Senator John Cornyn
Questions for the Record
Elena Kagan, Nominee, Supreme Court of the United States

1) **In *Confirmation Messes, Old and New,* 62 U. Chi. L. Rev. 919, 932 (1995), you wrote that "many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value."**

   a. Please explain in greater detail what you meant in this statement.

   Response:

   I was referring to constitutional values, by which I mean the fundamental principles articulated and embodied in our Constitution. In some cases, constitutional values point in different directions, and judges must exercise prudence and judgment in resolving the tension between them. In doing so, judges must always look to legal sources—the text, structure, and history of the Constitution, as well as the Supreme Court's precedents—not to their own personal values, political beliefs, or policy views.

   b. Please give examples of Supreme Court cases that, in your view, were decided primarily based on conceptions of value.

   Response:

   One recent example of what I meant by this statement is *Holder v. Humanitarian Law Project*, a case I argued on behalf of the United States in the Supreme Court and discussed during my confirmation hearings. That case involved a First Amendment challenge to the federal material support statute as applied to support for non-violent activities of terrorist organizations. The Court upheld application of the statute to the particular activities at issue in the case. In so holding, the Court noted and considered significant constitutional values relating both to national security and to free speech. The dissent evaluated and weighed these constitutional values differently.

   c. What are your own "conceptions of value"?

   Response:

   The constitutional values that I would consider in analyzing a particular case would depend on the constitutional provision at issue, the legal arguments made, and the facts presented. In considering such constitutional values, I would look always to legal sources, never to my own personal values, political beliefs, or policy views.

   d. Under what circumstances should Justices decide cases on their conceptions of value instead of their technical legal ability?

Response:

In some cases, there are significant constitutional values on both sides pushing in different directions. In analyzing such cases, judges must exercise prudence and judgment. In doing so, judges should look always to legal sources, and not to their own personal values, political beliefs, or policy views.

2) During your confirmation hearing, you said that, as society changes, courts should interpret the Constitution in light of its timeless principles. Please specify the timeless principles you have in mind.

Response:

The timeless principles I was referring to are those embodied in the Constitution. They include, for example, the principle that the government shall not engage in unreasonable searches and seizures and that the government shall not deny to any person the equal protection of the laws.

a. Other than *Brown v. Board of Educ.*, 347 U.S. 483 (1954), can you give examples of the cases in which the Supreme Court, in your view, properly reinterpreted the Constitution in light of its timeless principles?

Response:

Another example of appropriate interpretation of the Equal Protection Clause relates to gender discrimination. When the Fourteenth Amendment was ratified, no one thought it protected women against any form of discrimination. Current law on this subject, which provides heightened protection against discrimination on the basis of sex, resulted from the Court's application of the timeless principle articulated in the Equal Protection Clause to new cases that came before it.

b. Was *Roe v. Wade*, 410 U.S. 113 (1973), an example of the Supreme Court properly reinterpreting the Constitution in light of its timeless principles?

Response:

In *Roe v. Wade*, the Court applied the liberty provision of the Due Process Clause of the Fourteenth Amendment, which has been held to provide substantive protection to certain matters related to family and reproduction. I do not believe it would be appropriate for me to comment on the merits of *Roe v. Wade* other than to say that it is settled law entitled to precedential weight. The application of *Roe* to future cases, and even its continued validity, are issues likely to come before the Court in the future.

3) An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the

disadvantaged." I believe that pro bono service is crucial to upholding the ideal of "equal justice under law," and that, as the ABA notes in comments to its model ethics rules, "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

During your confirmation hearing, Sen. Cardin praised your record of pro bono service at length. He pointed to your efforts as Dean of Harvard Law School to expand loan forgiveness and public interest fellowship programs for Harvard students. And, as you note in your questionnaire, at least since 2003, you "have served on the boards of numerous non-profit organizations, including several specifically devoted to ensuring the availability of legal services for indigent persons."

I applaud your efforts to expand pro bono opportunities for Harvard students and your board service. But I am concerned that, based on your responses to this Committee in your questionnaire, it appears that you have never personally represented or otherwise assisted an indigent client on a pro bono basis. Further, it appears that until you joined the Board of the Skadden Fellowship Foundation in 2003, you had never, in your first 17 years as a lawyer, performed any service with an organization whose programming was "designed primarily to address the needs of persons of limited means." ABA Model Rule 6.1(a)(2). The ABA's model ethics rules state that a lawyer should perform 50 hours of pro bono work each year, a "substantial majority" of which should be in service to persons of limited means or programs that are "designed primarily to address the needs of persons of limited means."

a. Did you omit any pro bono service from your questionnaire?

Response:

I am not aware of any pro bono service omitted from my questionnaire response except that I may have done some pro bono work at Williams and Connolly that I do not now recall.

b. If not, please explain your decision to never personally represent an indigent client on a pro bono basis.

Response:

My general practice as a government lawyer and academic was not to represent individual clients (whether for pay or pro bono). I therefore undertook other efforts to promote pro bono service. As Dean of Harvard Law School, one of my highest priorities was expanding the pro bono service opportunities available to students. In particular, I oversaw a significant expansion on the Law School's clinical programs, which provide needed representation to indigent clients, in areas ranging from housing and employment to child advocacy to gender violence. In addition, I have served on the boards of several organizations devoted to increasing public interest and pro bono opportunities for

lawyers. I have tried to make a difference in this sphere by devoting substantial time and energy to these activities.

4) *Missouri v. Holland*, 252 U.S. 416, 432 (1920), held that "[i]f a treaty is valid there can be no dispute about the validity of a statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.

a. In your view, can Congress and the President expand or evade the scope of Congress's Article I powers by entering into a treaty requiring an enforcing law that would otherwise be unconstitutional?

Response:

Missouri v. Holland held that Congress may enact a statute implementing a treaty pursuant to its authority under the Necessary and Proper Clause, even if Congress does not otherwise have Article I authority to do so, provided the statute does not violate a constitutional prohibition.

b. Could Congress and the President enact a law enforcing a treaty to accomplish the aims ruled unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995), or *United States v. Morrison*, 529 U.S. 598 (2000)?

Response:

This question concerns whether and how the holding of *Missouri v. Holland* would apply to a particular hypothetical statute. If such a question came before the Court, I would consider all the briefs and arguments presented.

c. Assuming *arguendo* that Supreme Court might strike down the individual mandate provision of the Patient Protection and Affordable Care Act of 2010, could Congress and the President re-enact the individual mandate by agreeing to a treaty that required the United States to have an individual mandate to purchase health insurance?

Response:

This question concerns whether and how the holding of *Missouri v. Holland* would apply to a particular hypothetical statute arising from a particular hypothetical set of circumstances. If such a question came before the Court, I would consider all the briefs and arguments presented.

5) Professor Harold Hongju Koh has written about the difference between nationalists and transnationalists, whom, he says, "hold sharply divergent attitudes toward transnational law":

Generally speaking, the transnationalists tend to emphasize the interdependence between the United States and the rest of the world, while the nationalists tend instead to focus more on preserving American autonomy. The transnationalists believe in and promote the blending of international and domestic law; while nationalists continue to maintain a rigid separation of domestic from foreign law. The transnationalists view domestic courts as having a critical role to play in domesticating international law into U.S. law, while nationalists argue instead that only the political branches can internalize international law. The transnationalists believe that U.S. courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that U.S. courts should limit their attention to the development of a national system. Finally, the transnationalists urge that the power of the executive branch should be constrained by judicial review and the concept of international comity, while the nationalists tend to believe that federal courts should give extraordinarily broad deference to executive power in foreign affairs. . . .

Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn St. Int'l L. Rev. 745, 749-50 (2006); *see also* Harold Hongju Koh, *International Law is Part of Our Law*, 98 Am. J. Int'l L. 43 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996).

a. As described by Professor Koh, are you a transnationalist or a nationalist? Have you ever previously expressed your position on this question? What did you say?

Response:

I would not characterize myself using Professor Koh's categories, which I do not find particularly helpful in thinking about the issues involving foreign or international law that are likely to come before the Court. I have never used these terms for any purpose.

b. Do you believe that domestic courts have "a critical role to play in domesticating international law into U.S. law" and "should use their interpretive powers to promote the development of a global legal system"?

Response:

I believe that the role of domestic courts is to decide the cases that come before them based on the law. In some rare circumstances, United States law may require a court to look to foreign or international law to resolve the parties' claims. I do not believe, however, that courts should view their role as domesticating international law into U.S. law or as using their interpretive powers to promote the development of a global legal system.

6) Professor Koh has said that there can be no "law free" zones, no "extra-legal" spaces, no realm within which judges should not have the final word, no matter to which

branch the Constitution allocates the decisionmaking responsibility. According to Professor Koh, the question "[h]ow far do our human rights and constitutional obligations extend?" has been "brought into sharp relief by Abu Ghraib and the debates over extraterritorial torture, the mistreatment of detainees at Guantanamo, and the denial of habeas corpus and full trial rights to suspected enemy combatants." Professor Koh has stated that there is "no reason why constitutional due process should be limited at our 'physical borders.'"

a. To what extent do you believe that Article III courts should scrutinize the President's handling of foreign terrorists captured on the battlefield? Have you ever expressed an opinion on this matter? If so, please provide details.

Response:

In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court held, among other things, that foreign nationals apprehended abroad and detained at Guantanamo Bay have the constitutional privilege of habeas corpus. The Supreme Court has not addressed whether and to what extent other constitutional provisions apply to foreign nationals captured on the battlefield, or the federal courts' jurisdiction to hear claims brought by such foreign nationals. If these issues came before the Court, I would consider all the briefs and arguments presented.

In November 2005, I co-signed a letter from a number of law school deans to Senator Leahy regarding proposed legislation that would have stripped the federal courts of jurisdiction to hear certain claims brought by Guantanamo detainees. The Court in *Boumediene* decided one issue raised in that letter: the availability of habeas relief for detainees at Guantanamo. Congress itself dealt with the other principal issue raised in the letter by amending the legislation to provide for Article III review of military commission adjudications.

During my Senate Judiciary Committee hearing prior to my confirmation as Solicitor General, I discussed certain of these issues with Senator Graham.

As Solicitor General, I served as counsel of record in a case concerning application of the Suspension Clause to foreign nationals held at Bagram Air Force Base in Afghanistan, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). I served as counsel of record in that appellate court case (which is highly unusual) because of the significance of the government's interests in the litigation. I do not recall any other occasions on which I expressed an opinion on these issues.

b. Justice Lewis Powell, Jr., in *INS v.Chadha*, 462 U.S. 919 (1983), noted that "the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." What is your view of the Separation of Powers and how it functions in the context of the War on Terror?

Response:

The Court has applied the doctrine of separation of powers to government action in wartime using the tripartite framework set forth in Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In the first category, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. In the second category, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. In this category, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* In the third category, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38. It is the function of the federal courts to police the boundaries of presidential and congressional authority in this area using Justice Jackson's framework.

7) Do you have any personal objections to the death penalty?

Response:

No.

8) In a recent book, *Keeping Faith with the Constitution* (2009), Professors Goodwin Liu, Pamela Karlan, and Christopher Schroeder review and analyze the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. __ (2008). Describing Justice Scalia's majority opinion as an "interest-balancing" approach, they write that "the Court interpreted the constitutional principle to have the 'capacity of adaptation to a changing world.'" They then note that "[e]volving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court."

a. Do you believe that "evolving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court"?

Response:

I do not believe that any member of the Court referred to "evolving social norms" in considering *Heller*, nor do I think that phrase would have been helpful to the analysis. There is no doubt, however, that the Second Amendment will have to be applied to new facts and circumstances not present at the time of ratification. One example comes from the decision in *Heller* itself. There, the Court specifically rejected the argument "that only those arms in existence in the 18th century are protected by the Second

Amendment," reasoning that "[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 128 S. Ct. 2783, 2791-92 (2008).

b. Are there any "evolving social norms" that you presently think should "change the ambit of the Second Amendment's protection"?

Response:

Please see above.

9) Do you believe the Sentencing Guidelines ranges recommended for criminals convicted of child sex and pornography offenses are too harsh?

Response:

The appropriateness of the recommended sentencing ranges for particular federal crimes is a policy question for the Sentencing Commission and ultimately for Congress. As Solicitor General, I have approved appeals in a number of cases on the ground that the sentences imposed by district courts (including sentences for child sex and pornography offenses) were too low.

10) The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

a. Should the Eighth Amendment's prohibition on cruel and unusual punishment be evaluated based on contemporary understanding of what criminal sanctions are cruel and unusual?

Response:

The Supreme Court has repeatedly stated that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

b. If your answer to (a) is yes, what factors or sources of law is it appropriate for a court to consider in discerning such a contemporary understanding?

Response:

In determining whether a particular criminal sanction violates the Eighth Amendment, the Court considers two factors. First, the Court considers "the existence of objective indicia of consensus against" the sanction, including in particular the practices of the States. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). Second, the Court applies its "own judgment . . . on the question of the acceptability of the" sanction. *Id.* at 2658 (citation omitted).

c. In your view, what constitutes an "unusual" punishment for purposes of the Eighth Amendment?

Response:

Among other things, the Court has invalidated as "cruel and unusual punishment" the application of the death penalty to defendants under age 18, *Roper v. Simmons*, 543 U.S. 551 (2005); the application of the death penalty to the mentally retarded, *Atkins v. Virginia*, 536 U.S. 304 (2002); the application of the death penalty to a defendant convicted of rape, *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); and most recently the imposition of a sentence of life without parole to a juvenile convicted of a non-homicide crime, *Graham v. Florida*, 130 S. Ct. 2011 (2010). In these cases, the Court has not distinguished between "cruel" punishments and "unusual" punishments; it has simply invalidated the punishment at issue as "cruel and unusual."

11) Do you believe that this country's death penalty jurisprudence can continue to "evolve"?

Response:

The Supreme Court has repeatedly stated that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

a. If so, what kind of objective measures would you use to make that determination? Can you give us some examples of death penalty topics which might reflect "progress of a maturing society" in the future?

Response:

In determining whether a particular criminal sanction violates the Eighth Amendment, the Court considers two factors. First, the Court considers "the existence of objective indicia of consensus against" the sanction. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008). In considering this factor, the Court has focused on the sentencing practices of the States and the federal government. Second, the Court applies its "own judgment . . . on the question of the acceptability of the" sanction. *Id.* at 2658 (citation omitted). In this aspect of the inquiry, the Court has tended to focus on whether a given punishment would serve such purposes as deterrence and retribution. I am unable to speculate on any Eighth Amendment claims that may come before the Court in the future.

b. What is your view about the relevance of the laws of other countries in developing our Eighth Amendment jurisprudence?

Response:

In considering whether a particular punishment violates the Eighth Amendment, the Court has most recently said, "[t]he judgments of other nations and the international

community are not dispositive as to the meaning of the Eighth Amendment. But the climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual." *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010). As I understand this statement, the practices of other countries are *not* reviewed in determining whether "objective indicia of consensus against" the sanction exist. For purposes of that question, the practices of the States and the federal government are what matters. The Court has instead referenced the practices of other nations to confirm the Court's independent evaluation about the acceptability of the sanction (the second factor considered in the Court's current test). My understanding of the Court's opinions is that such practices have never formed the basis for the Court's independent conclusions; in any event, I do not think these practices should do so.

12) Do you think that international law and norms, specifically the treaties and other international laws the United States has signed, have any role to play in interpreting our own constitutional standards, for example in connection with exempting minors from the death penalty or prohibiting torture?

Response:

The Court has at times referenced treaties and other international law as confirming the Court's independent evaluation about the acceptability of a sanction under the Eighth Amendment. As noted above, my understanding of the Court's opinions is that international law has not formed the basis for the Court's independent conclusions; in any event, I do not think it should do so. In some limited circumstances, international law may have a role to play in interpreting provisions directly relating to international matters. For example, in interpreting the constitutional provisions referencing "ambassadors," the Court might consider the definition of "ambassadors" in international treaties.

13) Please explain specifically what rights are protected under what you have called the "liberty clause" in light of current Supreme Court precedent. Do you find any constitutional weakness in the arguments recognizing any of those rights?

Response:

The Supreme Court has repeatedly stated that the liberty component of the Due Process Clause guarantees a constitutional right to privacy—protection against certain governmental actions interfering with decisions involving family and reproduction. The Court has held that this right to privacy protects, among other things, the right to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right for a married couple to purchase contraceptives, *Griswold v. Connecticut*; 381 U.S. 479 (1965) and the right to terminate a pregnancy under certain circumstances, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). I do not think it would be appropriate for me to criticize the reasoning or conclusion of the Court's decisions in these cases.

14) In any given generation, does the Supreme Court have the authority to look at current American society, culture and mores to determine that there are new needs or freedoms that should be considered fundamental rights, or that there are new groups that may in certain circumstances be considered suspect classes? Does the Court have the authority to look at current American society and decide that rights once held fundamental are no longer fundamental?

Response:

All constitutional rights must be grounded in the text of the Constitution. Some constitutional provisions are written in broad language, and the Court has applied that broad language to new factual situations in the cases that come before it. When it decides such cases, the Court looks to legal sources—the text, structure, and history of the constitutional provision and the Court's precedents interpreting it—to determine how to apply the constitutional language to the facts at issue. For some constitutional questions, most notably involving the liberty provision of the Due Process Clause of the Fourteenth Amendment, the Court also looks to the Nation's traditions as they have been passed from generation to generation. This way of deciding cases, which most Supreme Court Justices have used, may lead to developments in the law over time. For example, the Court held in *Katz v. United States*, 389 U.S. 347 (1967), that the Fourth Amendment conferred a right to be free from a warrantless wiretap, even though prior cases had required a trespass on physical property to establish a constitutional violation.

15) Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court, that you believe can or should be identified in the future?

Response:

All constitutional rights must be grounded in the text of the Constitution. Some constitutional provisions are written in broad language, and the Court has applied that broad language to new factual situations in the cases that come before it. I do not think it would be appropriate for me to comment on hypothetical future cases.

16) Do you believe that the duty of the Supreme Court is to interpret the words of the Constitution only according to the meaning they had when the Constitution was adopted, when that meaning is ascertainable?

Response:

In interpreting certain constitutional provisions, the Court has found the original understanding of the provision to be dispositive. In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), for example, all nine Justices appeared to agree that the original understanding should govern the question whether the Second Amendment confers an individual right to bear arms. For other constitutional provisions, the Court's precedents have more frequently guided its approach. The First Amendment is a good example. The Framers of the Constitution did not understand the First Amendment as extending to libelous speech. The Court's precedents, however, have applied the First Amendment to bar many defamation actions. *E.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964). In general, as I stated at my hearing, I favor an approach to constitutional

interpretation that looks to a variety of legal sources—but only to legal sources—to determine how to apply the provisions of the Constitution to cases coming before the Court.

17) In his book, *Active Liberty*, Justice Breyer states that, "since law is connected to life, judges, in applying a text in light of its purpose, should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'"

Do you agree with Justice Breyer?

Response:

I am not sure exactly what Justice Breyer meant by that sentence or what range of cases he was discussing. I do believe that, in some constitutional cases, the Court may appropriately consider the practical circumstances surrounding its decision. The Court's interpretation of the Fourth Amendment is a good example. In deciding whether a particular search is unreasonable, the Court has often considered how its holding would affect the law enforcement practices of police. And in the realm of statutory interpretation, the Court often looks to the practical effects of interpreting a statute in a given manner to determine whether that interpretation is consistent with Congress's intent in enacting the statute.

18) The majority and dissenting opinions in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) took very different approaches to statutory interpretation. The majority stressed the importance of interpreting the word "discrimination" in Title IX "broadly." The dissenters, in contrast, wrote that Congress had not included causes of action for retaliation "unambiguously" in Title IX.

a. Putting aside how you would have voted in that case, which general approach to statutory interpretation- the majority or the dissent- is closer to your reading of statutes?

Response:

My approach to statutory interpretation would begin with the text. Where the text is clear, that is the end of the matter. Where the text is ambiguous, other sources may be relevant in determining the meaning that Congress intended to ascribe to a particular provision, including the structure of the statute, the legal context in which the statute was enacted, and the history of the provisions in question. In general, statutory provisions should be read neither broadly nor narrowly; they should be read reasonably, in order best to determine Congress's intent.

19) In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress could, consistent with the Eleventh Amendment, override state sovereign immunity through its enforcement power under Section 5 of the Fourteenth Amendment. Is *Fitzpatrick* consistent with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)? Please compare the decisions.

Response:

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against the States to enforce legislation enacted pursuant to the Indian Commerce Clause. In so holding, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had held that Congress could authorize suits against the states to enforce legislation enacted pursuant to the Commerce Clause. *Fitpatrick v. Bitzer*, 427 U.S. 445 (1976), concerned a different constitutional provision: Section 5 of the Fourteenth Amendment. In *Fitzpatrick*, the Court held that Congress could authorize suits against the states to enforce legislation enacted pursuant to Section Five. The two decisions are not inconsistent. As the Court in *Seminole Tribe* explained, *Fitzpatrick* "held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." 517 U.S. at 59. The Court reasoned that "*Fitzpatrick* was based upon a rationale wholly inapplicable to" Congress's Article I powers, namely "that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 65.

20) Since you graduated from law school, what in your view are the most significant cases the Supreme Court has decided and why do you consider them the most significant?

Response:

Some of the most significant cases decided by the Supreme Court since I graduated from law school are:

Grutter v. Bollinger, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003): In these cases, the Court considered the constitutionality of two higher education admissions policies that took account of race. The Court upheld the University of Michigan Law School's policy, which considered race as one of several factors in the evaluation of applications, as a narrowly tailored means of advancing the compelling state interest in achieving the educational benefits that flow from a diverse student body. The Court struck down the University of Michigan's undergraduate admissions program, which assigned applicants a numerical score based on a variety of factors and added an automatic bonus to the scores of minority applicants, as a flat racial preference system in violation of the Fourteenth Amendment.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and *Washington v. Glucksberg*, 521 U.S. 702 (1997): In these cases, the Court considered the constitutionality of abortion restrictions and a physician-assisted suicide ban under the Due Process Clause of the Fourteenth Amendment. *Casey* reaffirmed the central holding of *Roe v. Wade* that the Due Process Clause protects a woman's right to choose an abortion, while establishing a new, viability-based framework for evaluating the constitutionality of abortion restrictions. In *Glucksberg*, the Court held that the Due Process Clause does not protect the right to assistance in committing suicide. In so holding, the Court explained that the Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in

this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. at 720.

United States v. Lopez, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005): In these cases, the Court considered the constitutionality of laws enacted pursuant to Congress's authority under the Commerce Clause. In *Lopez*, the Court invalidated a federal statute that made it a crime for a person to possess a firearm in a place that he knows or has reason to know is a school zone. In *Morrison*, the Court invalidated a provision of the Violence Against Women Act that gave victims of gender-motivated violence a cause of action against the perpetrator. In *Raich*, the Court upheld a federal ban on the possession of marijuana grown at home for personal medical purposes. These cases are significant for their discussions of the limits on Congress's Commerce Clause power. In particular, *Lopez* and *Morrison* set limits on Congress's ability to regulate non-economic activity under the Commerce Clause.

21) If you were forced to pick one Justice in the last 100 years whose judicial philosophy has been most influential on the Court, who would it be?

Response:

Oliver Wendell Holmes. His opinions critiquing *Lochner v. New York*, 198 U.S. 45 (1905), and similar cases set forth the basic rationale for judicial deference to legislative policy decisions. In addition, his and Justice Brandeis's opinions on free speech issues are the foundation for the Court's First Amendment jurisprudence.

22) Please name the most poorly reasoned Supreme Court case, in your view, of the last fifty years.

Response:

I do not think it would be appropriate for me to grade recent decisions of the Supreme Court, as the status of those cases as precedent and their application to new factual circumstances are issues that may come before the Court. One relatively recent decision (although not in the last 50 years) that was poorly reasoned and that is unlikely to come before the Court again is *Korematsu v. United States*, 323 U.S. 214 (1944).

23) If a decision is older, does it deserve more respect than a more recent decision?

Response:

All else equal, an older precedent may well deserve more respect. In considering whether to overrule a prior precedent, one of the factors the Court considers is whether the precedent "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992). The longer a decision has been on the books, the more likely it is to be subject to reliance and to have been specifically reaffirmed by subsequent decisions. These are not the only factors informing the stare decisis inquiry. The Court would also consider whether the rule has proven unworkable, whether related principles of law have left

the rule behind, or whether the facts have so changed as to have robbed the rule of significant application or justification.

24) You spoke a bit at your hearing about justiciability. Where is the line between political questions and questions that are appropriate for a court to decide?

Response:

The Court has described the category of non-justiciable political questions as follows: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question." *Baker v. Carr*, 369 U.S. 186, 216 (1962). Of these, the factors that have been the most significant in the Court's political question cases are a "textually demonstrable commitment" of an issue to another branch and the lack of judicially manageable standards for deciding a challenge. In applying these and the other factors listed, the Court has attempted to determine when the political branches are best left to themselves to resolve conflicts between them.

25) What assurances can you give this Committee, the Senate, and the American people about your independence from the President and the White House?

Response:

I believe that, at every stage of my career, I have demonstrated the ability to perform my duties in an appropriate manner, in accordance with all applicable professional standards. For example, the Office of the Solicitor General has a long tradition of exercising independent legal judgment, and I believe I have upheld that tradition during my tenure. As I testified at my confirmation hearings, I believe deeply that an independent judiciary is fundamental to the rule of law. If confirmed, I would at all times exercise my independent judgment in considering the cases that come before the Court.

26) As a general matter, what level of deference should the courts pay to Congressional findings? If courts should exercise more than rational basis review, how closely should courts examine witness testimony and documentary evidence from the Congressional record?

Response:

The Court should be deferential to congressional findings of fact. The Court is institutionally incapable of collecting its own data, taking witness testimony, or producing investigative reports. Accordingly, the Court should give substantial regard to findings of fact made by Congress in the course of enacting a statute. Of course, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of legislation. *United States v. Morrison*, 529 U.S. 598,

614 (2000). If it were, Congress could insulate any and all statutes from constitutional review. But for reasons relating both to institutional competence and to institutional legitimacy, the courts should take very seriously congressional efforts to develop a record supporting a piece of legislation.

27) Article IV, Section 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Notwithstanding the Full Faith and Credit Clause, many states have established a so-called "public policy exception" which permits such states not to recognize "public acts, records, and judicial proceedings" of other states when contrary to such states' public policy.

a. In your view, do public policy exceptions violate the Full Faith and Credit Clause?

Response:

The Supreme Court has stated that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

b. Do you believe public policy exceptions may violate any other constitutional provision, and if so, which provision or provisions?

Response:

All state action must comply with federal constitutional requirements. But I am not aware of any Supreme Court decision suggesting that the use of a public policy exception violates any constitutional provision.