?

> Answer: I would point to my years of service in the leadership of OLC during the Clinton Administration as demonstrating my commitment to maintaining the integrity of that Office and my ability to do so. Furthermore, I have always endeavored to seek common ground where possible and to proceed respectfully where it is not. For example, I recently worked in a bipartisan fashion with former Associate Counsel to President George W. Bush, Brad Berenson, at the request of Senators Feingold and Brownback, to draft legislation to bring greater transparency and integrity to OLC, which resulted in the introduction of the OLC Reporting Act of 2008.

3. In "Tipping the Scale" on washingtonmonthly.com in 2002, you said that "the Rehnquist court is also noteworthy - to many, notorious - for its direct role in resolving a presidential election in the way likely to lead to a strengthening of the court's new direction." The clear implication of your statement is that at least four Justices voted to consider that case, seven voted to find a constitutional violation, and five voted for a remedy intentionally to facilitate election of a President who might appoint judges with a particular judicial philosophy. Do you believe that such considerations played any part in the decisions by those Justices?

> Answer: In this passage, I was commenting on the fact that the effect of the Supreme Court's decision in *Bush v. Gore* was to resolve the outcome of a presidential election, which in turn influenced the future composition of the Supreme Court. I did not in any way suggest, or mean to suggest, anything about the motivations of any of the Justices, something about which I have no information.

4. Nominees will often say that regardless of their personal views they will follow the law and acknowledge that Supreme Court decisions are the law of the land. But you wrote just last year that "progressives should agree - and should endeavor to persuade others - that restrictive abortion laws do violate women's constitutional rights, ***whether or not the Court protects those rights***." It appears that your judgment about what is or is not constitutional is driven by progressive politics as well as by the Supreme Court's decisions. Vice President Biden spoke at Attorney General Holder's investiture and referred to the mission statement of the Department of Justice. He said: "There is no

mention in that mission statement of politics. There is no room in that mission statement for ideology. And that's how it should be. Because there is no place for politics or ideology in this building." How are your statements, like the one I quoted, consistent with what the Vice President said?

> Answer: I agree with Vice President Biden's statement. My statement reflects the fact that nearly everyone who studies public law believes that the Supreme Court sometimes gets decisions wrong (though sometimes disagreeing about which decisions were in error). I noted that even if a case like *Roe* were overruled, progressives should still rely on the principles enshrined in the Constitution as a way of persuading their fellow citizens that they should work to protect those rights in the legislatures.
>
> But that was advice for citizen advocates and legislators. The Office of Legal Counsel, in determining the law governing the executive branch, follows decisions of the Supreme Court, and that is what I will do if I am confirmed as head of OLC. My role at OLC would be to apply the law according to decisions of the Supreme Court—regardless of how I personally thought the cases should have been decided.

5. You were on a panel at a conference on terrorism and the rule of law at the University of Chicago in October 2004. In your notes, you wrote that "this is a different kind of war, *if war at all*." Your notes indicate that saying we are at war is using "an imperfect analogy." At his confirmation hearing, however, Attorney General Holder said that "there is no question but that we are at war." Do you agree with the Attorney General that we are unequivocally at war? If so, what has changed in your thinking since October 2004 when you questioned whether we are at war and considered war simply an imperfect analogy?

> Answer: As I testified at my hearing, there is no question that we are at war with Al Qaeda. The remarks to which you refer addressed the broader question whether it was useful to speak generally of a "War on Terror." Specifically, I recounted hearing former Congressman Lee Hamilton speak about the findings of the 9-11 Commission, on which he had just finished serving as vice chair. I noted his explanation that our Nation was caught unprepared by the 9-11 attacks because we had not adjusted our understanding of national security to the new demands and threats we were (and are) facing. I further noted that the Commission had recommended several urgently needed changes to our national security apparatus, including in the areas of threat identification, intelligence, and international relations. And I emphasized the Commission's bottom-line conclusion; namely, that the radically changed nature of the threat we face as a nation demands a dramatically different understanding of the requirements of our national security. It was in this context that I pointed out that, despite their direct and serious engagement with these issues, neither Representative Hamilton nor the Commission's Report had generally used the language of "war" or a "War on Terror." I suggested that—following the Commission's lead—it might be a wise

choice not to use this language when talking about constitutional questions related to the new national security threats we face, because war has a long history of specialized constitutional meaning. It might be better, I suggested, to try to describe more precisely the radically new national security threats our nation faces. With respect to our conflict with Al Qaeda, or our conflicts in Iraq and Afghanistan, however, I do not consider "war" to be an imperfect analogy at all. Rather, as the Attorney General stated, it is an accurate description of the nature of those conflicts.

6. You met with the Columbia Law School's Human Rights Institute about their recommendations for the war on terror. They say that the two choices for handling the terrorists detained at Guantanamo Bay are release or criminal prosecution in domestic courts. Do you agree with that?

Answer: No, I do not agree that release or criminal prosecution in domestic courts are the only two possible dispositions for individuals held at Guantanamo Bay. The President's executive order of January 22, 2009 concerning closure of Guantanamo recognizes the possibility of other dispositions. That order has set in motion an interagency process for determining how each of the Guantanamo detainees should be handled.

7. At her confirmation hearing, Solicitor General nominee Elena Kagan said that under military law there is no requirement to let captured enemies go back to the war. Do you agree?

Answer: Yes, I do agree with Dean Kagan's statement that under traditional military law, enemy combatants may be detained for the duration of the conflict. That is what the Supreme Court said as well in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

8. Attorney General Holder said at his confirmation hearing that if there is evidence that a detainee is dangerous, then "I don't think.. .that that is a person who we can release." Do you agree with him or with those who say that these detainees should be either released or tried in civilian courts as criminals?

Answer: As indicated above, I do not believe that release or criminal prosecution are the only possible dispositions for detainees. The President's review of the appropriate disposition of each of the detainees is underway.

9. The *Washington Post* reported on Friday, February 20, that the Pentagon, at President Obama's direction, has reviewed treatment of detainees at Guantanamo Bay and concluded that it meets the requirements of the Geneva Convention. Are you aware of this and what do you think is the significance of this finding?

Answer: I have seen the *Washington Post* story. I have not seen the Pentagon report. In his executive order of January 22, 2009 concerning the closure of the

detention facility at Guantanamo Bay, the President directed that all detainees there be treated humanely and in accord with Common Article 3 of the Geneva Conventions. I understand the Pentagon investigation was undertaken in order to ensure compliance with that portion of the executive order.

10. In the book *Change for America*, you wrote that the practice of rendition should "immediately end." During his confirmation hearing, CIA Director Leon Panetta said that the practice of rendition should not be ruled out. Who is right?

Answer: I did not, in *Change for America* (or anywhere else), call for an "immediate end" to the practice of rendition. There thus is no conflict between what I wrote there and what you quote Leon Panetta as having said at his hearing. I do not oppose the practice of rendition, which public sources reveal did not begin in the Bush administration. What I wrote is: "Guantanamo, secret black sites, and extraordinary renditions to countries known to use torture also are stains on the United States' reputation as a champion for the rule of law and human rights. All should immediately end." The rest of the paragraph calls, not for an end to the practice of rendition, but for a review of detention and rendition policy to ensure that the United States does not transfer detainees to other countries where they will be tortured. President Obama has ordered that review.

11. In a 1989 article, you wrote that the state's interest in protecting the life of children before birth is <u>*never*</u> enough to outweigh a woman's right to have an abortion, even after viability. This is inconsistent with *Roe v. Wade's* trimester framework as well as how that framework was later revised in *Planned Parenthood v. Casey*, a decision you have also criticized. Do you still believe what you wrote, that the state's interest in protecting the life of children before birth can never overcome a woman's right to an abortion?

Answer: I am unsure of the statement to which you are referring, but your description is inconsistent with the way I have talked about and understood the issue for decades including in 1989. I believed then, and continue to believe, that *Roe v. Wade* was correctly decided, including in its core holding that prior to the point of viability, the ultimate decision whether or not to continue a pregnancy is for the woman, in consultation with her family, her physician, and the religious advisors she chooses to consult. After the point of viability, the government may ban abortion as long as it includes an exception where the woman's health or life is at stake. I believe *Roe* struck the right balance and that after the point of viability the state can overcome the woman's interests and impose a criminal ban on abortion, with necessary exceptions for life and health. If confirmed as the head of OLC, my advice on constitutional and other legal matters will be based on the Supreme Court's decisions, not my own views.

12. In the brief you wrote in *Webster v. Reproductive Health Services*, a case that did not involve a ban on abortion, you argued that statutes curtailing a woman's abortion choice "are disturbingly suggestive of involuntary servitude, prohibited by the Thirteenth Amendment." When Senator Specter asked you about this at your hearing on February

25, you acknowledged writing the brief but said: "I have never argued that there is a Thirteenth Amendment violation when the government restricts abortion….I will say categorically I do not believe the Thirteenth Amendment is relevant at all." Yet that was not the only time you have made this argument. In an interview with *Glamour* magazine in 1989, you said: "Any move by the courts to force a woman to have a child amounts to involuntary servitude."

- Do you believe that restrictions on abortion force women to be pregnant?

- If, as you said at your hearing, you now believe that the Thirteenth Amendment and involuntary servitude are irrelevant to abortion, please explain how you came to reject the previous positions cited above?

  Answer: *Webster v. Reproductive Health Services* was a case in which the Court was urged to overrule *Roe v. Wade*. It was widely believed at the time that the Court might do so, or at least substantially limit *Roe*. As I testified at my hearing, I do not believe that abortion restrictions violate the Thirteenth Amendment. My longstanding view has been that the right at issue is protected by the Fourteenth Amendment, as *Roe v. Wade* held and as the Court has since reaffirmed. The brief does not argue (nor does the quote in *Glamour*) that abortion restrictions violate the Thirteenth Amendment, and I am quite certain that I never have made that argument anywhere else. The brief to which you refer argues throughout that the Court should reaffirm *Roe* based on the Court's holding there that the Fourteenth Amendment protects the right of a woman to decide whether or not to continue a pregnancy prior to the point of fetal viability. I believe that if the government were permitted to prohibit abortion prior to fetal viability, such an abortion restriction could force women to continue to be pregnant (or resort to an illegal abortion procedure), and that would violate the Fourteenth Amendment. I cannot say more about what the footnote intended because, until I was told of the *National Review* article about it, I did not recall it nor do I remember its genesis. I would note that eleven lawyers signed that brief and that it was written on behalf of seventy-seven organizations, which I do recall led to a great deal of negotiation among counsel and organizations about the content of the brief.

13. In an op-ed just a few years ago, you argued that abortion restrictions as a reasonable compromise, "perhaps to help make abortion 'safe, legal, and rare' - proves nonsensical." The phrase "safe, legal, and rare" that you criticized was the position of the Clinton administration, during which you served in the same position to which you have now been nominated. Do you still believe that the Clinton approach to abortion was nonsensical? How do you square your opposition to reasonable compromise with your opening statement at your hearing about finding common ground approaches?

  Answer: I would note first that this is an issue of policy, which will be no part of my work if I am confirmed to head OLC. While people of good will disagree on abortion, I believe we can all agree that it is desirable to reduce the number of abortions, and I believe that reducing the number of unintended pregnancies is an

important way to achieve that goal. I have always strongly favored common-ground approaches that reduce the number of abortions by reducing the rate of unintended pregnancy and by supporting women who decide to bear children by giving them the resources necessary to bear healthy babies. In the quotation to which you refer, I was criticizing certain abortion restrictions, not the phrase "safe, legal, and rare." In my writings as an advocate and academic, I have criticized abortion restrictions that are designed to look like reasonable compromises, but that have the effect of disproportionately harming the most vulnerable of women, in particular poor and low-income women who suffer most from dramatically decreasing availability of abortion services.

14. One book describes your work with the National Abortion Rights Action League and says that you drew a hard line against restrictions even such as parental involvement in a minor's abortion decision. It says that you told NARAL: "Do not, as part of an affirmative legislative strategy, introduce even a liberalized version of a parental consent or notification law." Do you still believe that?

Answer: I was speaking there, in my position as an advocate, of what was best as a matter of legislative strategy, in particular the appropriate strategic response to the risk of bad amendments substantially changing a bill once a particular subject was raised. It has been a long time since I have been involved in such legislative work and I do not have a judgment about what should be done now with respect to the same issues of legislative strategy. I do remain opposed to laws that mandate parental consent or notice, though I believe minors generally should involve their parents. This is all, of course, a matter of policy, which would not be my role at OLC. If I were to be confirmed to head OLC, I would in giving legal advice adhere to all Supreme Court decisions, including those that upheld parental notice and consent requirements.

15. In the brief you filed in *Webster*, you argued that abortion restrictions violate the Constitution's guarantee of equal protection by having a disparate impact on women. Do you still believe that? Please explain how women and men are similarly situated with respect to pregnancy and childbirth.

Answer: The *Webster* brief did not argue that abortion restrictions violate the Constitution's guarantee of equal protection, but instead—as the Court held in *Roe* and reaffirmed in *Casey*—that such restrictions violate the Fourteenth Amendment's guarantee of liberty. At a few points, the brief noted, as the Supreme Court itself has, that the interpretation of women's liberty interests should be informed by equality concerns. The brief does not rest upon any notion that men and women are similarly situated with respect to pregnancy, which they of course are not.

16. In the brief you filed in *Bray v. Alexandria Women 's Health Clinic*, you characterized abortion clinic protesters as "politically motivated mob violence" engaged in "terrorist" behavior. Do you acknowledge that some people who protest abortion or

encourage women to give birth to rather than abort their babies do so out of a genuine belief that abortion kills preborn children and a genuine desire to help women who may not otherwise believe they are able to care for a child?

> Answer: Yes, I absolutely believe and know that to be true. I appreciate this is an issue that divides Americans, and even families. I have close friends, family, and members of my church who strongly differ on this issue, as is true I would expect of most of us. That is why I support so strongly the search for common-ground approaches that reduce abortions by reducing unintended pregnancies and provide support for healthy childbearing and healthy families.

17. In a blog posting on Slate.com in April 2008, you attacked the Supreme Court's decision in *Crawford* v. *Marion County Election Board.* You said the Indiana voter identification requirement upheld in that case discourages voting and is actually intended to prevent certain groups from voting. This is yet another example of intemperate and political dismissal of positions or arguments you may not agree with. Many people believe that protecting the integrity and validity of the voting process by ensuring that those who cast votes are legally entitled to do so is essential to our democracy. You may not share that belief, but to say that those people are lying to hide a secret objective to disenfranchise certain groups sounds like politics or ideology blinding you to the facts. Are you aware that Indiana and Georgia, with the strictest voter ID laws in country, had the two highest increases of Democratic voters in the country in the 2008 election. In Georgia, the African American share of the vote increased more than twice as much as it did in the neighboring state of Mississippi, which has no voter ID requirement. The facts directly contradict your prediction. Were you aware of these results and do they change your evaluation of that decision, and the motivation behind the voter ID requirement?

> Answer: I share your belief that protecting the integrity and validity of the voting process by ensuring that those who cast votes are legally entitled to do so is essential to our democracy. My post did not say anything to the contrary, nor did it accuse anyone of lying. Rather, it described my view that we should strive to make voters feel welcome and encourage them to participate in our great democracy. As the post mentioned, I was reacting to stories I had heard and read in Indiana that suggested that "many, but by no means all," supporters of the Court's decision might not have been bothered by the fact that the law might discourage some people from voting. It seems to me that the high overall Democratic voter turnout in Indiana or elsewhere does not necessarily prove any particular effect of voter ID requirements, though that certainly is a subject for study. If confirmed I will of course apply the Supreme Court's decision in *Crawford* whenever it is relevant to an issue before the office.

WRITTEN QUESTIONS OF SENATOR CHUCK GRASSLEY TO DAWN JOHNSEN TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

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

> Answer: Yes. I enforced and defended the laws and the Constitution of the United States, regardless of my personal and philosophical views, during my prior five years of service at the Office of Legal Counsel. Those who worked with me during that time—from throughout the Department of Justice and also top lawyers and officials from the CIA, the National Security Council, the Secret Service, and the Departments of Defense, Education, and Health and Human Services—have attested to that fact. If confirmed I would so again.

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

> Answer: I agree that obscenity falls outside the protection of the First Amendment and that laws designed to keep obscenity out of the hands of minors are important and must be enforced.

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

> Answer: *Heller* holds that the Second Amendment protects an individual right to bear arms. If confirmed, I would certainly accept *Heller* as having answered that question and would provide legal advice consistent with that precedent.

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

> Answer: I do not have a personal view because I have not studied the Second Amendment or the *Heller* case in any detail.

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

firearm?

Answer: Yes.

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

Answer: In general, I have no question about the constitutionality of the False Claims Act or its *qui tam* provisions. As with any statute, it is possible that particular applications could raise constitutional questions, but I hasten to add that I am not aware of any such applications of the False Claims Act. As you know, during the time I served at OLC, the office reversed a prior opinion that did raise broad concerns about the constitutionality of *qui tam* statutes.

7. Recently, a lawsuit was filed alleging that the seal provision of the False Claims Act, codified at 3 1 U.S.C *§* 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed in camera and remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I've been a critic of prolonged extensions of the seal. I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

Answer: I have not yet had occasion to study that decision or the constitutionality of the seal provision of the False Claims Act, so I do not have an informed view regarding whether that provision is constitutional.

8. When we met a couple weeks ago, we discussed a December 5, 2001, Letter Opinion issued by the Office of Legal Counsel (OLC) to the General Counsel at the Department of the Treasury. The OLC Opinion titled, "Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members," concludes that the Privacy Act "prohibits the disclosure of Privacy Act-protected information to the ranking minority member" of a congressional committee of jurisdiction that requests information fiom a Federal agency. The OLC Opinion reached this conclusion despite the fact that the Privacy Act allows disclosures, "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." Nowhere in the statute does it define "committee" to mean only the Chairman and not the Ranking Member.

Courts have also held views contrary to that of the OLC Opinion. For instance, the D.C. Circuit Courts of Appeal held that members of Congress have "constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information." *Murphy v. Dep't of the Army,* 613 F.2d 1151, 1157 (D.C. Cir. 1 979). Further, the 2nd Circuit held that information sent to a congressman in his official capacity as a *member* of a subcommittee fell "squarely within the ambit of § 552a(b)(9)". *See Devine v. United States,* 202 F.3d 547, 551 (2nd Cir. 2000).

Despite the plain language and the court interpretations, this opinion is often used as a shield to prevent disclosure of information to Ranking Members. Instead of citing case law, the OLC Opinion relies upon the "longstanding executive branch practice on this question," and, perhaps more surprisingly, the dicta from Congressional Research Service memorandum, to reach this conclusion.

a. Do you support the position taken by DOJ in this OLC Opinion?

> Answer: In general, I believe strongly that cooperation between the Department of Justice and Congress is appropriate and desirable, and I also have written extensively about the need for greater Executive Branch transparency. I have not yet had occasion to study the particular question addressed by the memorandum, and would need to do so at OLC in accordance with the traditional processes there, so I am not able to take a position on it at this time.

b. Do you believe that, as a general matter, Ranking Minority members of a Committee should be prohibited from obtaining information from an agency absent the approval of the Chairman? If so, why?

> Answer: I believe as a general matter that agencies should endeavor to cooperate with and provide appropriate information to Congress. As noted above, I have not studied whether there is a legal basis for distinguishing between a ranking minority member of a Committee and the Chairman, so I am not able to take a position at this time.

c. In your opinion, couldn't the wording of the Privacy Act that allows disclosure "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof' be construed to allow disclosure to Ranking Members if the Administration was willing to do so? Please explain why or why not.

> Answer: I have not studied the OLC opinion, nor have I read the statute, and have not had the benefit of OLC's traditional processes for evaluating such a question, so I am unable to offer an informed response to this question at this time.

d. If you are confirmed, will you pledge to revise this OLC Opinion to allow disclosure to Ranking Members? Why or why not?

Answer: It would be improper for me to pledge to overrule or revise any OLC opinion. I can pledge that if I am confirmed and this question comes before OLC, I will carefully review the matter, using OLC's traditional and appropriate procedures.

Senator Lindsey Graham
Dawn Johnsen Questions for the Record

1. You clearly and publicly supported the Supreme Court's decision in *Boumediene*. In *Maqaleh v. Gates*, the Department of Justice has adhered to the Bush administration's position that detainees held at Bagram airbase in Afghanistan lack the right to challenge their confinement in federal courts. Do you agree with the Department of Justice's stated position that detainees held at Bagram lack habeas corpus rights?

Answer: I have not studied this issue and do not have a position on it. If I am confirmed and if the issue were presented to OLC, I would follow the traditional OLC processes to respond, including researching the relevant facts and law and consulting with other components of the Department of Justice and with the Department of Defense and other agencies that have relevant expertise.

2. You have said of ideological conservatism and originalist constitutional interpretation—

> Ideological conservatives hold themselves out as faithful and strict constructionists and argue for their chosen interpretive methodologies—principally 'textualism' and 'originalism'—as a principled search for constitutional 'truth' unrelated to particular substantive outcomes. They depict those who hold different legal views—progressives, liberals, moderates, indeed all those in the mainstream of legal thought— as unprincipled judicial activists, inappropriately driven to reach outcomes that coincide with 'policy' preferences. Conservatives effectively shift focus away from particular substantive issues on which progressives often enjoy popular support to more abstract questions of theory, such as calls for 'judicial restraint,' 'originalism,' and 'federalism,' which conservatives apply selectively to reach desired outcomes.[1]

Do you believe that Chief Justice John Roberts is out of "the mainstream of legal thought?" If not, please give some examples of ideological conservatives you view as outside "the mainstream of legal thought."

Answer: I do not believe that Chief Justice John Roberts is outside the mainstream of legal thought. My intent here was not to suggest that anyone is outside the mainstream of legal thought, but to say that many who are criticized as "unprincipled judicial activists" are within the mainstream of legal thought. Although I did not draft this as artfully as ideal, I did not purport to name anyone as out of the mainstream and would not do so now.

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[1] Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 Harv. L. & Pol'y Rev. 239, 241 (2007).

3. You have written that "the courts underenforce constitutional rights, and the political branches have an obligation to fill constitutional gaps and uphold rights beyond those that the Court will enforce."[2]

   In your estimation, which constitutional rights do the courts underenforce? Do the courts underenforce all constitutional rights, or just selected ones?

Answer: The Supreme Court has fashioned a variety of doctrines (such as deference to the judgment of the political branches, justiciability, and others) that may lead a court to underenforce constitutional rights, a subject on which there exists an expansive body of academic literature. These doctrines apply to virtually all constitutional rights. The Court has also explained that some of its substantive doctrines, such as rational-basis equal protection review, are designed to be deferential to the political branches at least in part on the theory that those branches will themselves provide enforcement of the constitutional rights in question.

4. You called the Indiana Voter ID law, which was recently upheld by the Supreme Court, "excessive and indefensible," writing—

   > The point for some is that they really don't want certain kinds of people to vote, that they even feel if people won't take the 'trouble' to manage the logistical and financial barriers our state has erected (which pose no problem for most), then they simply don't deserve to vote. Of course, everyone is against fraud, but who really thinks this is about fraud?[3]

   Do you agree that voter fraud can corrupt the democratic process by skewing elections? Do you believe that it is reasonable for legislatures to take steps to mitigate potential voter fraud? If, as you wrote, the Indiana Voter ID law and other similar measures are not "about fraud," what do you think they are designed to do and what is the motivation of their proponents?

   Answer: If confirmed I, of course, will apply the Supreme Court's decision in *Crawford* whenever it is relevant to an issue before the office. That will be the extent of my involvement on the issue of Voter ID laws. I agree that where fraud exists, it clearly is legitimate and appropriate for a legislature to take steps to mitigate voter fraud in order to prevent the corrupting of the democratic process. In the short blog post from which you quote, I expressed the view that we should strive to make new voters feel welcomed and encouraged to participate in our great democracy. I noted I was reacting to stories I had heard and read in Indiana that suggested that "many, but by no means all" supporters of the Court's decision

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[2] Dawn Johnsen, *Post by Dawn Johnsen*, The Constitution in 2020, Nov. 26, 2004, http://constitutionin2020.blogspot.com/2004/11/post-by-dawn-johnsen.html.

[3] Dawn Johnsen, *A View on Crawford From Indiana*, Slate, April 29, 2008, http://www.slate.com/blogs/blogs/convictions/archive/2008/04/29/a-view-on-crawford-from-indiana.aspx.

might not be bothered by the fact the law might discourage some people from voting. Again, my role at OLC would be to apply the *Crawford* decision were it ever relevant to a legal issue before the OLC, regardless of my personal views.

QUESTIONS FOR DAWN JOHNSEN FROM SENATOR CORNYN

1. In *Boumediene v. Bush*, the Supreme Court arrived at its ruling that the Guantanamo detainees have the habeas corpus privilege based on an evaluation of three factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." A crucial factor in their decision was that the United States has maintained complete, uninterrupted, and indefinite control of Guantanamo for over 100 years, even though Cuba still officially owns the land.

Currently, there are 600 or more detainees being held by U.S. forces at the Bagram air base in Afghanistan. Like the detention center at Guantanamo Bay, Cuba, the prison at Bagram is controlled by the United States. Recently, lawyers representing these detainees have argued that Bagram is essentially the same as Guantanamo and that prisoners there ought to have the same rights as those at Guantanamo. The cases of these detainees are being argued before the U.S. District Court.

a. Do you believe that the detainees at Bagram are also entitled to the writ of habeas corpus?
b. Do you believe that a legitimate distinction can be made from *Boumediene* regarding "the nature of the sites where apprehension and then detention took place?"
c. Do you personally agree with last week's filing by the Justice Department that reaffirmed the litigation position taken by the Bush Administration with respect to habeas claims from Bagram detainees?

Answer: I have not studied this issue and do not have a position on it. If I am confirmed and if the issue were presented to OLC, I would follow the traditional OLC processes to respond, including researching the relevant facts and law and consulting with other components of the Department of Justice and with the Department of Defense and other agencies that have relevant expertise.

2. Several former Clinton Administration officials have stated that the practice known as extraordinary rendition was regularly practiced during that administration. Richard Clarke, the counterterrorism coordinator for the National Security Council, wrote that renditions-which he defined as "operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government"- "were becoming routine" by "the mid-1990s." He added that "[s]ometimes FBI arrest teams, sometimes CIA personnel, had been regularly dragging terrorists back to stand trial in the United States or flying them to incarceration in other countries." Mr. Clarke stated that "President Clinton approved every snatch" - another term for rendition - "that he was asked to review. Every snatch CIA, Justice, or Defense proposed during [Clarke's] tenure as [Counterterrorism Security Group] chairman, from 1992 to 2001, was approved.

"Former CIA Director George Tenet asserted the following in 2002: "In conjunction with the FBI, CIA had rendered 70 terrorists to justice around the world" prior to September 11. "Al-Qa'ida might have been able to operate freely in Afghanistan, but the terrorists knew they were fair game elsewhere."

In a March 11, 2005 op-ed in the *New York Times* entitled "A Fine Rendition," Michael Scheuer, the Clinton-era Chief of the CIA'S bin Laden unit, asserted that officials in the Clinton White House and Justice Department:

> ". . . knew that taking detainees to Egypt or elsewhere might yield treatment not consonant with United States legal practice. How did they know? Well, several senior C.I.A. officers, myself included, were confident that common sense would elude that bunch, and so we told them - again and again and again. Each time a decision to do a rendition was made, we reminded the lawyers and policy makers that Egypt was Egypt, and that Jimmy Stewart never starred in a movie called 'Mr. Smith Goes to Cairo.' They usually listened, nodded, and then inserted a legal nicety by insisting that each country to which the agency delivered a detainee would have to pledge it would treat him according to the rules of its own legal system."

a. During your tenure in the Clinton Administration Office of Legal Counsel, to what extent were you aware of participation in the practice of extraordinary rendition by the Clinton Administration generally, and by the FBI or other components of the Justice Department specifically?

b. Did you ever authorize the practice of rendition or otherwise express an opinion endorsing the legality of the practice? If so, do you believe you made the correct decision?

c. Do you believe that the Clinton Administration's practices with respect to rendition were lawful? Do you believe they were otherwise consistent with American values?

Answer: I know that the practice of rendition did not begin with the Bush Administration and my belief is that it is not in all cases unlawful. I have not engaged in any study of the Clinton Administration's rendition practices that would allow me to comment on their legality or advisability. President Obama has ordered reviews of detention and rendition policies. It would be inappropriate for me to answer these questions that would require me to disclose nonpublic legal advice that I provided during the course of my service at OLC. Moreover, the subject matter is such that, if such advice was given, it likely would have been classified.

3. In July 1994, Clinton Administration Deputy Attorney General Jamie Gorelick argued before the House Select Committee on Intelligence that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes. The Committee at the time was considering legislation to subject such searches to approval from the FISA court. That issue arose when attention was drawn to the practice of intelligence agents conducting clandestine searches within the United States. Such searches extended not only to foreign embassies, but to U.S. citizens within our borders. The warrantless searches of the office and home of Aldrich Ames, a U.S. citizen, in June and October 1993 gave rise to concerns that courts might strike down this practice.

Deputy Attorney General Gorelick's testimony before the Senate Intelligence Committee maintained, "the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General." She stated further, "it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities." In the Justice Department's view, she testified, it did not matter whether searches were "conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. . . . [w]e believe that the warrant clause of the Fourth Amendment is inapplicable to such searches."

a. Do you agree with this statement?

b. Were you aware of this position during your tenure in the Justice Department?

Answer: I was generally aware of this issue and of Deputy Attorney General Gorelick's position. Although I had not (and still have not) carefully studied the question, I had no disagreement with her position and understood it to be the position of most of the federal courts that had addressed the question in a related context.

4. If you "do not believe the 13th Amendment is relevant at all" to the questions before the Supreme Court in *Webster v. Reproductive Health Services*, then why did you cite the 13th Amendment in footnote 23 of the brief that you filed in that case? Do you believe that the Amendment informs the 14th Amendment analysis in cases related to abortion?

Answer: As I testified at my hearing, I do not believe that abortion restrictions violate the Thirteenth Amendment. My longstanding view is that the right at issue is protected by the Fourteenth Amendment, as *Roe v. Wade* held and as the Court has since reaffirmed. The brief does not argue that abortion restrictions violate the Thirteenth Amendment, and I am quite certain that I have never made that argument anywhere else. I cannot say more about what the footnote intended because, until I was told of the *National Review* article about it, I did not recall it

nor do I remember its genesis. I would note that eleven lawyers signed that brief and it was written on behalf of seventy-seven organizations, which I do recall led to a great deal of negotiation among counsel and organizations about the content of the brief.

Questions of Senator Tom Coburn, M.D.
"*Nomination of Dawn Johnsen to be Assistant Attorney General, Office of Legal Counsel*"
United States Senate Committee on the Judiciary
February 25, 2009

Abortion

1. Please review and respond to the attached documents addressing abortion's effects on women.

   Answer: I am not a psychologist or social scientist, but appreciate that research is ongoing regarding the impact of pregnancy, childbirth and abortion, including as reviewed in a 2008 American Psychological Association report on all peer-reviewed studies in the past twenty years.

2. Ms. Johnsen, you have written numerous articles and Supreme Court briefs, and have given many advocating abortion rights and opposing virtually all government attempts to regulate abortion.

   a. When do you believe life begins?

   Answer: The question when a human life begins has religious, philosophical, and scientific dimensions. It also has legal dimensions, of course. In my view, the legal dimension, which is what I have addressed in my work, should continue to be governed by the Court's decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*.

3. You have stated in several articles that "*the fetus is a physical part of a woman"* and that this is an "*essential fact*" for limiting the government's actions with regard to promoting its interests. Please explain this view further.

   a. To say a fetus is merely "part of a woman," are you saying a growing child deserves no more recognition or respect from the state than a pancreas or gall bladder?

   Answer: No.

   b. Is there any circumstance in which you believe the law should recognize an unborn child as an individual, separate from the mother?

   Answer: I have written a few pieces about how law and policy treat the fetus in cases where the woman has chosen to bear a child. In such cases I have encouraged approaches that do not create an adversarial relationship, but instead

(consistent with the positions of the major medical organizations to address these issues) seek to support women in acting responsibly and bearing healthy children. There are situations where the law could and should recognize the fetus, in ways that would not be create an adversarial relationship but actually support healthy childbearing.

c. Do you believe it appropriate for the State to recognize the fetus for the purposes of inheritance and probate law?

Answer: Yes.

4. In an article from last year, you called the term *"partial-birth abortion" "an invented and intentionally provocative political term previously unknown to the medical profession."*

a. Whatever you call the procedure, you acknowledge that it occurs when an unborn child is partially out of the woman's body?

Answer: Yes, I am aware that is how the laws typically are phrased.

b. In your view, at what point does that unborn child acquire a right to life? [Does it attach only when the child is completely out of the woman's body? Or some time thereafter? When?]

Answer: If by right to life you mean an interest that would support an abortion ban, that point is fetal viability.

c. If you are confirmed, do you feel you would be able to defend a partial-birth abortion ban?

Answer: It would not be my role as the head of OLC to do so, because I would not litigate. But to the extent I might be consulted, I certainly would have no problem advising that a law like the one the Court upheld in *Gonzales v. Carhart* could be defended, because the Court held it was not facially unconstitutional.

5. In your writings, you have made several references to "*the progressive agenda*" and remarked in the area of abortion jurisprudence that "*the progressive agenda would focus on the courts as the vehicles for desired change*."[1]

a. On what basis do you believe that courts are an appropriate vehicle to enact a "progressive agenda?"

Answer: My statement reflects the fact that nearly everyone who studies public law believes that the Supreme Court sometimes gets decisions wrong (though they sometimes disagree about which decisions were in error). It is certainly

[1] *Id.* at *.

appropriate to attempt to persuade the courts to change their interpretations, based on a sincere belief that a court erred. But that advice applies to citizen advocates and legislators. The Office of Legal Counsel, in determining the law governing the executive branch, follows decisions of the Supreme Court, and that is what I will do if I am confirmed as head of OLC. My job if confirmed would be to apply the law according to decisions of the United States Supreme Court whenever the Court had spoken—regardless of how I personally thought the cases should have been decided.

b. How can we be sure you will not carry such an agenda into the Justice Department?

Answer: I deeply believe that the Office of Legal Counsel must be protected from harmful political or ideological agendas or influences. Maintaining the independence of the office—protecting its analysis and advice from corrupting influences—is the single most important responsibility of those who lead OLC. I believe that my five years of service in a leadership position at OLC—three and a half years as Deputy Assistant Attorney General and a year and a half as acting Assistant Attorney General—demonstrate my commitment to the independence and integrity of the office.

Since leaving OLC, much of my scholarship has examined the importance of keeping the office free from harmful political or ideological behavior, and has explored concrete ways of preventing such harm. I would cite in particular to my work developing and promoting the "Principles to Guide the Office of Legal Counsel," the first principle of which essentially captures the spirit of your question: "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering . . . inadequately promotes the President's constitutional obligation to ensure the legality of executive action." Dawn Johnsen, 54 UCLA Law Review 1559, 1604 (2007) (quoting the Principles).

I believe all my work in the leadership of the Office of Legal Counsel from 1993 until 1998 demonstrate that I made decisions not according to any political or ideological preferences, but according to the law. Letters written on behalf of my nomination by the people with whom I worked closely during those years attest to my commitment to the rule of law. These letters come from officials throughout the Department of Justice, and also top lawyers and officials from the CIA, the National Security Council, the Secret Service, and the Departments of Defense, Education, and Health and Human Services. To cite just one specific example, I advised the Clinton Administration that, clearly counter to the policy preferences of all involved, it could not unilaterally waive a congressionally enacted statute of limitations in order to pay what it viewed as meritorious racial discrimination claims brought against the government by African-American farmers. My opinion also pointed out that new legislation would be required to authorize such

an expenditure, and Congress in response enacted such legislation. I pledge to this Committee that I will continue to honor the critical independence from policy preferences and party politics that is indispensable to the Office of Legal Counsel.

6. Do you believe that anyone in good faith and upon careful reflection can arrive at the conclusion that the Constitution does not include the right to abortion and that *Roe* should be overturned?

Answer: Yes, I absolutely believe and know that to be true. I know this is an issue that divides Americans, and even families. I have close friends, family, and members of my church who strongly differ on this issue, as is true I would expect of most of us. That is why I support so strongly the search for common-ground approaches that reduce abortions by reducing unintended pregnancies and provide support for healthy childbearing and healthy families.

7. In *Webster v. Reproductive Health Services*, your brief on behalf of 77 women's groups presented the argument that abortion restrictions constitute disparate treatment between men and women since men do not endure the burdens of pregnancy. Is that your own view of the issue?

a. Your brief maintained that "the non-fatal health risks associated with legal abortion are very limited and substantially lower than those risks . . . created by continued pregnancy and delivery."[2] Another brief you submitted in that case on behalf of women who had had abortions asserts, "The experience is no longer traumatic; the response of most women to the experience is relief."[3] Now we know from multiple scientific studies to date that in fact abortion does cause significant psychological problems for many women. The Elliott Institute research survey alone references over two dozen studies on its website.[4] Don't your statements understate abortion's harm to women?

Answer: To the best of my knowledge, the statements were accurate.

b. Your brief continued that a state's restriction of abortion "curtails women's ability to participate equally with men in the public world."[5] Is it your view that pregnancy is a condition that renders women unequal to men? [How else do you explain the view that pregnancy must be able to be eliminated before running its natural course—otherwise women are not equal?]

Answer: The brief contended, and the Supreme Court observed in Casey, that government-compelled childbearing through abortion restrictions (*not* pregnancy) does curtail women's life options.

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[2] 1989 WL 1127689, *9.
[3] 1989 WL 1115239, **25-26.
[4] See http://www.afterabortion.org/reasmor.html.
[5] 1989 WL 1127689, *3.

c. Your brief attacked in strong language the solicitor general's argument in *Webster* that "such options as abstinence and contraception" offer women a "meaningful opportunity" to avoid an unwanted pregnancy. You argued that the solicitor general's "factual premise that women who become pregnant have in some sense consented to the pregnancy belies reality." "[U]nderlying the Solicitor General's position," you continued, "appears to be the outmoded view that women ought not engage in sexual intercourse for reasons other than procreation and that those who do—unlike their male partners—deserve to be punished with an unplanned pregnancy."[6]

A. Your brief also includes the following comment: "Abstinence during the forty years a woman is fertile is not a viable way of life for most women."[7]

(1) Is that your personal view?

Answer: Yes.

(2) Since much of that period occurs when a female is a minor, it must follow that abstinence is not a viable way of life for girls who are adolescents or teenagers, correct?

Answer: No, I do not believe that follows. I believe abstinence should be part of sexuality education, but not the whole of it.

(3) Doesn't that message undermine the values of most parents, as well as the premise of most states' statutory rape laws?

Answer: No, I do not see how it could.

B. Your brief also rebukes governments for the problem of unwanted pregnancy: "By requiring women to sacrifice their bodies and their liberty in ways that the state never demands of men, state laws manifest the stereotype that it is women's 'natural role' to bear children."[8] The word "stereotype," of course, is a negative one; it suggests an attitude to be eradicated.

(1) But isn't it just a reality of nature that only one gender is capable of bearing children?

Answer. Yes, only women are capable of bearing children.

(2) Have I, by stating that fact, embraced a negative stereotype? [IF NOT] Aren't you saying that the practice of abortion is a necessary step to

[6] *Id.* at *6 n.5.
[7] *Id.*
[8] *Id.* at *25.

remedying a defect of nature, and a state is only making matters worse by doing anything to restrict that practice?

Answer. No you have not thereby embraced a negative stereotype.

C. Isn't it also true that your comments diminish the capacity of women to exercise personal responsibility? [If not, are you saying that women do or do not bear responsibility for consensual activity when that activity results in an unwanted pregnancy?]

Answer. No, I believe women and men should exercise personal responsibility and the government should support such efforts through programs aimed at reducing the incidence of unintended pregnancy, including by supporting the availability of contraception.

8. You have written extensively about how the recognition of fetal rights infringes upon woman's autonomy.[9]

a. If you are correct that "women's autonomy" should trump the rights of the fetus in every instance, wouldn't it follow that the courts should permit abortion on demand up to the time of birth?

Answer: No, I have consistently and long supported the viability line drawn in *Roe* as the appropriate one.

b. Why should a woman's autonomy differ at all after the point of viability?[10]

Answer: I believe that *Roe v. Wade* was correctly decided, including in its core holding that prior to the point of viability, the ultimate decision whether or not to continue a pregnancy is for the woman, in consultation with her family, her physician, and the religious advisors she chooses to consult. After the point of viability, the government may ban abortion as long as it includes an exception where the woman's health or life is at stake. I believe *Roe* struck the right balance and that after the point of viability the state can overcome the woman's interests and impose a criminal ban on abortion, with necessary exceptions for life and health.

9. In an article from last year, you called the term "partial-birth abortion" "an invented and intentionally provocative political term previously unknown to the medical profession." You also lumped into the category of "wrongly decided cases" "decisions that upheld the exclusion of abortion from health care the government provided the poor, the prohibition of abortion services at publicly

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[9] For example, see Johnsen, Dawn, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty,Privacy and Equal Protection*, 95 YALE L. J. 599, 624 (1986).

[10] She argued in response to the Missouri solicitor general's argument that the interest is not compelling enough to override the woman's right even after viability. "*Webster* and Women's Equality," Johnsen, Dawn, Wilder, Marcy J. *American Journal of Law and Medicine*. Boston: 1989. Vol. 15, Iss. 2-3, p. 178.

funded medical facilities (even when no public funds subsidized the services), parental notice and consent requirements, and most recently, *Gonzales v. Carhart*."[11]

a. Is it safe to say that you do not believe any regulation of abortion beyond requiring medical professionals to perform them would be constitutional?

Answer: The Supreme Court has upheld many restrictions on abortion as constitutional, including parental notice and consent laws, funding restrictions, a federal ban on partial birth abortions, and waiting periods. If confirmed as the head of OLC, if ever asked to provide legal advice about the constitutionality of abortion restrictions, my advice would of course be based upon those Supreme Court decisions. You seem also to be asking about my own views, so I will say that I personally do not oppose laws that regulate providers of abortion services just as the government does other providers of medical services, when the purpose and effect is truly to protect the health of patients and the safety of the procedure.

b. A majority of the Supreme Court has consistently held it permissible to deny the use of public funds or public facilities to perform abortions. Do you believe that the distinction between such a regulation and a law restricting what private parties can do with their own money is a constitutionally significant one?

Answer: I recognize the Court has so held and if confirmed would fully abide by those rulings.

c. If you are confirmed, do you feel you would be able to defend a partial-birth abortion ban that resembled the one the Supreme Court upheld in *Gonzales v. Carhart*?

Answer: As I stated above, it would not be my role as the head of OLC to do so, because I would not litigate. But to the extent I might be consulted, I certainly would have no problem advising that a law like the one the Court upheld in *Gonzales v. Carhart* could be defended, because the Court held it was not facially unconstitutional.

10. In your 2006 article entitled "How *Roe* will go," you had sharp criticism for the notion that abortion should be "safe, legal, and rare." You wrote, "The notion of legal restrictions as some kind of reasonable 'compromise'—perhaps to help make abortion 'safe, legal, and rare'—proves nonsensical."[12] Yet it was the platform, or at least the rhetoric, of both of the last two pro-choice presidents, Clinton and Obama, to try to keep abortion rare.

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[11] *A Progressive Agenda for Women's Reproductive Health and Liberty on Roe v. Wade's Thirty-Fifth Anniversary*, issue brief for American Constitution Society (2008) at 1, 5.

[12] How Roe will really go, Philadelphia Daily News (January 30, 2006).

a. Are you on board with President Obama's goal of reducing abortions – of keeping them rare?

b. [If she retreats from her rhetoric] So you concede the goal of reducing abortions is desirable? Why is this goal desirable? [if not because an innocent human life is at stake]

Answer: I would note first that this is an issue of policy, which will be no part of my work if I am confirmed to head OLC. While people of good will disagree on abortion, I believe we can all agree that it is desirable to reduce the number of abortions, and I believe that reducing the number of unintended pregnancies is an important way to achieve that goal. I have always strongly favored common-ground approaches that reduce the number of abortions by reducing the rate of unintended pregnancy and by supporting women who decide to bear children by giving them the resources necessary to bear healthy babies. In the quotation to which you refer, I was criticizing, not the phrase "safe, legal, and rare" but certain abortion restrictions. In particular, I have criticized abortion restrictions that are designed to look like reasonable compromises, but that have the effect of disproportionately harming the most vulnerable of women, in particular poor and low-income women who suffer most from the dramatically decreasing availability of abortion services.

c. According to William Saletan, your opposition to requiring parents' involvement in the abortion decisions of their teenage daughters was strong enough that you urged NARAL: "Do not, as part of an affirmative legislative strategy, introduce even a liberalized version of a parental consent or notification law."[13] Do you remain opposed to such laws?

Answer: I was speaking there, in my position as an advocate, of what was best as a matter of legislative strategy: in particular the appropriate strategic response to the risk of bad amendments substantially changing a bill once a particular subject was raised. It has been a long time since I have been involved in such legislative work and I do not have a judgment about what should be done now with respect to the same issues of legislative strategy. I do remain opposed to laws that mandate parental consent or notice, though I believe minors generally should involve their parents. This is all, of course, a matter of policy, which would not be my role at OLC. If I were to be confirmed to head OLC, I would in giving legal advice adhere to all Supreme Court decisions, including those that upheld parental notice and consent requirements.

[13] WILLIAM SALETAN, BEARING RIGHT 289 (University of California Press , August 20, 2003)