Senator Jeff Sessions
Questions for the Record
Elena Kagan

1. **Federal law requires that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2006). The same statute requires a justice to recuse himself "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(3). In response to a question from Senator Leahy at your hearing, you testified:**

> **"I would recuse myself from any case in which I've been counsel of record at any stage of the proceedings, in which I've signed any kind . . . brief.**
>
> **And I think that there are probably about 10 cases . . . I haven't counted them up particularly, but I think that there are probably about 10 cases that are on the dockets next year in which that's true, in which . . . I've been counsel of record on a petition for certiorari or some other kind of pleading. So that's a flat rule."**

a. **Please provide the names of these cases and a detailed explanation of what role you played in each case, including what role you played in the decision to appeal and the development and approval of arguments presented in the brief.**

Response:

A list of all cases in which I served as counsel of record for a party or amicus appears in my questionnaire response. To the best of my knowledge, the Court will hear next term the following cases in which I served as counsel of record: *Abbott v. United States*; *Michigan v. Bryant*; *NASA v. Nelson*; *Flores-Villar v. United States*; *United States v. Tohono O'odham Nation*; *Costco v. Omega*; *Staub v. Proctor Hospital*; *Williamson v. Mazda Motor of America, Inc.*; *Sossamon v. Texas*; *Mayo Foundation for Medical Education and Research v. United States*; *Pepper v. United States*. In these cases, I was substantially involved in the preparation of each pleading on which my name appears. And in the subset of these cases in which the government filed a petition for writ of certiorari, I approved the decision to file that petition.

b. **During your testimony, you also stated**

> **"In addition to [the cases mentioned above], I said to you on the questionnaire that I would recuse myself in any case in which I'd played any kind of substantial role in the process."**

Although you stated that "but I think that that would include any case in which I've officially formally approved something," but did not provide any further guidance on the meaning of a "substantial role in the process."

i. Please explain how you would define the term "substantial role" and provide the types of activities that you envision satisfying that standard.

Response:

I would recuse myself from any case in which I approved or denied a recommendation for action in the lower courts. This category would include cases in which I authorized an appeal, intervention, or the filing of an amicus brief. It would also include cases in which I denied leave to intervene or file an amicus brief. I would also recuse myself from any cases in which I did not take such official action but participated in formulating the government's litigating position or reviewed a draft pleading. In all other circumstances, I would consider recusal on a case-by-case basis.

ii. Please provide a list of the cases in which you have played a "substantial role" as Solicitor General.

Response:

A complete list of all cases in which I approved or denied a recommendation for action in the lower courts was appended to my questionnaire response. I did not maintain a running list of the much smaller group of cases in which I took no such official action, but participated in formulating the government's litigating position or reviewed a draft pleading. If confirmed, I would develop an appropriate process for identifying such cases to ensure my recusal—consulting when necessary with the Justice Department about whether or the extent to which I participated in a case.

iii. Do you consider cases in which you personally reviewed or participated in discussions about the filings of the United States (in any federal court, at any level) to be included in the category of cases in which you "played any kind of substantial role"? Why, or why not?

Response:

If I personally reviewed a draft pleading or participated in discussions to formulate the government's litigating position, then I would recuse myself from a case. In my view, this level of participation in a case would warrant recusal.

iv. Does your understanding of "substantial role" include cases in which you were not the formal decisionmaker, but for which you gave advice to those making the decisions? Why or why not?

Response:

If I gave advice about the government's litigating position or the content of a filing, then I would recuse myself from the case. In my view, this level of participation in a case would warrant recusal.

v. Do you consider cases that might come before you on the Court after you had initially denied permission to appeal or to intervene or to file amicus briefs at some interlocutory point in the case to be included in this category of cases in which you "played any kind of substantial role"? Why, or why not?

Response:

Yes. In my view, this level of participation in a case would warrant recusal.

vi. Please provide a list of cases in which you have "officially approved something" during your time as Solicitor General.

Response:

As noted above, a spreadsheet listing all such decisions is attached to my questionnaire response.

c. Justice Marshall implemented a broad recusal rule "to quell any appearance of impropriety," and Justice Scalia recused himself from a controversial case decided in 2004 after he made public comments regarding the case while it was pending before the Ninth Circuit. If confirmed, will you follow the examples of Justice Marshall and Justice Scalia, recusing yourself, in the words of Justice Marshall, "to quell any appearance of impropriety" that may result from you participating in such a case?

Response:

If confirmed, I will consider carefully the recusal practices of current and past Justices, including Justices Marshall and Scalia, and I will consult with my colleagues in determining whether to recuse myself from any particular case.

2. At your hearing, Senator Cornyn asked you what role you thought a judge's opinion of the evolving norms and traditions of our society had in interpreting the written Constitution. You replied:

> **"I think that traditions are most often looked to in considering the liberty clause of the 14th Amendment. I think every member of the court thinks**

> **that the liberty clause of the 14th Amendment applies to more than physical restraints. And I think almost every member thinks that it gives some substantive protection and not just procedural protections."**

One of the basic American traditions is the opportunity to work hard at an honest vocation and keep the fruits of our labor. It is that tradition of liberty that has given America its reputation as a land of opportunity. Nonetheless, at times, this tradition has not been respected by governments. For example, during Reconstruction, many Southern states enforced laws and policies designed to keep newly freed blacks in a state of constructive servitude by depriving them of economic self-sufficiency. Given these traditions and the history surrounding the Fourteenth Amendment, do you believe economic liberty is a value protected by that Amendment?

Response:

The Supreme Court has interpreted the liberty provision of the Due Process Clause of the Fourteenth Amendment by "examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). That test would be the starting point for any consideration of a due process liberty claim, including one involving economic liberty. I do not think it would be appropriate for me to comment on whether a particular form of liberty is protected by the Due Process Clause, as such an issue might come before the Court in the context of a particular case.

3. In response to a question from Senator Whitehouse, you testified at your hearing that

> **"I do think congressional fact-finding is very important and that courts should defer to it. It doesn't mean that fact-finding is either necessary or sufficient. Sometimes Congress can make no findings of fact at all and the court should still to defer -- should still defer to -- to Congress. And, on the other hand, sometimes congressional fact-finding can't save a statute. But . . . in very significant measure, the courts should defer to congressional fact-finding."**

a. Should a court defer to Congressional fact-finding if a trial court found that Congress had made such factual findings knowing that they were false?

Response:

I am not aware of any Supreme Court precedent suggesting that courts should defer to a knowingly false finding of fact made by Congress. As a practical matter, I think it is highly unlikely that Congress would engage in knowingly false fact-finding.

b. Should a court defer to Congressional fact-finding if a trial court determined that Congress was deliberately indifferent to the truth or falsity of these factual findings?

Response:

In evaluating congressional findings of fact, the Court has looked to the evidence underlying the findings. If there were no evidence underlying the findings—for example because Congress was deliberately indifferent to the truth of the findings—then that would be a factor for the Court to consider in evaluating those findings. As a practical matter, I think it is highly unlikely that Congress would engage in fact-finding with deliberate indifference to the truth of the findings.

c. If a court can evaluate the veracity of Congressional fact-finding, on what basis should a court evaluate the truth or falsity of such factual findings?

Response:

Because the Supreme Court does not have the institutional capacity to engage in fact-finding, it is typically not the role of the Court to evaluate the truth or falsity of the findings. Rather, the role of the Court is to carefully consider congressional findings in the context of evaluating the constitutionality of a statute.

4. At your hearing, you had an exchange with Senator Franken about the Supreme Court's opinion in *Circuit City v. Adams*, 532 U.S. 105 (2001). Senator Franken criticized Justice Kennedy for "ignoring the legislative history" of a provision in the Federal Arbitration Act and asked you to agree that Justice Kennedy's failure to look to the legislative history of the statute was in error. You replied as follows:

> **"I suspect that Justice Kennedy may have meant that he thought that the text was clear and, therefore, the legislative history was not something that should appropriately be explored, but I'm just guessing on that."**

Senator Franken said "I think you're guessing wrong." In fact, you did guess correctly. The full sentence of the *Circuit City* opinion Senator Franken quoted says "[a]s the conclusion we reach today is directed by the text of §1, we need not assess the legislative history of the exclusion provision. *Ratzlaf* v. *United States,* 510 U.S. 135, 147-48 (1994) ('[W]e do not resort to legislative history to cloud a statutory text that is clear')." Nonetheless, you did indicate that you thought it was proper to look to legislative history. You said:

> **"[W]hen a text is ambiguous, which, you know, frequently happens, then I think that the job of the courts is to use whatever evidence is at hand to understand Congress's intent, and that includes exploration of Congress's purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted, and in what circumstances, and by way of looking at legislative history.**
>
> **Now, I think courts have to be careful about looking at legislative history and make sure that what they're looking to is -- is reliable, but courts should not**

at all exclude signs of congressional intent and should really search hard for congressional intent when the text of the statute itself is unclear."

a. Is it appropriate to rely on legislative history if such legislative history is available from only one house of Congress?

Response:

I am not aware of any Supreme Court precedent suggesting that the Court may not consider legislative history from only one House of Congress. But in considering legislative history as evidence of what Congress meant when it enacted the statute, the breadth of the legislative history is relevant to its value.

b. In looking to legislative history, is it appropriate to look at only committee reports and other formal documents, or is it appropriate to look at floor debates, committee meeting debates, hearing transcripts and other legislative materials?

Response:

Floor debates, committee meeting debates, hearing transcripts, and other legislative materials can be relevant sources of legislative history. But the Court should carefully consider the reliability of such materials as evidence of congressional intent.

c. When looking at committee reports, is the report relevant only to the extent it represents the views of those who voted for the legislation in committee, or must the courts also look to the views of those who did not vote for the bill in committee, but did vote for the bill's final passage?

Response:

A court considering legislative history typically will look to committee reports, but may also look to other materials, including statements of Members of Congress who voted against the legislation in committee but voted in favor of the bill's final passage. The question, with respect to all such materials, is whether they reliably indicate Congress's intent in enacting a statute.

d. In looking at floor debates, is it necessary to compare what a member of Congress said on the floor with his final vote on the legislation to determine its relevance?

Response:

The weight to be given to a particular floor statement depends on the context, including the speaker's other statements and votes.

e. Is it permissible for the courts to assess the veracity of statements in legislative history, or must the courts simply accept these statements as the true intentions of the legislature?

Response:

The weight to be given to a particular statement in the legislative history depends on the context, including other statements in the legislative history that express a contrary view.

f. In his dissent in *Lane v. Pena*, 518 U.S. 187 (1996), Justice Stevens wrote that "a rule that refuses to accept guidance from relevant and reliable legislative history, does not facilitate -- indeed, actually obstructs -- the neutral performance of the Court's task of carrying out the will of Congress."

i. Do you agree with Justice Stevens' statement?

Response:

I am not familiar with the context of Justice Stevens' statement. I believe, as I indicated to Senator Franken, that when the text of a statute is ambiguous, legislative history can be a valuable source of evidence of the meaning that Congress intended to give a particular statutory provision.

ii. Do you think it is a court's task in statutory construction to "carry out the will of Congress," or is it a court's task to interpret the meaning of the text of legislation, leaving it to Congress to clearly express its will in that text?

Response:

The role of a court is to determine Congress's intent in enacting a statute. Where the text of the statute is clear, that is the end of the matter, because that is the best evidence of Congress's intent. Where the text is ambiguous, it is the job of the court to determine what Congress meant by looking to other legal sources, such as the statute's structure, title, context, and legislative history.

g. Justice Scalia critiqued the practice of looking to legislative history in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993), saying:

> **"The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . .' But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."**

Do you agree that, given the diversity of viewpoints represented in the United States Congress, the legislative history of a statute could be a source of confusion?

Response:

In some cases, the legislative history of a statute may indeed be confusing. For that reason, among others, when the text of a statute is clear, the text should govern.

5. **In response to a question from Chairman Leahy, you stated that ours is a Constitution**

> **"that has all kinds of provisions in it, so there are some that are very specific provisions. It just says what you are supposed to do and how things are supposed to work. . . . But there are a range of other kinds of provisions in the Constitution of a much more general kind, and those provisions were meant to be interpreted over time, to be applied to new situations and new factual contexts. . . . And I think that they laid down--sometimes they laid down very specific rules. Sometimes they laid down broad principles."**

a. **Would you classify the Second Amendment as a "very specific provision" or a "broad principle" in the Constitution?**

Response:

I do not believe, and I did not mean to suggest in my hearing testimony, that all constitutional provisions fall into one of two categories—"very specific provisions" or "broad principles." Rather, I meant that different constitutional provisions contain language at different levels of generality, which present different interpretive issues. The issue in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), was whether the Second Amendment conferred an individual right to bear arms or merely a collective right associated with militias. The Court considered both the language and the history of the Second Amendment in deciding that it conferred an individual right.

b. **In the course of your discussion with Senator Leahy you also mentioned the Fourth Amendment. In view of your contention that the Constitution includes very specific provisions and broad principles, could you explain, briefly, the "broad principle" for which this Amendment stands?**

Response:

The Fourth Amendment, most fundamentally, protects against "unreasonable searches and seizures." That provision raises the question, explored in numerous cases, of what searches are "unreasonable."

c. **Do you think the Sixth Amendment is "a very specific provision" of the Constitution or a "broad principle"? Please explain your answer.**

Response:

The Sixth Amendment guarantees several rights of criminal procedure, including the right to a speedy trial, the right to a jury trial in the venue where the crime was committed, the right to confrontation, and the right to the assistance of counsel. Each of these provisions presents interpretive issues, but of a narrower scope than some other constitutional provisions raise.

d. Do you think the Eighth Amendment is "a very specific provision" of the Constitution, or a "broad principle"? Please explain your answer.

Response:

The Eighth Amendment protects against "cruel and unusual punishment" and "excessive" bail and fines. The principal interpretive issues raised by this Amendment concern which punishments are "cruel and unusual" and which bail and fines are "excessive."

e. Do you think the Tenth Amendment is "a very specific provision" of the Constitution, or a "broad principle"? Please explain your answer.

Response:

The Tenth Amendment reserves to the States or to the people the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." The principal question the Court has considered with respect to this Amendment is whether it provides protections to the States and to the people beyond what follows from a system of enumerated and limited federal powers.

i. Do you think the purpose of the Tenth Amendment was intended to give further textual protections to federalism, apart from the broader structure set up by the Constitution?

Response:

As Justice Story explained, the Tenth Amendment is an "affirmation" of the "necessary rule of interpreting the constitution" that all powers "not conferred" on the federal government are "withheld, and belong[] to state authorities." *United States v. Darby*, 312 U.S. 100, 124 (1941). In *New York v. United States*, the Court noted that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." 505 U.S. 144, 155 (1992).

ii. **If you believe the Tenth Amendment is a "broad principle," do you think the "broad principle" was ultimately intended to protect the liberty of individuals, or the power of governments?**

Response:

The Court has explained that the Tenth Amendment was intended to protect the powers reserved to the states, and thereby to safeguard individual liberty: "The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted).

6. **At your hearing, several Senators repeatedly referred to *Ledbetter v. Goodyear Tire*, 550 U.S. 618 (2007). For example, one Senator said that, in the *Ledbetter* case "the Court on gender discrimination took the test, which I find incredible to believe, that Lilly Ledbetter was supposed to know about her discrimination even though it was impossible to discover it and she was barred by Statute of Limitations."**
In *Ledbetter*, the Supreme Court held that because the plaintiff filed her claim too late, the statute did not permit recovery. The clear language of the statute in question stated: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." The statute did not include an exception for pay discrimination cases where the actual discrimination had occurred years earlier. In dissent, Justice Ginsburg said that this case was a huge setback for women's rights, and that the Court should not read the 180-day period to apply to these facts. For the majority, Justice Alito admitted the result did not make sense, but it was up to the legislature, and not the court to rewrite bad statutes. Shortly after President Obama was elected, Congress enacted the Lilly Ledbetter Fair Pay Act, which remedied this statutory flaw.

a. **If you believe that the clear text of a statute calls for an unjust result, could you conceive of a circumstance where it would be appropriate for a judge to interpret the statute in a manner that is "more just" but inconsistent with congressional intent? Or, is it more appropriate for judges to interpret the statute honestly, point out the unjust result and wait for Congress to remedy the statute?**

Response:

The role of the Court in all cases of statutory interpretation is to interpret the statute in the manner consistent with congressional intent. I do not think it would be appropriate for me to say whether a particular decision conformed to this principle.

b. When is it appropriate for the Court to wait for Congress to remedy statutes?

Response:

Considerations of stare decisis have "special force" in the context of statutory interpretation, since Congress can amend the statute if it desires a contrary result. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

7. At your hearing, Senator Franken discussed *Citizens United v. FEC*, 558 U.S. 50 (2010), stating: "I'm more worried about how this decision is going to affect our communities and our ability to run those communities without a permission slip from big business." If you are confirmed, would you consider how a decision "is going to affect our communities" in determining what is required under the Constitution?

Response:

The Court's interpretation of the Constitution should be guided by legal sources: the text, structure, and history of the relevant constitutional provision, and the Court's precedents interpreting the provision. In interpreting the First Amendment, the Court may consider the effect of the statute or regulation on the ability of those affected by it to engage in free speech, as well as the way in which the statute or regulation advances countervailing state interests.

8. In response to a question from Senator Feinstein alluding to *Heller* and *McDonald*, you said that "there are various reasons for why you might overturn a precedent. If the precedent . . . proves unworkable over time or if the doctrinal foundations of the precedent are eroded, or if the factual circumstances that were critical to why the precedent -- to the original decision, if those change."

a. Please explain the standard the Court has, or in your view should, apply in determining whether a precedent has become "unworkable."

Response:

My response to Senator Feinstein was a general one, referring to all precedents, not to any cases in particular. The Court has explained that a precedent is unworkable if, over time, it has "defied consistent application by the lower courts," *Payne v. Tennessee*, 501 U.S. 808, 830 (1991)—that is, if the precedent has led to inconsistent outcomes and has proved incapable of being applied in a principled manner.

b. **Please explain how the "doctrinal foundations" of the *Heller* opinion could become "eroded," given that the doctrinal foundations are the text and original meaning of the Second Amendment.**

Response:

Heller is a precedent of the Court entitled to full stare decisis effect. As noted above, my response to Senator Feinstein concerning the doctrine of stare decisis was a general one; I did not suggest any way in which the doctrinal foundations of the *Heller* decision could become eroded. In general, this aspect of the doctrine of stare decisis refers to the erosion of prior decisions of the Court.

c. **Please explain how the "doctrinal foundations" of the *McDonald* opinion could become eroded, given that the basis of the decision was that the Right to Keep and Bear Arms is a fundamental right.**

Response:

Please see above.

d. **Please provide an example of factual circumstances critical to the *Heller* and *McDonald* opinions that could change so that these decisions should be overruled, rather than merely distinguished.**

Response:

As noted above, my response to Senator Feinstein was a general one; I did not suggest that factual circumstances critical to *Heller* or *McDonald* could change. If that claim were to come before the Court, I would fairly consider the briefs and arguments on both sides, but would do so against the strong background presumption of stare decisis.

e. **Do you believe the *meaning* of the Right to Keep and Bear Arms could change with "factual circumstances," rather than simply the *effect* of that right in a particular context?**

Response:

The Court applies the Second Amendment, as it applies any other constitutional provision, to new factual circumstances over time, as the Court decides the cases that come before it. This process does not change the constitutional provisions or the essential rights they confer, but may affect the way those rights apply in particular contexts.

9. **In *District of Columbia v. Heller*, Justice Scalia wrote that the Court's decision did not bring the constitutionality of regulations on guns in "sensitive places" into question. Logically, if there are sensitive places, there must be non-sensitive places where the Right to Keep and Bear Arms cannot be denied. What standard should**

the Court apply to distinguish between a non-sensitive places where gun restrictions are not proper and a sensitive place where such restrictions are permissible?

Response:

In *Heller*, the Court stated that the home is a location "where the need for defense of self, family, and property is most acute." 128 S. Ct. at 2817. By contrast, the Court noted that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* In future cases, the Court may be asked to decide whether other locations subject to gun regulations are more like the home, "where the need for defense of self, family, and property is most acute," or more like schools and government buildings.

10. At your hearing, Senator Leahy said:

> **"Two years ago, in *District of Columbia v. Heller*, the Supreme Court held the Second Amendment guarantees to Americans the individual right to keep and bear arms. I am a gun owner, as are many people in Vermont, and I agreed with the *Heller* decision. And just yesterday in *McDonald v. the City of Chicago*, the Court decided the Second amendment right established in Heller is a fundamental right that applies to the States as well as the Federal Government. . . . Is there any doubt after the Court's decision in *Heller* and *McDonald* that the Second Amendment to the Constitution secures a fundamental right for an individual to own a firearm, use it for self-defense in their home?"**

You replied: "[t]here is no doubt, Senator Leahy. That is binding precedent entitled to all the respect of binding precedent in any case. So that is settled law." However, you also testified, in response to a question from Senator Feingold: "I suspect that going forward the Supreme Court will need to decide what level of constitutional scrutiny to apply to gun regulations. . . It's clearly a decision that will come before the Court." Do you agree that, generally speaking, the Supreme Court applies the strict scrutiny test to regulations when there is a real and appreciable impact on, or a significant interference with, the exercise of a fundamental right?

Response:

Generally speaking, the Court uses different levels of scrutiny in applying different constitutional rights, depending on the particular right at issue and the context in which the right is asserted. For example, some restrictions on the freedom of speech—such as those that discriminate on the basis of viewpoint—are evaluated under strict scrutiny, while others—such as those that regulate the time, place, and manner of speech—are evaluated under more permissive levels of scrutiny. Similarly, government classifications based on race are evaluated under strict scrutiny, while government classifications based on gender are evaluated under intermediate scrutiny. The level of scrutiny that the courts should apply to particular gun regulations under the Second Amendment is an issue that is being litigated in the federal courts and is likely to come before the Supreme Court in the future.

11. During your hearing, you repeatedly referred to "settled law" and respecting precedent. As a law clerk for Justice Marshall, however, you expressed your desire to overturn precedent on a number of occasions. You wrote a memorandum to Justice Marshall recommending that he vote to deny a certiorari petition in *Pughsley v. O'Leary*, 484 U.S. 837 (1987) (cert. denied). The petitioner had sought to have his conviction overturned, claiming that his lawyer was constitutionally ineffective for not challenging the multiple identifications by the victim. The standard under which his claim of ineffective assistance of counsel was to be judged, of course, was set forth by the Supreme Court in the 1984 case of *Strickland v. Washington*, 466 U.S. 668 (1984), which remains the standard today, more than 25 years later. You wrote to Justice Marshall, however, "I'd like to reverse Strickland too, but something tells me this court won't buy the idea."

a. Why did you want to reverse *Strickland v. Washington*?

Response:

Justice Marshall strongly disagreed with *Strickland*. He dissented in that case because he believed that the test set forth in *Strickland* did not adequately protect the Sixth Amendment right to counsel, and he continued to object to the way the decision was applied. This memo indicates that I then agreed with his well-known views. *Strickland* is settled law, entitled to stare decisis effect.

b. What did you mean by "this court"?

Response:

I meant the Supreme Court.

c. Why did you think the Court as a whole would disagree with your preference to absolve defendants of any responsibility for showing prejudice?

Response:

Strickland v. Washington was a precedent of the Court, and no litigant had presented a strong argument for its reversal. *Strickland* continues to be settled law today.

12. This case was not the only case in which you ignored *stare decisis*. In *Hayes v. Dixon*, 484 U.S. 824 (1987) (cert. denied), a state court upheld, against an Equal Protection challenge, a statute requiring that paternity be established by acknowledgement or adjudication during a man's lifetime in order for the illegitimate child to inherit by intestate succession. In your memorandum to Justice Marshall, you acknowledged that "the Court upheld a near-identical" statute in *Lalli v. Lalli*, 439 U.S. 259 (1979), but wrote that "[t]he reversal of *Lalli,* which was a terrible decision, may not be a lost cause." You explained that the decision was "very close" and that "the personnel of the Court has changed considerably since then." Ultimately, you advised Justice Marshall not to try to discard the precedent

just yet: "But I'm not sure that reversing prior decisions is a great idea right now. . . . Even assuming that you wish to try to overturn *Lalli*, I think you should wait for a case in which the [petitioner] has clearly gotten screwed."

a. When would reversing prior decisions be a "great idea"?

Response:

As I testified at my confirmation hearings, the Court has explained that mere disagreement with a prior decision is not enough to justify overruling the decision. Instead, the Court considers whether the decision has proved unworkable over time, whether the decision's doctrinal foundations have eroded, or whether the factual circumstances that were critical to the original decision have changed.

b. Why did you want to "wait for a case" where the petitioner had "gotten screwed"?

Response:

This memo, like others I wrote during my clerkship, reflected Justice Marshall's strongly-held views about the law. Here, I was expressing the point, in the colloquial and informal language we used in certiorari memos to Justice Marshall, that if he were inclined to consider revisiting *Lalli*, he should wait for a case with a more compelling set of facts for his point of view.

13. In his opening statement, Senator Schumer recited the Supreme Court's holding in *Lochner v. New York*, 198 U.S. 45 (1905), where the Court held that the Due Process Clause of the Fourteenth Amendment was violated by a New York statute that set a maximum number of hours bakers could work in a week. Senator Schumer then went on to argue that the Supreme Court's opinion earlier this year in *Citizens United v. FEC* represented a return to the *Lochner* era. In *Citizens United*, the Supreme Court held that individuals who band together in corporate form to express a political message cannot be banned from doing so in the months preceding an election. You argued that case in front of the Supreme Court, so you have taken a public position on the case that you swore was founded in the facts and law. Do you think the *Citizens United* decision represents a return to the *Lochner* era?

Response:

I argued *Citizens United* before the Supreme Court on behalf of the United States, and as an advocate in that case I was convinced of the strength of the government's arguments. Those arguments are best expressed in the government's supplemental briefs in the case. The Court ruled against the government, and that decision is a precedent of the Court. If confirmed, I would give *Citizens United* full stare decisis effect. I would evaluate arguments in any future case on this issue as an independent, impartial judge, not as an advocate for the government.

14. In his opening statement, Senator Cardin said that he had "been troubled by the increasing number of 5-4 decisions over the last five years in which a divided Supreme Court reversed decades of progress and precedent with rulings that side with powerful corporate interests, rather than protecting individual rights." Senator Cardin went on to say that in a "5-4 split decision, *Gross v. FBL Financial*, the court made it easier for corporate America to discriminate against aging baby boomer workers." In *Gross*, the Court merely held that a person suing his employer on a claim of age discrimination was required to prove that age discrimination was the cause-in-fact of his adverse employment action. Do you think this decision was an activist decision that "reversed decades of progress"?

Response:

I do not think it would be appropriate for me to comment on the correctness of a precedent of the Court.

15. In a memorandum you wrote to Justice Marshall concerning the case of *Citizens for Better Education v. Goose County Consol. Independent School District*, 484 U.S. 804 (1987) (dismissing appeal for want of substantial federal question), you endorsed a school rezoning plan that explicitly took race and ethnicity into account. The plan did so even though there was no history of segregation in the schools at issue.

a. You called this rezoning plan "amazingly sensible," "fair-minded[]," and "good sense." Please explain how your belief that the rezoning plan was "amazingly sensible" is relevant to the constitutional analysis.

Response:

It has been over 20 years since I reviewed the pleadings and factual record in this case. My recollection is that when I said the plan was "amazingly sensible," I meant that it was narrowly tailored to achieve the district's goals.

b. In 2007, the Supreme Court struck down a nearly identical plan in the case of *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). Based upon your comments in your memorandum to Justice Marshall, is it fair to assume that you believe the *Seattle* case was wrongly decided? Please explain why or why not.

Response:

I do not recall the facts of *Citizens for Better Education* well enough to comment on whether the court of appeals' decision in that case was consistent with *Parents Involved*. *Parents Involved* is settled law, entitled to stare decisis effect. I do not believe it would be appropriate for me to comment on the correctness of *Parents Involved*.

16. In a memorandum you wrote to Justice Marshall concerning the case of *Bowen v. Kendrick*, 487 U.S. 589 (1988), you endorsed a district court ruling that opined that religious organizations engage in "indoctrination" in their pregnancy prevention

efforts. You wrote, "I think the [district court] got the case right," and observed, "when the government funding is to be used for projects so close to the central concerns of religion, all religious organizations should be off limits." During your confirmation hearings for Solicitor General, you disavowed your comments in this case, stating that your memorandum was "the dumbest thing I ever read" and "deeply mistaken."

a. Was this the only memorandum you wrote for Justice Marshall that you believe is "deeply mistaken"?

Response:

I wrote more than 500 certiorari memos for Justice Marshall over the course of the term I clerked for him, more than two decades ago. I am sure that more than one was mistaken.

b. If this was not the only memorandum you wrote that was "deeply mistaken," what other memoranda that you wrote are now, in your view, deeply mistaken?

Response:

I have not reviewed the full set of memoranda. Of those I have seen, the memo about *Bowen v. Kendrick* seems the "dumbest."

17. In the case of *Schmidt v. Ohio*, 484 U.S. 942 (1987) (cert. denied), Christian parents had decided to educate their daughter at home, but did not seek the permission of the school district superintendent as required by an Ohio statute. They were convicted of violating the statute. The state supreme court rejected the parents' argument that the statute violated their First Amendment right to religious freedom, and they petitioned the Supreme Court for review. 505 N.E.2d 627 (Ohio 1987) (syllabus of court). The state court described the parents as "'born-again Christians,' [who] believe that it is their undelegable duty as parents to educate Sara themselves. [They] undertook to teach Sara at home with assistance from a correspondence curriculum they obtained from Winchester Christian Academy, a private, non-chartered school located in Columbus." *Id.* In your memorandum to Justice Marshall concerning the case, you described the parents quite differently, calling them "self-described born-again Christians who adhere to a literal interpretation of the Bible and have little sympathy with the secular world." What did you mean when you described the parents as having "little sympathy with the secular world"?

Response:

I would have to read the parents' petition to know precisely what I meant by this phrase. The lower court decision indicates that the parents refused all contact with administrators of the public school system. As that decision noted, the parents believed "that their religious beliefs not only required them to educate" their daughter "themselves, but also forbade them from

seeking" the school superintendent's "permission to do so." *State v. Schmidt*, 505 N.E.2d 627, 627 (Ohio 1987).

18. In a memorandum you wrote to Justice Marshall concerning the case of *Miner v. New York Dept. of Correctional Services*, 488 U.S. 941 (1988) (cert. denied), you endorsed the use of the Full Faith and Credit Clause to impose one state's definition of marriage on another state. In *Miner*, a prisoner in New York entered into a sham marriage in Kansas via proxy, so that he could take advantage of rights to conjugal visits. The prisoner had been convicted of committing a murder-for-hire by stabbing a woman 21 times for $1,000, which he wanted so that he could buy a new motorcycle. *People v. Safian*, 396 N.Y.S.2d 432, 433-35 (N.Y.A.D. 1977). The marriage was illegal under New York law, but the prisoner argued that the Full Faith and Credit Clause required New York to recognize the sham marriage as valid.

a. Nowhere in your memorandum did you mention the circumstances concerning the prisoner's heinous crime. Why did you think that this information was not relevant to Justice Marshall's consideration of these cases?

Response:

In this memo, I advised Justice Marshall to request a response from the State so that the Court could make its decision on certiorari on the basis of full briefing. I do not now recall whether or how the circumstances of the petitioner's crime were relevant to the Full Faith and Credit issue in the case (i.e., whether New York needed to recognize a marriage considered valid in Kansas, or whether the public policy exception allowed New York not to do so). But I presumably thought at the time that the decision to ask the State to file a brief opposing certiorari did not depend on the circumstances of the petitioner's crime.

b. In your tribute to Justice Marshall, you wrote that his stories "served another function as well: they reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories – stories of people's lives as shaped by law, stories of people's lives as might be changed by law." You also noted that "Justice Marshall had little use for law as abstraction, divorced from social reality . . . his stories kept us focused on law as a source of human well-being." With this in mind, why did you deem the stories of the victims of heinous crimes unimportant, especially when you deemed the underlying stories in other cases to be very important and devoted great attention to them?

Response:

Where the circumstances of a crime were important to the legal issue in the case, and where I was advising Justice Marshall to vote for or against certiorari (as opposed to

recommending that he ask the State to submit a brief), I brought those circumstances to Justice Marshall's attention.

c. In your memorandum, you wrote that the prisoner's argument was "arguably correct."

i. Was that your own assessment of the prisoner's argument, or the argument you believed Justice Marshall would want you to make to him?

Response:

My assessment of the prisoner's claim was based on my review of his petition. The State had not filed a responsive pleading, and I advised Justice Marshall to request such a pleading, so that the Court could evaluate the opposing argument.

ii. Why did you believe it was "arguably correct" for one state to be able to force its definition of marriage on the people of another state?

Response:

I do not recall the exact argument made by the petitioner in this case. I apparently thought the argument raised sufficient issues to ask for the State to file a response.

19. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court upheld a Customs Service drug testing program for employees whose jobs involved drug interdiction, carrying a firearm, or access to classified information. You wrote that the issue presented by the case – whether the government must demonstrate individualized suspicion in order to administer an employee a drug test – was important for the Court to decide. Nonetheless, you advised Justice Marshall to "think twice" before voting to grant certiorari. You wrote, "I think the facts of this case may militate against a decent result. Customs officials are almost necessarily involved in enforcing drug smuggling laws. This involvement may lead a majority of the Court to find that the Customs Service's drug-testing program is perfectly reasonable. It might be wise to wait for a case in which the government is testing employees who have no involvement with the enforcement of narcotics laws."

a. What result would not have been "decent"?

Response:

Based on Justice Marshall's view of the law, I thought he would believe that the Fourth Amendment required probable cause to perform a drug test. And in fact, Justice Marshall dissented in *Von Raab* on this ground the following year. 489 U.S. 656, 679 (1989).

b. Was the Court's decision – that government employees responsible for enforcing drug smuggling laws could be subjected to drug tests – not a "decent" result?

Response:

Please see above.

c. **You advocated waiting for a weak drug-testing case before deciding this issue. Is it "wise," as you suggested to Justice Marshall in this memorandum, for the Court to choose cases in order to implement policy preferences?**

Response:

I gave Justice Marshall this advice based on my understanding of his view of the law and his criteria for evaluating petitions for certiorari.

20. **In a 1988 memorandum to Justice Marshall concerning *Vacanti v. United States*, 488 U.S. 821 (cert. denied), you wrote that you were "a bit shocked" that the federal government publishes a newsletter soliciting child pornographers to send items through the mails. Your successor clerk added by handwritten note a crucial fact – that the petitioner had been swapping and collecting child pornography for a decade prior to his arrest.**

a. **Given that predisposition is key to the government's argument that a criminal was not entrapped, why did you consider it unimportant for Justice Marshall to know this child pornographer's decade-long history?**

Response:

I advised in this case that Justice Marshall request a response from the government to the petition for certiorari. My co-clerk wrote his note after that response had been received. I suspect that the government's response called attention to the petitioner's criminal history in a way that the petition, which was the only pleading I reviewed, did not.

b. **How do you expect investigators to discover and apprehend child pornographers like the petitioner in that case, who had been operating in secret and without detection for a decade?**

Response:

My memo did not criticize the use of sting operations to catch child pornographers. I merely expressed surprise at the particular facts of the operation at issue in this case, which involved the government's regular publication of a newsletter soliciting and offering child pornography.

21. **In *Burr v. New York*, 485 U.S. 989 (1988) (cert. denied), the petitioner's friend appeared at a police station and told police that the petitioner murdered the victim, removed his clothes, and threw the body in a manhole. Some of the informant's information was verified when the police observed a body in the sewer and found the clothing and a knife nearby. In a full statement by the friend, he described in horrific detail a very violent murder and the murderer's statement to him that he**

was going to Texas. After midnight that night, the police arrested the petitioner in his apartment. The New York courts concluded that there were sufficient exigent circumstances to justify a warrantless arrest. You disagreed, writing, "According to the state courts, police officers discovered late at night (on a Saturday) that [petitioner] had committed a homicide and that [petitioner] was preparing to flee to Texas. I'm not sure if these circumstances qualify as sufficiently 'exigent' to justify a warrantless arrest, but the case is fact-specific and this Court would almost certainly affirm the state court judgment."

a. What other circumstances would have been required in this case for you to find "exigent circumstances"?

Response:

I do not recall the details of this case. It may have been that I thought the government had not presented sufficient evidence that the defendant's departure for Texas was imminent.

b. In a handwritten note after reviewing the Government's response, you added, "I continue to believe that they [the facts] did not [support the arrest], but I cannot see anything good coming out of review of this case by this Court." When you wrote, "I continue to believe," you clearly were not "channeling" Justice Marshall. What did you fear that "this Court" would have done in reviewing the case?

Response:

When I said that "I continue[d] to believe that" the facts did not support the arrest, I was expressing my assessment of the case based on Justice Marshall's view of the law relating to warrantless arrests. When I said that "I cannot see anything good coming out of review of this case by this Court," I was making a prediction about the outcome of the case if the Court were to grant certiorari, again based on Justice Marshall's view of the law.

22. In *Boles v. Foltz*, 484 U.S. 857 (1987) (cert. denied), the defendant indicated at his arraignment on larceny charges that he wanted a lawyer before proceeding, and the judge ceased the proceeding. Four days later, after officers read the defendant his *Miranda* rights and he signed a waiver, the police interrogated him about the larceny and a recent murder. The defendant confessed to the murder, and on review, the Sixth Circuit rejected the defendant's argument that police interrogation was prohibited by his request for counsel at the arraignment, instead finding that his ambiguous statement was a request for counsel only at the hearing. In a memorandum to Justice Marshall, you wrote, "I think that the admission of this statement is outrageous. This Court should hold that [petitioner] invoked his right to counsel so as to preclude police officers from initiating interrogation. I worry, however, that the Court might reach the opposite result so that all ambiguous statements in the future will be construed in favor of the police."

Last month in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), in holding that a criminal suspect must unambiguously invoke the right to remain silent, the Supreme Court reiterated that a suspect must invoke the *Miranda* right to counsel "unambiguously" and if a statement is "ambiguous or equivocal," the police are not required to end the interrogation or clarify the suspect's intentions. *Id.* at 2259-60. Based on your "worry" that "ambiguous statements . . . will be construed in favor of the police," do you think the *Thompkins* decision is "outrageous?"

Response:

I served as counsel of record for the federal government in *Berghuis v. Thompkins*, and in my judgment, the arguments made in the government's brief were well supported by the law. I do not think it would be appropriate for me to comment any further on the correctness of a Supreme Court decision.

23. In *Patterson v. United States*, 485 U.S. 922 (1988) (cert. denied), the petitioner was arrested in Mexico for using counterfeit money. After Mexican authorities interrogated him and while the petitioner was still in Mexican custody, a Secret Service agent interviewed him. Based on the interview, the agent executed a search warrant on a printing shop in San Diego, recovering counterfeiting equipment and $1.5 million in counterfeit bills. The trial court suppressed the petitioner's un-*Mirandized* statements, but denied the petitioner's motion to suppress the physical evidence obtained pursuant to the search warrant, and the Ninth Circuit affirmed. The petitioner's statement, which was "concededly voluntary, was properly used to establish probable cause" for the search warrant. In a memorandum to Justice Marshall, you wrote: "I think this holding does great disservice to the *Miranda* rule, but the Court's recent decisions – most notably *Oregon v. Elstad* [470 U.S. 298] (1985) – provide support for it. It seems to me likely that this Court would use this case to curtail even further the scope and meaningfulness of *Miranda* protections."

a. What was the "disservice" you thought was done to *Miranda*?

Response:

My recollection of this case is that I thought Justice Marshall would have viewed the admission of evidence derived from statements obtained in violation of *Miranda* to undermine the *Miranda* rule.

b. *Oregon v. Elstad* held that unwarned admissions must be suppressed, but subsequent knowing and voluntary statements need not be. Justice O'Conner wrote that the holding "in no way retreat[ed] from the bright-line rule of *Miranda*." You suggest in your memorandum that *Elstad* "curtail[ed]" *Miranda*. How so?

Response:

In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court held that the failure of law enforcement officers to administer *Miranda* warnings to a defendant in custody did not

taint subsequent admissions made by the defendant after he was fully advised of and had waived his *Miranda* rights. Justice Marshall joined Justice Brennan's dissent, which argued that the Court's decision "extends a potentially crippling blow to *Miranda*" by declining to extend the "fruit of the poisonous tree" doctrine to *Miranda* violations. *Id.* at 319 (Brennan, J., dissenting). The dissent explained, "[i]f violations of constitutional rights may not be remedied through the well-established rules respecting derivative evidence, as the Court has held today, there is a critical danger that the rights will be rendered nothing more than a mere 'form of words.'" *Id.* at 320. This was Justice Marshall's view of the law, and my certiorari memorandum to him on the *Patterson* case was written through the prism of that view.

c. What did you fear the Court would do to "curtail" the "scope and meaningfulness" of *Miranda*?

Response:

My recollection is that I predicted the Court was likely to decide that physical evidence discovered from executing a search warrant supported by statements obtained in violation of *Miranda* was admissible evidence. Based on Justice Marshall's dissent in *Elstad*, I understood that he would view such a decision as curtailing the scope and meaningfulness of *Miranda*.

24. In *Tompkins v. Texas*, 490 U.S. 754 (1989) (aff'd *per curiam* by an equally divided Court), you wrote a note to Justice Marshall where you observed: "The best chance of getting the Texas death penalty statute declared unconstitutional lies in limiting the grant on this case . . . ." Why did you believe the Texas death penalty statute was unconstitutional?

Response:

Justice Marshall believed the Texas death penalty statute was unconstitutional, and this memorandum offered advice based on my understanding of his view of the law.

25. In *Lingar v. Missouri*, 484 U.S. 872 (1987) (cert. denied), the Supreme Court declined to review a death sentence where the petitioner argued that (1) the jury's venireman should have been stricken for cause, and (2) evidence of his homosexuality was improperly admitted into evidence at the penalty phase of trial. You wrote a memorandum recommending the vacating of the sentence below and remanding for further proceedings. You observed on the venireman issue: "This would not be a good question to review; it is fact-bound, and we would lose given that the juror ultimately stated unequivocally that he could comply with the law." Who is the "we" you were referring to?

Response:

My recollection is that the phrase "we would lose" was shorthand for advising Justice Marshall that his view of the law was unlikely to prevail in this case.

26. In a memorandum you wrote to Justice Marshall concerning the case of *Benevento v. United States*, 486 U.S. 1043 (1988) (cert. denied), you observed, "[T]here is no good reason to place an exclusionary-rule issue before this Court, which will doubtlessly only do something horrible with it." What was the "horrible" outcome concerning the exclusionary rule you feared would be reached by a majority of the Supreme Court?

<u>Response:</u>

Justice Marshall's views on the exclusionary rule were different from those of a majority of the Court, as expressed for example in the dissent he joined in *Oregon v. Elstad*. My recollection is that this sentence was meant to suggest to him that, if the Court granted certiorari in this case, it would likely decide the case in a manner that was inconsistent with his views on the exclusionary rule.

27. In *United States v. Kozminski*, 487 U.S. 931 (1988), the petitioners were convicted of holding two mentally retarded farm workers in involuntary servitude and of conspiring to deprive them of constitutional right to be free from involuntary servitude. You wrote a memorandum recommending the granting of certiorari, because "[t]here is a circuit split on this issue." You also agreed with the Solicitor General's call for an expansive reading of involuntary servitude, noting that the Solicitor General was "for once on the side of the angels . . . ." Please give some examples of cases in which the Solicitor General at that time, Charles Fried, was not "on the side of the angels."

<u>Response:</u>

I do not recollect specific examples. As a general matter, Justice Marshall's views on criminal procedure issues tended not to be aligned with the positions taken by the federal government.

28. You have described Justice Marshall as your "hero" and his "vision of the Court and the Constitution" ("to safeguard the interests of people who had no other champion") as "a thing of glory." Justice Marshall, along with Justice Brennan, believed that the death penalty was unconstitutional under any circumstances. In their concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972), they wrote that they would have held that any use of the death penalty is *per se* a violation of the Eighth Amendment.

a. Do you agree that the death penalty is *per se* unconstitutional?

<u>Response:</u>

The Supreme Court has long held that the death penalty is not per se unconstitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976). *Gregg* is a precedent of the Court entitled to full stare decisis effect.

b. If not, do you agree that it is settled law that the death penalty is constitutional?

Response:

Yes.

c. Are there any express references to capital punishment in the Constitution?

Response:

Yes. The Fifth Amendment states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury." The Fourteenth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law."

d. Where applicable, does the plain text of the Constitution control questions of application of the Bill of Rights?

Response:

Yes.

e. Do you agree that Justices Brennan and Marshall engaged in judicial activism when they ignored the text of the Constitution and centuries of Supreme Court precedent to try to outlaw capital punishment?

Response:

I do not think it would be appropriate for me to criticize the views or opinions of particular Justices, especially one for whom I worked and to whom I owe a great debt. The Supreme Court has held that the death penalty is not per se unconstitutional, and that holding is settled law.

29. In response to questions from Senator Kyl, you acknowledged that "the Solicitor General's office does, from time to time … have some communications with members of the White House with respect to particular cases."

a. In how many cases during your time as Solicitor General have you or your office had communications with the White House about particular cases?

Response:

I do not think it would be appropriate for me to comment on internal Executive Branch deliberations about cases, including communications with the White House.

b. **You refused to answer whether such communications occurred with respect to two cases identified by Senator Kyl – *Chamber of Commerce v. Candelaria* and *Lopez-Rodriguez v. Holder*. The decisions about which Senator Kyl inquired have already been made – you decided to urge the Court to grant *certiorari* in *Candelaria* and you decided not to seek further review in *Lopez-Rodriguez v. Holder*. Senator Kyl's question did not seek any information protected by a "deliberative process" privilege, and he did not ask you to divulge to the Committee any of the content of the discussions that may or may not have occurred with respect to these cases. His question was limited to the basic fact of whether your office had communications with the White House with respect to these two cases.**

When asked by Senator Grassley about your role in the Justice Department's filings in *Smelt v. United States*, you volunteered that you and members of your office "reviewed some briefs" and "participated in some discussions" with others in the Department of Justice without divulging any of the content of those consultations. As your answer to Senator Grassley shows, the mere fact that consultations outside the Office of the Solicitor General took place in a specific case is not privileged.

With the narrow parameters of the question in mind, please answer whether you or your office had communications with the White House with respect to *Chamber of Commerce v. Candelaria* or *Lopez-Rodriguez v. Holder*.

Response:

In response to a question from Senator Grassley about the Justice Department's litigation strategy in *Smelt v. United States*, I stated that I was not the "decision-maker" in this case, because the case was in district court, "and the Solicitor General's decision-making responsibilities take over in the appellate" courts. I also noted that "members of my office and I reviewed some briefs and participated in some discussions," but "I can't reveal any kind of internal deliberations of the Department of Justice." That another Justice Department component had primary responsibility for a case at the district court level is not confidential information. And I have thought it appropriate in the context of the Senate's consideration of my nomination to provide information about my own participation in various matters. The information Senator Kyl requested is different. Communications between the Office of the Solicitor General and other Executive Branch entities, including administrative agencies and the White House, are part of the government's confidential deliberative process in developing litigation positions and strategy. Therefore, I do not believe it would be appropriate for me to discuss such communications.

c. **Please answer the following questions regarding you and your office's involvement in District Court litigation. If you decline to answer any of the following questions, please explain the legal basis for your refusal. Please also explain how any such refusal to answer these questions is consistent with your willingness to discuss with Senator Grassley your role in *Smelt*.**

i. **At what point in time did you and members of your office "review[] briefs" and "participate[] in some discussions" in relation to the *Smelt v. United States* litigation?**

Response:

I reviewed some briefs in the *Smelt* case and participated in discussions about the case shortly before the briefs were filed. My participation in the case was sufficiently substantial that I would recuse myself if I were confirmed and this case were to come before the Court.

ii. How did the *Smelt* litigation in District Court first come to your attention as Solicitor General?

Response:

I do not recall exactly how the *Smelt* litigation first came to my attention. The case was handled by lawyers in the Civil Division, operating under the supervision of the Office of the Associate Attorney General, the Office of the Deputy Attorney General, and the Office of the Attorney General. I was one of a number of other people in the Department consulted by those offices about the litigation.

iii. Did you or your office have communications with anyone in the White House regarding the Federal government's position in *Smelt* or regarding the arguments the Federal Government would or would not pursue in *Smelt*?

Response:

I do not believe it would be appropriate for me to discuss internal Executive Branch deliberations about a particular case.

iv. Did you or your office "review[] briefs" and/or "participate[] in some discussions" in relation to the case of *Gill v. Office of Personnel Management*, currently pending in the U.S. District Court for the District of Massachusetts? If so, how did the *Gill* litigation come to your attention as Solicitor General?

Response:

Yes. I believe that discussions about *Gill* overlapped with discussions about *Smelt*.

v. Did you or your office have communications with anyone in the White House regarding the Federal government's position in *Gill* or regarding the arguments the Federal Government would or would not pursue in *Gill*?

Response:

I do not believe it would be appropriate for me to discuss internal Executive Branch deliberations about a particular case.

d. During your tenure as Solicitor General, in how many cases still before the District Courts of the United States have you reviewed briefs or participated in discussions about legal strategy? Please identify such cases.

Response:

The primary function of the Office of the Solicitor General is to represent the United States before the Supreme Court and to oversee the representation of the federal government in the courts of appeals. In the normal course, the Office does not participate in district court litigation. In some circumstances, however, the Solicitor General or a lawyer in the Office may be consulted on a district court case that raises significant legal issues. Because these consultations are usually informal, the Office does not keep records of them. In addition to the cases referenced in other parts of this question, I recall participating in discussions about legal strategy in a number of cases involving the detainees at Guantanamo Bay and other national security matters.

e. From the time of your confirmation as Solicitor General, in how many cases before the District Courts of the United States have you or your office organized, hosted, or otherwise participated in meetings or discussions about the United States' discovery responses or motions regarding discovery? Please identify such cases.

Response:

As noted above, the Office of the Solicitor General does not participate in district court litigation in the normal course. Because participation in district court litigation by lawyers in the Office is usually informal, the Office does not keep records of such participation. Other than the single meeting referenced below, I do not recall personally participating in any such meetings.

i. Did you organize, host, or otherwise participate in meetings to discuss the United States' responses to discovery requests or to motions or orders to compel discovery in the case of *Log Cabin Republicans v. United States*?

Response:

To the best of my recollection, I participated in one such meeting.

ii. Did anyone else in your office participate in such meetings regarding this litigation?

Response:

Yes. Two career attorneys from the Office also attended the meeting.

30. In *Christian Legal Society v. Martinez*, the Supreme Court considered a case in which Hastings College of Law refused to allow a Christian organization to register as an official campus student group. Christian Legal Society wanted to exclude students from officer and voting membership positions who did not agree with the faith principles of the organization, and Hastings said that exclusion violated the school's nondiscrimination policy. The brief for Christian Legal Society argues that "[t]he First Amendment does not allow governmental institutions to deny this associational freedom to religious groups, while protecting the rights of everyone else." For this proposition, it cites your article, *The Changing Faces of First Amendment Neutrality*, quoting you as saying that viewpoint-based "selective subsidization" is "more troublesome than a complete absence of public funding," and warrants a "strong presumption of unconstitutionality . . . rebuttable only upon a showing of great need and near-perfect fit."

a. Do you agree that if Hastings has denied an associational freedom to a religious student group that it has granted to other groups, such a denial would be presumptively unconstitutional?

Response:

I do not think it would be appropriate for me to comment on a recent decision of the Supreme Court. As a general matter, I continue to believe that the First Amendment generally prohibits the government from subsidizing some points of view but not others; the example I gave in the article was a law providing for public funding of all speech endorsing incumbent city officials in reelection campaigns.

b. Christian Legal Society argues in the case that its right to free exercise of religion prevents the school from forcing it to accept students as voting members who do not agree with its religious tenets. While in the Clinton Administration, you wrote a memorandum urging the Supreme Court to reverse a case in which the California Supreme Court ruled against a landlord's rights to refuse to rent to unmarried couples on the basis of her religious beliefs. You said in that context that the plurality's opinion was "quite outrageous—almost as if a court were to hold that a state law does not impose a substantial burden because the complainant is free to move to another state." You agreed with the landlord's right to exclude on the basis of religious beliefs without having to forfeit the ability to do business in the state in which a nondiscrimination law applied. Would you also agree that Christian Legal Society should have the right to exclude students from leadership on the basis of religious belief without having to forfeit the ability to operate as an officially recognized student organization on campus?

Response:

I do not believe it would be appropriate for me to comment on the correctness of a particular Supreme Court decision.

31. Please describe with particularity the process by which these questions were answered.

Response:

Responses to these questions were drafted by legal staff of the White House based on my guidance. I edited these draft responses, and gave final approval to all answers.

32. Do these answers reflect your true and personal views?

Response:

Yes.