S. HRG. 109–46

CONFIRMATION HEARING ON THE NOMINATION OF PAUL D. CLEMENT TO BE SOLICITOR GENERAL OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

APRIL 27, 2005

Serial No. J–109–16

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

21–706 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ARLEN SPECTER, Pennsylvania, *Chairman*

ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
SAM BROWNBACK, Kansas
TOM COBURN, Oklahoma

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

DAVID BROG, *Staff Director*
MICHAEL O'NEILL, *Chief Counsel*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

PRESENTER

STATEMENT OF THE NOMINEE

QUESTIONS AND ANSWERS

SUBMISSION FOR THE RECORD

NOMINATION OF PAUL D. CLEMENT TO BE SOLICITOR GENERAL OF THE UNITED STATES

WEDNESDAY, APRIL 27, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Coburn, and Feingold.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. It is precisely 9:30 and the Judiciary Committee will now proceed to the nomination of Paul D. Clement, to be Solicitor General of the United States.

Mr. Clement comes to this position with an outstanding record in his academic work and his professional work and in Government service. He graduated summa cum laude from Georgetown University, received a master's in philosophy with distinction from Cambridge, a law degree from the Harvard Law School, magna cum laude.

He has served in the Office of Solicitor General for the past four years as the Principal Deputy Solicitor General and has argued more than 20 cases in the U.S. Supreme Court, which would make any lawyer envious.

Starting the questions a little earlier than anticipated, Mr. Clement, was that beautiful child related to you—is that beautiful related to you?

Mr. CLEMENT. He was, indeed.

Chairman SPECTER. He is, indeed.

[Laughter.]

Mr. CLEMENT. We will see about that.

[Laughter.]

Chairman SPECTER. When I was sworn as an assistant district attorney, my oldest son was 22 months, and right in the middle of the swearing-in—it wasn't covered by C–SPAN—he rushed up to the bar and started to make a fuss precisely as your child did. So I think that is a good omen for all of us.

Before joining the Government, Mr. Clement headed up the appellate practice of the Washington staff of King and Spalding. He

served as chief counsel to Senator Ashcroft, so he is a member of the Senate family. He served as a law clerk to Justice Scalia, and also to D.C. Circuit Judge Lawrence Silberman.

At this point, I am going to turn the hearing over to Senator Coburn because I have been invited to come to the White House for a signing ceremony. But I appreciated the opportunity to meet with you informally earlier this week and know of your outstanding record.

Senator Coburn will preside at the hearing, and I want to thank him for taking on this extra task. He has been very industrious as a first-term Senator. Of course, he has been a Senator now for almost four months, but he has put in more time already than some Senators do in a full term or beyond. He has been at the hearings, been at the meetings. Yesterday, we had a lengthy hearing that he attended all of.

We are in the midst of working on a very complicated asbestos bill and he has brought special expertise to that issue by virtue of his dual profession, Senator and doctor. He will have to decide, if he wants to comment, which is first and which is second, but I do thank him for presiding at the hearing and I now turn thegavel over to Senator Coburn.

Senator COBURN [presiding.] Thank you, Mr. Chairman.

Welcome, Mr. Clement. And thank you for those fine words, Mr. Chairman.

I would like to recognize Senator Feingold, if I might, and then we will continue the hearing.

Senator Feingold.

PRESENTATION OF PAUL D. CLEMENT, NOMINEE TO BE SOLICITOR GENERAL OF THE UNITED STATES BY HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you very much, Mr. Chairman. First, I would like to ask unanimous consent that Senator Leahy's statement be included in the record.

Senator COBURN. Without objection.

Senator FEINGOLD. Mr. Chairman, it is my pleasure to be here and to introduce to the Committee Paul Drew Clement, whom the President has nominated to serve as Solicitor General of the United States.

As we all know, the position of Solicitor General is an extremely important post in our Government. It is the third-ranking position in the Department of Justice, but because the Solicitor Generalserves as the voice of the United States Government at the United States Supreme Court, the position comes with extra stature and responsibility.

Paul Clement is a son of Wisconsin and is well-qualified to carry out these singular responsibilities. He is a graduate of Cedarburg High School, outside of Milwaukee, a summa cum laude graduate of the Georgetown University School of Foreign Service, and received his J.D. magna cum laude at Harvard Law School, where he was an editor of the law review. He also received a master's degree from Cambridge University, in England.

After he is graduation from law school in 1992, Mr. Clement clerked for Judge Lawrence Silberman on the D.C. Circuit and for Supreme Court Justice Antonin Scalia. He has worked in private practice for the firms Kirkland and Ellis, and King and Spalding. In between his stints at those firms, he was then-Senator John Ashcroft's chief counsel on this Committee for two years.

From the beginning of the Bush administration in 2001, Mr. Clement has been the Principal Deputy Solicitor General and has served as Acting Solicitor General since the recent departure of Ted Olson from that position. He has argued 26 cases before the Supreme Court over the past four years, including some of the highest-profile cases of the past few terms, such as TENNESSEE v. LANE, *United States* v. *Booker* and the Hamdi and Padilla cases. Paul is regarded as a truly outstanding oral advocate, one of the best in the country today.

You can see from this resume that Paul has accomplished quite a lot in his still young career. If confirmed, he will be the youngest Solicitor General in over 50 years, and only three other occupants of the office in its history have been younger than him. One of them was William Howard Taft, who became Solicitor General when he was only 32 years old.

Mr. Chairman, I agreed to introduce Paul Clement to the Committee not only because of his impressive resume, and certainly because he worked as an intern during college for a Wisconsin Senator whom I defeated in 1992. No. I am doing this because of how he carried out his responsibilities in another case he argued before the Supreme Court, McConnell v. FEC, the case testing the constitutionality of the Bipartisan Campaign Reform Act, sometimes referred to as the McCain-Feingold bill.

I am not sure how many people remember that when McCain-Feingold passed the Senate, there was some doubt and concern about how vigorously the Justice Department would defend it in court. I sought and received pledges from both the Attorney General and the Solicitor General at the time in their confirmation hearings that they would defend the law if Congress passed it.

When the time came for oral argument, Ted Olson defended Title I, the soft money ban, and Paul Clement argued in favor of the constitutionality of Title II, the provisions dealing with issue ads. Seth Waxman, Solicitor General in the Clinton administration, represented the bill's principal sponsors in the argument.

Now, that was truly a legal dream team, and Paul's performance, which I witnessed personally, was superb, every bit as good as his two senior colleagues. He argued for 40 minutes without notes and with complete command of both the intricacies of the statute and the legal precedents bearing on the case. In the end, as we all know, the Supreme Court upheld all of the major provisions of our bill, including Title II, which most legal observers believed was the most susceptible to constitutional challenge.

So, Mr. Chairman, it is based on personal experience that I can say with confidence that Paul Clement will faithfully execute his responsibilities as Solicitor General. I am sure there will be times when I will disagree with a position he and his office will take. That internship with Senator Kasten he held long ago was probably a good indicator of that, but I am certain that Paul will per-

form his duties with professionalism and integrity and I am truly honored to appear on behalf today.

Thank you, Mr. Chairman.

Senator COBURN. Thank you, Senator.

Senator Kohl and House Judiciary Chairman Sensenbrenner have asked that their statements be made a part of the record. They will be made a part of the record, without objection.

I just have a couple of brief comments. I, too, am supporting this nomination, even though I was very disappointed in the Supreme Court review of McCain-Feingold in terms of the limitation of free speech.

I would ask that you now stand and take an oath before this Committee.

Do you swear that the testimony you are about to give before the Committee will the truth, the whole truth and nothing but the truth, so help you God?

Mr. CLEMENT. I do.

Senator COBURN. Thank you. Be seated.

I just have a few questions for you, if I might, and I am here in my capacity as a citizen of the United States, as well as a Senator and a doctor, to answer our Chairman's comment.

You have been in the Solicitor General's office since 2001 and you have argued 26 cases. What is the change that has come about since 2001 to now and what changes will you make in terms of that office if you become the Solicitor General of the United States?

Mr. CLEMENT. Well, Senator, thank you for that question. I think that in the time that I have been in the Office of the Solicitor General, I wouldn't say that the office has changed very much at all, and I think that one of the things that is one of the really valued traditions in the Office of the Solicitor General is the fact that there is a great continuity in the office, there is a great tradition in the office.

As you may know, there really are only two positions in the Office of the Solicitor General that vary from administration to administration. There is the Solicitor General himself or herself and then there is one Principal Deputy Solicitor General that vary from administration to administration.

All the other lawyers in the office, all the other public servants in the office stay from administration to administration, and I think that continuity is really important. And I will certainly look for ways to try to improve the operation in small ways and to try to fine-tune operations, but I also think that by and large I ascribe to the aphorism that if it is not broken, then don't try to fix it. And I think the Office of the Solicitor General, in my humble view, in any event, is not broken, and so I wouldn't envision any major overhaul of the office or its functions.

Senator COBURN. Thank you. I have actually erred. I should have given you an opportunity for an opening statement, which I will do now.

STATEMENT OF PAUL D. CLEMENT, OF WISCONSIN, NOMINEE TO BE SOLICITOR GENERAL OF THE UNITED STATES

Mr. CLEMENT. Well, I appreciate that, Senator. I want to thank you and thank Senator Feingold. I am honored and humbled to be

before you today. Before I say anything further, I would like to take an opportunity to introduce my family, at least those you haven't met yet, to the Committee, and I would like to start with my wife, Alexandra.

I am sure that virtually every married nominee who comes before the Committee makes a point of saying how important their spouse is in terms of the support that they receive from them, and that their public service really would not be possible without the support of their spouse, and that is certainly true in my case.

But in my case, the very fact that Alex lets me work outside the home is really quite remarkable because when I was studying law up at Harvard, Alex was across the Charles River at the business school earning her MBA. And so every day that she allows me to practice law outside the home while she stays home with our three boys is a personal sacrifice and an indulgence of my interests, for which I am eternally grateful.

Our three boys were with us. Two of them have survived, it looks like. Our oldest is Thomas Antonio. Thomas is 6–1/2 years old and he is very happy to be here because it means a day off from kindergarten. Theodore Gerald, or Theo as we call him, is 4 years old, and he is pretty happy to be on a day off from preschool, as well. Our youngest is Paul Gregory, or P.G., who made an appearance and may be with us intermittently, and he is 2 years old. All three of the boys, but especially Thomas and Theo, have been promised Yugio cards in direct proportion to how well they behave this morning. So we have high hopes.

My parents are not able to be here today. My mother just had major back surgery and my father is helping her with that recovery. So they are both back home. I know they wanted to be here, and I just want to express that my gratitude to them for placing me on a path that has brought me here today really knows no bounds.

Alex and I are also joined by many friends today, colleagues in the Office of the Solicitor General and colleagues at my former law firm, King and Spalding. I want to thank them all for being here and I really appreciate their support.

As I said at the outset, I am humbled and honored to be here today, and I am humbled, honored and grateful to the President and the Attorney General for nominating me, selecting me for this post. One of the reasons I am so grateful is that, if confirmed, I would have the opportunity to continue to serve with my colleagues in the Office of the Solicitor General.

The lawyers and other public servants in the Office of the Solicitor General are quite literally the most talented group of people that you can imagine. Collectively, they represent decades of experience representing the interests of the United States before the Supreme Court. They have been justly called the finest law firm in the Nation. And because the people in the office also are some of the nicest people and the most mutually-supportive people that you can imagine, I really personally can't imagine a better place for a lawyer to work.

One of the reasons it is such a terrific place to work is that the office has important responsibilities to each of the three branches in our system of separated powers. Most obviously, the Solicitor

General is an executive branch official, and the office defends the policies and practice of the executive branch in the courts when they are challenged.

The office quite literally sits at the crossroads of the separation of powers as the primary vehicle through which the Article II branch of Government speaks to Article III. But, of course, the office also owes important responsibilities to the Article I branch, the Congress of the United States.

Whenever the constitutionality of an act of Congress is called into question, outside a narrow band of cases implicating the President's Article II authority, the office will defend the constitutionality of the acts of Congress as long as reasonable arguments can be made in the statute's defense.

Finally, the office also owes an important responsibility to the Supreme Court of the United States. I have heard reference made to the Solicitor General as the tenth Justice of the Supreme Court. I am quick to add I have never heard that comment made by any of the nine real Justices.

[Laughter.]

Mr. CLEMENT. But that said, the Supreme Court itself does acknowledge the special role of the Solicitor General in each and every volume of the United States Reports. At the very beginning of each volume, immediately after a listing of the Justices, there is listing of the officers of the Court. And even before the listing of the more obvious candidates like the clerk of the Court, the marshal, the librarian, the reporter of decisions, each volume lists the Attorney General and the Solicitor General as officers of the Court.

Now, I think that reflects, in part, the reality that the Solicitor General is far and away the most frequent litigant before the Supreme Court. But it also reflects the reality that the Solicitor General is an officer of the Court.

The special relationship between the Office of the Solicitor General and the Court is one built on candor and trust. The lawyers in the Office of the Solicitor General are advocates, but they are advocates like no other. I think former Solicitor General Sobeloff captured this point very well when he said that the Solicitor General is not a neutral. He is an advocate, but he is an advocate whose client's business is not merely to prevail in the instant case. My client's interest is not to achieve victory. My client's interest is to establish justice.

I am very, very hopeful and proud to have the opportunity, if confirmed, to continue the fine traditions of the office and to have an opportunity to serve in an office that has such important responsibilities to all three branches of Government.

That is considerably more uninterrupted time than the Justices usually give me, so I thank you for your indulgence and I would be happy to answer any of the questions you have, Senator Coburn and Senator Feingold.

[The biographical information of Mr. Clement follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Paul D. (Andrew) Clement

2. Address: List current place of residence and office address(es.)

   A. Residence: Alexandria, VA
   B. Office: U.S. Department of Justice; 950 Pennsylvania Ave, NW; Washington, DC 20530

3. Date and place of birth.

   June 24, 1966, in Milwaukee, Wisconsin

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Alexandra Jacinto Guerreiro Clement: formerly a financial analyst, now a stay-at-home parent.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Georgetown University (8-84-5-88), BSFS (5/1988), summa cum laude;
   University of Wisconsin-Milwaukee (6-86-7-86) (summer program, no degree);
   Cambridge University (9-88-6-89), M.Phil. (10/89), with distinction;
   Harvard Law School (8-89-5-92), JD (5/1992), magna cum laude.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   United States Department of Justice, Principal Deputy/Acting Solicitor General (February 2001-Present);
   Georgetown University Law Center, Adjunct Professor (Separation of Powers Seminar) (1998-present);
   King & Spalding, Washington, DC, Partner and Head of Firm's Appellate Practice (July 1999-February 2001);

United States Senate, Committee on the Judiciary, Subcommittee on the Constitution, Federalism & Property Rights, Chief Counsel (1997-1999);
Kirkland & Ellis, Washington, DC, Associate (1994-1997);
Associate Justice Antonin Scalia, United States Supreme Court, Law Clerk. (1993-1994);
Judge Laurence H. Silberman, U.S. Court of Appeals for the District of Columbia Circuit, Law Clerk. (1992-1993);
Gibson, Dunn & Crutcher, Washington, DC, Summer Associate (1992);
Harvard University Department of Economics, Teaching Fellow (1990-1992)
Covington & Burling, Washington, DC, Summer Associate (1991);
McGuireWoods, Washington, DC, Summer Associate (1990).
Brian Clement Painting, Employee (Summer 1988)

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Georgetown University Institute for the Study of Diplomacy Junior Fellow in Diplomacy (1987-88);
Georgetown University Notz Medal (outstanding student in international economics, 1988)
Georgetown University Nevils Medal (outstanding student in US Diplomatic History, 1988)
British Foreign Office Scholar (full-funded scholarship for study at Cambridge awarded by British government, 1988-89);
Teaching Fellow, Harvard University Department of Economics (1990-1992);
Olin Fellow in Law and Economics, Harvard Law School (1991-92);
Temple Bar Scholar (4-week program in London to learn about the British legal system, 1994);
Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security (2003)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

District of Columbia Bar (Member, 1996-current)
Wisconsin Bar (Member, 2003-current)
Federalist Society, Chairman of Litigation Subcommittee on Class Actions (1998-2001), member (1998-2001).
The Administrative Office of the Courts, Advisory Committee on Federal Rules of Appellate Procedure, ex-officio member (2004-current)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Supreme Court Historical Society.
My wife and I are members of the Mount Vernon Park Association.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Virginia (11/6/1994);
District of Columbia Court of Appeals (5/3/1996);
U.S. Court of Appeals for the District of Columbia Circuit (7/31/1996);
U.S. Court of Appeals for the 8th Circuit (9/3/1996);
Supreme Court of the United States (1/24/2000);
U.S. Court of Appeals for the 6th Circuit (3/2/2000);
U.S. Court of Appeals for the 10th Circuit (3/22/2000);
U.S. Court of Appeals for the 4th Circuit (3/30/2000);
U.S. Court of Appeals for the Federal Circuit (4/19/2000);
U.S. Court of Appeals for the 7th Circuit (1/9/2001);
U.S. Court of Appeals for the 9th Circuit (6/14/2002);
Supreme Court of Wisconsin (5/29/2003);
U.S. Court of Appeals for the 2nd Circuit (5/29/2003).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

PUBLICATIONS (copy attached):

A Practitioner's-Eye View of the Court, Legal Times (August 12, 2002)

When Uncle Sam Steps In (with Viet Dinh), Legal Times (June 19, 2000).

Constitution Provides No Support for Opponents of Preemption (with Viet Dinh), Washington Legal Foundation, Legal Backgrounder (November 12, 1999)

Class Action Watch, A Publication of the Federalist Society's Litigation Practice Group and Its Class Actions Subcommittee (From the Editors column) (Fall 1999)

Class Action Watch, A Publication of the Federalist Society's Litigation Practice Group and Its Class Actions Subcommittee (From the Editors column) (Spring 1999)

Class Action Watch, A Publication of the Federalist Society's Litigation Practice Group and Its Class Actions Subcommittee (From the Editors column) (Fall 1998)

Diversity Jurisdiction: Mend it; Don't End It, Litigation News (Spring 1998);

Supreme Court Decision Bolsters Tort Reform Efforts, Washington Legal Foundation, Legal Opinion Letter (November 1, 1996)

Note, An Economic Analysis of Punitive Damages, 105 HARVARD LAW REVIEW 1900 (1992);

Case Comment, Cohen v. Cowles Media Co., 105 HARVARD LAW REVIEW (1991)

SPEECHES (I generally do not use a prepared text for speeches, and so I do not have copies of the speeches below. The Legal Times transcript article [attached] and the C-Span coverage of the two speeches provide a fairly representative sample of the speeches. I do not have copies of the speeches that were broadcast on C-Span, but I understand they are available for purchase on the C-Span store portion of the C-Span website.):

Supreme Court Preview (OT 2004), Pepperdine Law School, Malibu, CA (11-16-04)

Law and Terrorism Panel, Third Circuit Judicial Conference, Hershey, PA (11-5-04)

International Law and the U.S. Supreme Court, Georgetown University, Washington, DC (10-12-04) (n.b.: this speech was broadcast by C-SPAN)

Supreme Court Preview (OT 2004), Coke Inn of Court, Washington, DC (9-20-04)

Supreme Court Review (OT 2003)/Preview (OT 2004), Federalist Society, Milwaukee, WI (9-16-04) (n.b.: this speech was broadcast by C-SPAN)

Supreme Court Review (OT 2003), Federalist Society, Charleston, SC (7-22-04)

Supreme Court Review (OT 2003), Federalist Society, Philadelphia, PA (7-21-04)

International Law in Supreme Court (OT 2003), DC Bar, International Section, Washington, DC (7-8-04)

Law and Terrorism Conference Panel, U.S. Military Academy, West Point, NY (4-16-04)

Global Forum Shopping Conference, U.S. Chamber of Commerce, Washington, DC (3-25-04)
Law and Terrorism Panel, National Association of Women Judges, Washington, DC (10-10-03)
Supreme Court Preview (OT 2003), Coke Inn of Court, Washington, DC (9-03)
ABA, Administrative Law Section, Great Debates Series, Walker v Cheney, Washington, DC (6-27-03)
First Amendment and the Internet Panel, Bruce Ennis Foundation, Washington, DC (11-21-02)
Law & Terrorism Panel, Boalt Hall, Berkeley, CA (10-26-02)
Supreme Court Review (OT 2001) Panel, Georgetown University Law Center, Washington, DC (7-17-02) (n.b.: transcript of this panel discussion was published in Legal Times on 8-12-02) (attached)
Supreme Court Review (OT 2001), Federalist Society, Milwaukee, WI (6-02)
Law and Terrorism Panel, DC Bar, Annual Judicial and Bar Conference, Washington, DC (4-19-02)
Supreme Court Review (OT 2001), Defense Research Institute, Seminar on Life, Health, Disability and ERISA Issues, Washington, DC (4-12-02)
Supreme Court Mid-Term Review (OT 1999), Washington Legal Foundation, Washington, DC (2-8-00)
Constitutional Issues Facing the 106th Congress, Federalist Society, Pittsburgh, PA and Philadelphia, PA (5-99)
Supreme Court Review (OT 1995), Washington Legal Foundation, Washington, DC (7-96)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. 8/3/04.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

United States Department of Justice, Acting/Principal Deputy Solicitor General (February 2001-Present) (appointed);
United States Senate, Judiciary Subcommittee on the Constitution, Federalism & Property Rights, Chief Counsel (1997-1999) (appointed);
Justice Antonin Scalia, United States Supreme Court, Law Clerk. (1993-1994) (appointed);

Judge Laurence H. Silberman, U.S. Court of Appeals, District of Columbia Circuit, Law Clerk. (1992-1993) (appointed);
White House Office of Public Liaison, Intern (1987) (appointed);
United States Senator Robert W. Kasten, Intern (1985-86) (appointed).

15. Legal Career:

A. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Associate Justice Antonin Scalia, United States Supreme Court, Law Clerk. (1993-1994);
Judge Laurence H. Silberman, U.S. Court of Appeals for the District of Columbia Circuit, Law Clerk. (1992-1993);

2. whether you practiced alone, and if so, the addresses and dates;

No

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

United States Department of Justice, Principal Deputy/Acting Solicitor General (February 2001-Present); 950 Pennsylvania Ave, NW; Washington, DC 20530.
Georgetown University Law Center, Adjunct Professor (Separation of Powers Seminar) (1998-present); 600 New Jersey Ave, NW; Washington, DC 20001.
King & Spalding, Partner and Head of Firm's Appellate Practice (July 1999-February 2001); 1730 Pennsylvania Avenue, NW; Washington, DC 20006-4706.

United States Senate, Judiciary Subcommittee on the Constitution, Federalism & Property Rights, Chief Counsel (1997-1999); 224 Dirksen Senate Office Building; Washington, DC 20510
Kirkland & Ellis, Associate (1994-1997); 655 Fifteenth Street, NW; Washington, DC 20005
Gibson, Dunn & Crutcher, Summer Associate (1992); 1050 Connecticut Avenue, NW; Washington, DC 20036
Covington & Burling, Summer Associate (1991); 1201 Pennsylvania Ave, NW; Washington, DC 20004
McGuireWoods, Summer Associate (1990); Washington Square, 1050 Connecticut Avenue N.W.; Suite 1200; Washington, DC 20036.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My practice has always focused on appellate matters and on legal issues that arise in trial courts. My practice has also focused predominantly on the federal courts. In my current position, I represent the United States government in a wide variety of appellate matters. In private practice, I handled appellate matters for a wide variety of public and private clients. The one exception to this focus on appellate matters is when I worked in the United States Senate. There, I handled legislative issues and legal counseling related to legislative issues.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

In my current practice, my clients tend to be government entities, such as the Federal Election Commission and the Equal Employment Opportunity Commission. I have also represented the President, Vice President, Secretary of Defense and Attorney General in litigation filed against them. In private practice, I represented diverse corporate clients, such as General Electric and Hershey Foods Corporation, as well as individuals and government entities.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

With the exception of my time working in the Senate, I have appeared in court frequently, primarily in the context of appellate arguments or dispositive legal issues in trial court. I have appeared in court quite frequently in my current capacity, including 26 Supreme Court arguments on behalf of the United States.

2. What percentage of these appearances was in:

(a) federal court;

100% of my very frequent appearances have been in federal court in my current job. Previously, 90% of my work was in federal court.

(b) state courts of record;

Previously, about 10% of my work.

(c) other courts.

3. What percentage of your litigation was:

(a) civil:

90 %

(b) criminal.

10%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

None. I have participated in the briefing of legal issues in cases tried to verdict and have successfully argued dispositive legal motions in trial court, but I read this question as focusing on actual trial litigation, which has not been my area of practice.

5. What percentage of these trials was:

(a) jury;
N/A
(b) non-jury.
N/A

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) McConnell v. Federal Election Commission, No. 02-1674, 540 U.S. 93 (2003); argued 9/8/2003; decided 12/10/03. This case concerned the constitutionality of the Bipartisan Campaign Reform Act (BCRA). I represented the Federal Election Commission and the other federal parties and presented argument before the Supreme Court on behalf of the federal parties. I split the argument with Solicitor General Olson. Solicitor General Olson argued in defense of the Title I soft-money provisions in the morning session. I argued in defense of the Title II provisions addressing electioneering communications, as well as a number of challenged provisions in Titles III-V of the Act. With minor exceptions, the Court upheld the Act in its entirety, and with respect to major portions of the decision, the Court divided 5-4.

a. Date of representation: Summer and Fall 2003
b. Name of the Court: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: Seth Waxman, Wilmer Cutler & Pickering, 2445 M Street, NW, Washington, DC 20037, (202) 663-6800; Jay Sekulow, 200 Maryland Avenue, NE, Washington, DC 20002, (202) 337-2273; Kenneth Starr, Kirkland & Ellis, 655 Fifteenth St., NW, Washington, DC 20005, (202) 879-5000; Floyd Abram, Cahill Gordon & Reindel LLP, 80 Pine Street, New York, NY 10005, (212) 701-3000; Charles Cooper, Cooper & Kirk, 1500 K St, NW, Suite 200, Washington, DC 20005, (202) 220-9600; Bobby Burchfield, 1201 Pennsylvania Ave, NW, Washington, DC 20004, (202) 662-6000; Laurence Gold, 815 Sixteenth St, NW, Washington, DC 20006, (202) 637-5130.

2) Tennessee v. Lane, No. 02-1667, 541 U.S. 509 (2004); argued 1/13/04; decided: 5/17/04. This case concerned the constitutionality of the application of Title II of the Americans with Disabilities Act to State governments. I represented the United States, which had intervened to defend the constitutionality of an Act of Congress. I presented argument on behalf of the United States in the Supreme Court. The Court upheld the

constitutionality of Title II, as applied in this case involving courthouse access, and upheld its application to state defendants, despite the Eleventh Amendment objections raised by the State of Tennessee. The Court upheld the statute by a 5-4 vote.

a. Date of representation: Spring 2005
b. Name of the Court: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: Michael Moore; Civil Litigation & State Services Division; PO Box 20207; Nashville, TN 37202, (615) 741-2471.

3) Booker v. United States (consolidated with Fan Fan v. United States), No. 04-0104 and 04-0105, 125 S.Ct. 738 (2005); argued 10/04/04; decided 1/12/05. This case concerned the constitutionality of the Federal Sentencing Guidelines and the proper remedy to cure any Sixth Amendment difficulty. I represented the United States in both of these consolidated cases. I oversaw the process of selecting appropriate cases for the Court to consider the effect of its decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), on the Federal Sentencing Guidelines, and asking the Court to grant certiorari and expedite consideration of these two cases. I presented argument on behalf of the United States in a two-hour consolidated argument in the Supreme Court. The Court decided by a 5-4 margin that the logic of *Blakely* applied to the Federal Sentencing Guidelines and so they could not be applied as mandatory guidelines consistently with the Sixth Amendment. The Court, by a different 5-4 majority, accepted a variation on the government's remedial argument and held that the Federal Sentencing Guidelines could continue to be applied if courts treated them as advisory, rather than mandatory.

a. Date of representation: Fall 2004
b. Name of the Court: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: T. Kelly; 145 West Wilson Street; Madison, WI 53703, (608) 255 9491

4) Hamdi v. Rumsfeld, No. 03-6696, 124 S. Ct. 2633 (2004); argued: 4/28/04; decided: 6/28/04. This case concerned the President's authority to detain citizens as enemy combatants and the proper procedures for determining whether an individual qualifies as an enemy combatant. I represented Secretary Rumsfeld and the other federal respondents to the habeas petition filed in this case. I presented argument on behalf of the federal parties in both the United States Court of Appeals for the Fourth Circuit (twice) and in the Supreme Court. The Court, in a plurality opinion by Justice O'Connor for three other Justices and a separate opinion of Justice Thomas, found that the President had the authority to hold a United States citizen seized on a foreign battlefield as an enemy combatant pursuant to the Authorization for Use of Military Force passed by Congress on September 18th, 2001. The Court also reversed the Fourth Circuit and required the executive branch to provide a constitutionally sufficient notice and hearing before a citizen could continue to be held as an enemy combatant.

a. Date of representation: Summer 2002-Spring 2004
b. Name of the Court: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: Frank Dunham Jr.; Federal Public Defender; 1650 King Street, Suite 500; Alexandria, VA 22314, (703) 600 0800

5) Rumsfeld v. Padilla, No. 03-1027, 124 S. Ct. 2711 (2004); argued: 4/28/04; decided: 6/28/04. This case concerned the proper judicial district for filing a habeas petition challenging present, physical confinement and the President's authority to detain a citizen seized in the United States as an enemy combatant. I represented Secretary Rumsfeld and the other federal respondents to the habeas petition filed in this case. I presented argument on behalf of the federal parties in the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and the Supreme Court. The Supreme Court, by a 5-4 majority, held that the habeas petitioner (Padilla) had filed his habeas petition in the wrong judicial district. The Court held that his challenge to his present, physical confinement in South Carolina should have been brought in South Carolina, not in the Southern District of New York. Because the Court ruled in the government's favor on the jurisdictional issue, the Court did not address the merits of the question concerning the President's authority.

a. Date of representation: Summer 2002-Spring 2004
b. Name of the Court: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: Donna Newman; 121 West 27 St, Suite 1103; New York, NY 10001; (212) 229-1516

6) Equal Employment Opportunity Commission v. Waffle House, No. 99-1823, 534 U.S. 279 (2002); argued 10/10/01; decided 1/5/02. This case concerned whether an employee's agreement to arbitrate employment disputes precluded the EEOC from initiating its own enforcement action in court on behalf of the employee. I represented the Equal Employment Opportunity Commission. I presented argument on behalf of the Commission before the Supreme Court. The Court decided, in a 6-3 decision, that the employee's agreement to arbitrate his dispute did not preclude the Equal Employment Opportunity Commission from bringing an enforcement action in court against the employer to seek relief on behalf of the employee.

a. Date of representation: Fall 2001
b. Name of the Court and Judges: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: David Gordon, 1900 Marquis One Tower; 245 Peachtree Center Ave., NE; Atlanta, GA 30303 (404) 525-8200

7) Federal Election Commission v. Beaumont, No. 02-403, 539 U.S. 146 (2003); argued: 3/25/03; decided: 6/16/03. This case concerned the constitutionality of the blanket prohibition in the Federal Election Campaign Act on corporate campaign contributions to candidates. I represented the Federal Election Commission. I oversaw the process of deciding to seek certiorari after the United States Court of Appeals for the Fourth Circuit found the application of the statute to non-profit corporations unconstitutional. After the Court granted certiorari, I presented argument on behalf of the Commission in the Supreme Court. The Court, in a 7-2 decision, reversed the Fourth Circuit and upheld the prohibition on campaign contributions to candidates directly from corporations, as opposed to from political action committees formed by the corporation.

a. Date of representation: Summer 2002-Spring 2003
b. Name of the Court and Judges: United States Supreme Court
c. Co-counsel and principal counsel for the other parties: James

Bopp Jr.; Bopp, Coleson & Bostrom; One South Sixth Street; Terre Haute, IN 47807-3510, (812) 232-2434

8) Federal Maritime Commission v. South Carolina Ports Commission, No. 01-46, 535 U.S. 743 (2002); decided; argued 2/25/02; decided 5-28-02. This case concerned the availabity of Eleventh Amendment immunity for State defendants before federal administrative bodies. I represented the United States. I presented argument on behalf of the United States in the Supreme Court in defense of the constitutionality of the assertion of jurisdiction by the Federal Maritime Commission under the Shipping Act of a complaint filed against an arm of the State. The Court, in a 5-4 decision, rejected our arguments and found that the State's Eleventh Amendment immunity precluded the Commission from exercising jurisdiction over a complaint filed by a private party against a State defendant.

a. Date of representation: Spring 2002

b. Name of the Court and Judges: United States Supreme Court

c. Co-counsel and principal counsel for the other parties: Attorneys for Petitioner: Phillip Christopher Hughey, Federal Maritime Commission; 800 North Capitol Street, NW; Washington, DC 20573-0001, (202) 523-5740; Attorneys for Respondent: Warren L. Dean Jr., Thompson Colburn LLP; 1909 K Street, NW, Ste. 600; Washington, DC 20006, (202) 585-6900

9) Tenet v. Doe, No. 03-1395, 125 S. Ct. 1230 (2005); argued: 1/11/05; decided: 3/2/05. This case concerned the jurisdiction of federal courts over suits by alleged spies against the United States. I represented Director Tenet and the other federal defendants in this lawsuit. I oversaw the process of deciding to seek Supreme Court review of a decision of the United States Court of Appeals for the Ninth Circuit that distinguished the Supreme Court's decision in *Totten v. United States*, 92 U.S. 105 (1876), and asserted jurisdiction over the claims of alleged spies. After the Court granted the government's petition for certiorari, I presented argument on behalf of the federal parties in the Supreme Court. The Court, in a unanimous decision, reversed the Ninth Circuit, reaffirmed its decision in *Totten*, and held that the federal courts do not have jurisdiction over suits filed by alleged spies that necessarily depend on their status as alleged spies in order to obtain relief.

a. Date of representation: 2004-2005

b. Name of the Court: United States Supreme Court

c. Co-counsel and principal counsel for the other parties: Steven Hale; Perkins Coie, LLP; 1201 Third Ave., Suite 4800; Seattle, WA 98101, (202) 359-8633

10) Van Orden v. Perry, No. 03-1500; argued: 03/02/05; not yet decided. This case concerns the constitutionality of the public display of the Ten Commandments by the State of Texas on the grounds of the State Capitol. I represented the United States as amicus curiae. I presented argument on behalf of the United States in the Supreme Court in support of the State of Texas. I explained the federal government's interest in the constitutionality of a number of displays of the Ten Commandments on the property of the federal government. The Court has not yet decided this case.

a. Date of representation: Spring 2005

b. Name of the Court: United States Supreme Court

c. Co-counsel and principal counsel for the other parties: Erwin Chemerinsky; Duke University; Science Drive & Towerview Road; Durham, NC, (919) 613-7173

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

During my service as Principal Deputy Solicitor General, I worked with others in the Administration and individuals on the Senate Judiciary Committee staff in addressing some of the legal concerns raised about the Victims' Rights Amendment in order to arrive on a version of the Amendment that the Administration could endorse.

I also serve as a member of the Attorney General's Task Force on Intellectual Property and have examined some of the legal options available to the Department of Justice in combating the theft of intellectual property.

When I served on the staff of the United States Senate Judiciary Subcommittee on the Constitution, Federalism and Property Rights, I provided counsel to the Subcommittee Chairman, Senator John Ashcroft, on a variety of legislative issues, including proposed legislation that ultimately became the Digital Millennium Copyright Act. I have also taught a seminar in Separation of Powers law at the Georgetown University Law Center since the Fall Semester of 1998.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   As an employee of the Department of Justice, I participate in the Thrift Savings Plan. I continue to hold shares of mutual funds in 401(k) plans set up by previous employers, but no previous employer makes any continuing contributions to those plans.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I have a relatively modest list of financial holdings and in my current position, the Office maintains a list of potential conflicts and monitors filings to ensure that my participation conforms to the Department's rules. Because I have been working at the Department for over four years, there are relatively few matters from my private practice that raise conflict issues, but I nonetheless review matters with an eye to any potential conflicts of interest. In the event of a potential conflict of interest, I will consult with the Department of Justice ethics officials.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

   None. Although I have served as an Adjunct Professor of Law at the Georgetown University Law Center since 1998, I do not plan to teach as an adjunct if confirmed.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   Please see attached SF-278.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

Please see attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

III. GENERAL (PUBLIC)

1. 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." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   In my current position, I work full time for the public and my ability to work for non-government clients is severely restricted. Nonetheless, some of the cases I have worked on have clearly assisted the disadvantaged. I have argued cases that have, for example, increased the rights of prisoners to combat racial discrimination *(Johnson v. California)*, provided rights for individuals with disabilities to sue state governments (*Tennessee v. Lane*), and given the Equal Employment Opportunity Commission greater rights to sue employers on behalf of employees subjected to discrimination (*EEOC v. Waffle House*).

   In private practice, I dedicated substantial amounts of time to no-fee or reduced-fee work. For example, I provided no-fee representation to a variety of non-profit organizations led by the Center for Education Reform in the school choice litigation in Cleveland (amicus brief in the 6th Circuit) and Florida (amicus brief in Florida Court of Appeals). I would estimate at least 100 hours of time went into the filing of these two briefs. The ultimate beneficiaries of these programs, whose federal constitutionality was ultimately vindicated, were the low-income students.

   I also provided reduced-fee representation (with the reduced fees ultimately paid by the U.S. government) to a family whose child was injured by the administration of a childhood vaccine. I provided roughly 50 hours of assistance in the filing of a petition for certiorari challenging the denial of benefits.

   I also represented an individual doctor on a no-fee basis in a successful appeal of a civil false claims action brought against the doctor. The government initially sought over $80 million in fines and penalties against this foreign-born solo practitioner. (I spent well over 100 hours on this representation which culiminated in an oral argument before the D.C. Circuit.)

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.

   No.

FINANCIAL STATEMENT
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	25,410	Notes payable to banks-secured	----------
U.S. Government securities-add schedule	----------	Notes payable to banks-unsecured	----------
Listed securities-add schedule	569,890	Notes payable to relatives	----------
Unlisted securities--add schedule	----------	Notes payable to others	----------
Accounts and notes receivable:	----------	Accounts and bills due	----------
Due from relatives and friends	----------	Unpaid income tax	----------
Due from others	----------	Other unpaid tax and interest	----------
Doubtful	----------	Real estate mortgages payable-add schedule	----------
Real estate owned-add schedule	685,600	Chattel mortgages and other liens payable	----------
Real estate mortgages receivable	----------	Other debts-itemize:	----------
Autos and other personal property	40,000		
Cash value-life insurance	14,800		
Other assets itemize:	----------		
		Total liabilities	----------
		Net Worth	1,335,700
Total Assets	1,335,700	Total liabilities and net worth	1,335,700
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	----------	Are any assets pledged? (Add schedule)	----------
On leases or contracts	----------	Are you a defendant in any suits or legal actions?	----------
Legal Claims	----------	Have you ever taken bankruptcy?	----------
Provision for Federal Income Tax	----------		
Other special debt	----------		

LISTED SECURITIES:
MUTUAL FUNDS - Paul Clement

Mutual Fund	Amount
T. Rowe Price:	
Small-Cap Value	106,660
Int l Bond	62,750
Health Sciences	11,350
Media & Telecom	9,930
Science & Tech	8,890
Prime Reserve	540
Vanguard	
500 Index	34,850
Total Stock Index	24,170
Life Strategy Growth	18,530
Int l Growth	6,480
U.S. Growth	4,370
Total Bond Index	7,280
TSP: G-Fund	16,410
TSP: C-Fund	80,820
STI Cap Apprec	6,610
Calamos Growth	5,910
STI Int l Equity Index	8,140
Japan Fund	6,110
Janus Worldwide	2,860
TIAA-CREF Growth & Income	1,130
Strong Corp Bond	6,400
Strong Multicap Value	720
First Financial Fund	3,710
TOTAL	**$434,620**

3/31/05

LISTED SECURITIES:
STOCK - Paul Clement

Stock	Amount
AT&T Corp	760
Avaya	120
Barrick Gold	4,840
Borders	4,590
Brillian	130
Coachmen	4,840
Comcast	2,130
Cia Paranaense Energi	2,230
Eastman Kodak	3,220
Exxon Mobil	6,770
Fedex Corp.	23,640
First Data	20,800
Medco Health	250
Merck	3,220
Midway Games	2,100
Nat I Semi	3,590
Nike	9,070
Tech SPDR	2,110
Three-Five	360
Toronto Dom	8,340
Agere Systems	20
Berkshire Hathaway B	6,000
Brasil Telecom	1,760
CNF	4,910
Lucent	150
Palm One	160
Palmsource	20
3Com Corp.	350
Citigroup	4,820
Luby s	2,250
St Paul/Travelers	150
Williams	1,630
ML Macadamia	7,280
Medco Health	280
Verizon	2,380
TOTAL	**$135,270**

3/23/05

REAL ESTATE OWNED
Paul Clement

Residence in Alexandria, Virginia

U.S. Department of Justice

Washington, D.C. 20530

MAR 15 2005

Marilyn Glynn
Acting Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Paul D. Clement, who has been nominated by the President to serve as Solicitor General, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. Section 208, requires that Mr. Clement recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute, has a financial interest. Mr. Clement has been counseled and has agreed to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect his financial interests.

We have advised Mr. Clement that because of the standard of conduct on impartiality at 5 CFR 2635.502, he should seek advice before participating in a particular matter involving specific parties which he knows is likely to have a direct and predictable effect on the financial interest of a member of his household, or in which he knows that a person with whom he has a covered relationship is or represents a party.

Mr. Clement is an Adjunct Professor with Georgetown University Law School. He will not participate personally and substantially in a particular matter that would have a direct and predictable effect on his employment with the Law School unless he is granted a waiver to participate, and he will not participate in a particular matter in which the Law School is or represents a party, unless he is authorized to participate. In addition, Mr. Clement has agreed that he will not teach or receive compensation as an Adjunct Professor with the Law School while serving as Solicitor General.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

Date of Appointment, Candidacy, Election, or Nomination *(Month, Day, Year)*	Reporting Status (Check Appropriate Boxes)	Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☒	Termination Filer ☐	Termination Date *(If Applicable) (Month, Day, Year)*

	Last Name	First Name and Middle Initial
Reporting Individual's Name	Clement	Paul D.
Position for Which Filing	Title of Position: Solicitor General	Department or Agency *(If Applicable)*: Department of Justice
Location of Present Office (or forwarding address)	Address *(Number, Street, City, State, and ZIP Code)*: 950 Pennsylvania Ave., NW Wash., DC 20530	Telephone No. *(Include Area Code)*: (202)514-2206
Position(s) Held with the Federal Government During the Preceding 12 Months *(If Not Same as Above)*	Title of Position(s) and Date(s) Held: Acting Solicitor General/Principal Dep. SG (2-01-now)	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Not Applicable Judiciary Committee	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date *(Month, Day, Year)*
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.		1/18/05
Other Review (If desired by agency)	Signature of Other Reviewer	Date *(Month, Day, Year)*: 3/14/05
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date *(Month, Day, Year)*
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).		3/15/05
Office of Government Ethics Use Only	Signature	Date *(Month, Day, Year)*

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Agency Use Only

OGE Use Only

Reporting Individual's Name: Paul D. Clement

SCHEDULE A

Page Number: 2

Assets and Income (BLOCK A)

Identify each asset held by you, your spouse, or dependent children for the production of income which had a fair market value exceeding $1,000 at the close of the reporting period.

Identify each asset or source of income held by you, your spouse, or dependent children which generated over $200 in income during the reporting period.

None ☐

Valuation of Assets at close of reporting period (BLOCK B)

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. (BLOCK C)

#	Assets and Income	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000	Dividends	Rent and Royalties	Interest	Capital Gains	Excepted Investment Fund	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000	Actual Amount (Only if "Other" specified)	Date (Mo., Day, Yr.) (Only if Honoraria)
Examples	Central Airlines Common																											
	Doe Jones & Smith, Hometown, State																											
	Kempstone Equity Fund																											
	IRA: Heartland 500 Index Fund																											
1	Coachman Industries Common		X															X										
2	Eastman Kodak Common		X															X										
3	Nike Class B Common		X															X										
4	Janus Worldwide Fund		X											X				X										
5	Berkshire Hathaway B Common		X															X										
6	Brasil Telecom Participacoas APF		X															X										

1/91 Edition Can Be Used; Editions Prior to 1/91 Cannot Be Used.

Reporting Individual's Name: Paul D. Clement

SCHEDULE A (continued)

Page Number: 3

Block A: Assets and Income	Block B: Valuation of Assets							Block B: Income Type						Block C: Amount								
Identify each asset held for the production of income which had a fair market value exceeding $1,000 at the close of the reporting period. Identify each asset or source of income which generated over $200 in income during the reporting period.	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	Over $500,000	Dividends	Rents, Royalties	Interest	Capital Gains	Business Income	Trust Income	Other (Specify Type)	None	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000	Actual Amount (Only if "Over" specified)	Date (Mo., Day, Yr.) Only if Honoraria
1 Vanguard US Growth Fund		X									X						X							
2 Vanguard International Growth Fund		X									X						X							
3 T. Rowe Price Health Sciences Fund		X									X						X							
4 T. Rowe Price Media & Telecom Fund		X									X						X							
5 T. Rowe Price Science & Technology Fund		X									X						X							
6 T. Rowe Price Small Cap Value Fund			X					X		X	X					X								
7 T. Rowe Price International Bond Fund			X					X			X						X							
8 ~~Invesco Dynamics Fund~~ ~~IX~~ Columbus Growth A		X						X			X					X								
9 STI Classic Int'l Equity Index		X						X			X					X								

1/91 Edition Can Be Used; Editions Prior to 1/91 Cannot Be Used.

Reporting Individual's Name: Paul D. Clement

SCHEDULE A continued

Page Number 4

Block A — Assets and Income: Identify each asset held for the production of income which had a fair market value exceeding $1,000 at the close of the reporting period. Identify each asset or source of income which generated over $200 in income during the reporting period.

	Block A: Assets and Income	Block B: Valuation of Assets: None (or less than $1,001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	$500,001-$1,000,000	Over $1,000,000	Block C: Income: Type: Dividends	Rent and Royalties	Interest	Capital Gains	Excepted Investment Fund	Excepted Trust	Qualified Trust	Other (Specify Type)	Amount: None (or less than $201)	$201-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000	Actual Amount (Only if "Other" Specified)	Date (Mo., Day, Yr.) (Only if Honoraria)
1	CNF Inc. Common		X															X										
2	First Data Corporation Common			X														X										
3	Luby's Inc. Common		X															X										
4	ML Macedamia LP Class A		X							X									X									
5	Verizon Communications Inc. Common		X															X										
6	Merck & Co. Inc. Common		X															X										
7	Toronto Dominion Bank Common		X							X									X									
8	AT&T Corporation Common		X															X										
9	Barrick Gold Corporation Common		X															X										

1/91 Edition Can Be Used; Editions Prior to 1/91 Cannot Be Used.

Reporting Individual's Name: Paul D. Clement

SCHEDULE I: Continued

Page Number: 5

	Block A: Assets and Income	Block B: Valuation of Assets					Block C: Income Type						Block C: Amount										Actual Amount Only if "Other" specified	Date (Mo., Day, Yr.) Only if Honoraria
	Identify each asset held for the production of income which had a fair market value exceeding $1,000 at the close of the reporting period. Identify each asset or source of income which generated over $200 in income during the reporting period.	None (or less than $1,000)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $500,000	Dividends	Rent and Royalties	Interest	Capital Gains	Capital Gains Dividends Paid	Short-Term Capital Gains	Qualified Trust	Other (Specify)	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000		
1	CIA Paranese Engeri - ADR	X					X									X								
2	Exxon Mobil Corporation Common	X					X									X								
3	AMEX SPDR Technology Index	X					X									X								
4	Three-Five Systems, Inc. Common	X					X									X								
5	Vanguard Total Bond Market Index Fund	X					X									X								
6	STI Classic Capital Appreciation Fund	X					X									X								
7	Strong Corporate Bond Fund	X					X									X								
8	TIAA-CREF Growth and Income Fund	X					X									X								
9	Japan Fund	X					X									X								

1/91 Edition Can Be Used; Editions Prior to 1/91 Cannot Be Used.

Reporting Individual's Name: Paul D. Clement

SCHEDULE A continued

Page Number: 6

Block A — Assets and Income: Identify each asset held for the production of income which had a fair market value exceeding $1,000 at the close of the reporting period. Identify each asset or source of income which generated over $200 in income during the reporting period.

Block B — Valuation of Assets

#	Assets and Income	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000
1	Vanguard 500 Index Fund			X					
2	Vanguard Total Stock Market Index Fund			X					
3	Borders Group, Inc. Common		X						
4	Fedex Corporation Common			X					
5	Midway Games Inc. Common		X						
6	National Semiconductor Corporation Common		X						
7	Presidential Savings Bank			X					
8	TD PDC Waterhouse Bank		X						
9	Ameritrade (cash balance trading account)		X						

Block C — Income: Type

#	Assets and Income	Dividends	Rent and Royalties	Interest	Capital Gains	Excepted Investment Fund	Excepted Trust	Qualified Trust	Other (Specify Type)
1	Vanguard 500 Index Fund	X				X			
2	Vanguard Total Stock Market Index Fund	X				X			
3	Borders Group, Inc. Common								
4	Fedex Corporation Common								
5	Midway Games Inc. Common								
6	National Semiconductor Corporation Common								
7	Presidential Savings Bank			X					
8	TD Waterhouse Bank								
9	Ameritrade (cash balance trading account)								

Block C — Income: Amount

#	Assets and Income	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000	Actual Amount (Only if "Other" specified)	Date (Mo., Day, Yr.) (Only if Honoraria)
1	Vanguard 500 Index Fund		X									
2	Vanguard Total Stock Market Index Fund		X									
3	Borders Group, Inc. Common	X										
4	Fedex Corporation Common	X										
5	Midway Games Inc. Common	X										
6	National Semiconductor Corporation Common	X										
7	Presidential Savings Bank	X										
8	TD Waterhouse Bank	X										
9	Ameritrade (cash balance trading account)	X										

1/94 Edition Can Be Used; Editions Prior to 1/94 Cannot Be Used.

Reporting Individual's Name: Paul D. Clement

SCHEDULE A (continued)

Page Number: 7

	Block A: Assets and Income	Block B: Valuation of Assets						Block C: Income Type						Block C: Amount							
	Identify each asset held for the production of income which had a fair market value exceeding $1,000 at the close of the reporting period. Identify each asset or source of income which generated over $200 in income during the reporting period.	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000	None	Dividends	Rent and Royalties	Interest	Capital Gains	Tax-exempt Income	Blocked Income	Other (Specify Type)	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000	Actual Amount Only if "Other" specified	Date (Mo./Day/Yr.) Only if Honoraria
1	Citigroup Common		X								X																
2	Virginia Education Savings Trust: Vanguard Life Strategy Growth Fund		X								X				X												
3	Comcast Corp.		X								X																
4	First Financial Fund		X								X				X				X								
5	Williams Companies, Inc. Common		X								X																
6																											
7	Georgetown University Law Center																Adjunct Faculty Salary									$1,200	
8	AT&T Wireless		X								X																
9																											

1/91 Edition Can Be Used; Editions Prior to 1/91 Cannot Be Used.

Reporting Individual's Name	SCHEDULE B N/A	Page Number
		8 of 10

Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (x)			Date (Mo., Day, Yr.)	Amount of Transaction (x)												
		Purchase	Sale	Exchange		$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Certificate of divestiture
Example	Central Airlines Common	x			2/1/99			x										
1																		
2																		
3																		
4																		
5																		

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $260, and (2) travel-related cash reimbursements received from one source totaling more than $260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. **Exclude** anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $104 or less. See instructions for other exclusions.

None ☐

	Source *(Name and Address)*	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$300
1			
2			
3			
4			
5			

Reporting Individual's Name: Paul D. Clement

SCHEDULE C

Page Number: 9

Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None [X]

	Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	$10,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000
Examples:	First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.							
	John Jones, 123 J St., Washington, DC	Promissory note	1999	10%	on demand							
1												
2												
3												
4												
5												

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None [X]

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example:	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/91.	Doe Jones & Smith, Hometown, State	7/85
1			
2			
3			
4			
5			
6			

1/91 Edition Can Be Used; Editions Prior to 4/91 Cannot Be Used.

Reporting Individual's Name

Paul D. Clement

SCHEDULE D

Page Number

10

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY Doe Jones & Smith, Hometown, State	Non-profit education Law firm	President Partner	6/82 7/85	Present 11/91
1	Georgetown University Law Center	Law School	Adjunct Professor	8/98	Present
2	(If confirmed, I would not teach or receive				
3	compensation as an adjunct professor while				
4	serving as Solicitor General).				
5					
6					

Part II: Compensation In Excess Of $5,000 Paid by One Source

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services, generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

None ☒

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, State Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services Legal services in connection with university construction
1		
2		
3		
4		
5		
6		

1991 Edition Can Be Used. Editions Prior to 1991 Cannot Be Used.

Senator COBURN. I think we just heard that the Justices gave you 40 minutes at one time.

Mr. CLEMENT. But it wasn't uninterrupted, I assure you.

Senator FEINGOLD. They interrupted him plenty.

[Laughter.]

Senator COBURN. Well, thank you very much. It brings to mind a question. How do you decide what cases you are going to challenge? You made the statement if there is an adequate defense based on the statute. How do you decide that?

Mr. CLEMENT. Well, Senator, fortunately, although the ultimate decision does rest with the Solicitor General, I don't have to make that decision alone. And so generally when I am considering a case where, to take the instance where an act of Congress has been called into question, I will have the benefit of the thinking of the agency of the Government that is most directly affected by the statute.

So if you have a statute in the transportation area, for example, the general counsel of the Department of Transportation will share with the office his views or her views. And then typically whatever litigation division in the Department is most directly affected—generally, the Civil Division—will also provide us with their views on the question.

Then one of the career lawyers in our office will provide a thorough memorandum examining the arguments on both sides of the issue. A deputy solicitor general will then either write their own memo or annotate that memo, and it will really be on the basis of those memos that the decision will be made.

Now, I hasten to add, though, that it is a standard that we would apply such that it would be a very rare act where a Solicitor General would not defend an act of Congress. In my time as Acting Solicitor General, I did have to make such a decision once in the context of an appropriations rider that asked recipients of transportation funds to engage in effectively what was viewpoint discrimination.

After that was struck down by the district court, we made a judgment that we simply did not have a viable argument in defense of the statute. It was a very difficult decision. It was a decision reached only after careful thought and study. And as I say, that is the only time in my time as Acting Solicitor General that I had to make such a decision.

The only time that I can remember Solicitor General Olson making such a decision—again, I think there was only one instance and it was in conjunction with a bankruptcy provision that simply seemed out of step with the Court's 11th Amendment jurisprudence in a way that we didn't think there was any viable argument to be made in that case either.

Senator COBURN. Thank you.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Clement, you noted in your statement that when the constitutionality of an act of Congress is challenged, the office has the responsibility to defend that act whenever reasonable arguments can be made in its defense. That responsibility, of course, was the subject of my questions to your predecessor when he appeared be-

fore this Committee and the McCain-Feingold bill was still being considered by the Congress. I just want to get on the record your response to a question that I asked him.

Is there any change in your view of the office's responsibility with respect to a statute passed by Congress if the President when signing the bill into law expresses grave doubts as to the constitutionality of the statute?

Mr. CLEMENT. Well, Senator, I think that the basic analysis that we would take would really be no different in that case. I do think, though, that whatever prompted the President's grave doubts would probably be part of our analysis, and I can imagine a situation where the doubts are so grave that we ultimately decide that a reasonable argument can't be made in defense of the statute.

That said, though, I would think that if I consider two factors—one, the fact that the President, who would be my ultimate boss at this point, signed the law—and I would take that as one factor, and then I would take the fact that grave doubts were expressed about the constitutionality. I would say actually the former would be more important and a factor I would weight more heavily in thinking that there would be reasonable arguments to be made in defense of the statute, as opposed to the latter because I think presumably the President himself, if he thought that there couldn't even be reasonable arguments in defense of the statute, would be, all things being equal, unlikely to sign the bill.

Senator FEINGOLD. So the expression of grave doubts goes to your analysis, not to your responsibility?

Mr. CLEMENT. Absolutely, Senator.

Senator FEINGOLD. Now, let me ask you sort of the flip side. I understand that when the Department decides not to defend a statute, it notifies the Senate Legal Counsel so that the Senate can decide whether to intervene in the case. This happened about nine times in the Bush administration, including once since you became Acting Solicitor General.

Can you tell me about how that decision is made, who is involved in making it, and what kinds of considerations go into that decisionmaking process?

Mr. CLEMENT. Well, Senator, I would be happy to address that. As I was saying earlier, I think that process is one that ultimately is a decision that the Solicitor General, or in the one case the Acting Solicitor General has to make ultimately as the decisionmaker.

But that said, it is the result of an exhaustive process that starts with the various affected agencies, continues through the litigating division at the Justice Department, and then includes lawyers in the Office of the Solicitor General. And at the end of that process, there is an ultimate decision that has to be made, and as I said, it is not a decision that is in any way taken lightly.

I can walk you through a little bit some of the thought process I had as reflected in the memo that I sent to the Senate Legal Counsel in the one case where I had occasion not to defend an act of Congress, and it was a specific appropriations provision that told the Metro and other recipients of Federal transportation funds that they could not run advertisements that took a pro-legalization view of marijuana.

And it was a difficult decision because we actually could consider—and again this is reflected in the letter that we went to Senate Legal Counsel and to her House counterpart—we actually could conceive of an argument to defend the statute, which is that a recipient of Federal funding could voluntarily decide not only not to accept pro-legalization ads, but also could refuse to accept anti-legalization ads or ads to keep marijuana criminalized, and in that sense could effectively convert the Federal regulatory provision or statutory provision from a viewpoint discriminatory one into a content-based one, and there would at least be viable arguments at that point that could be made.

But in confronting that analysis, it certainly occurred to me that it would be very difficult to assume that the same Congress that wanted to preclude funding recipients from running pro-legalization ads would simultaneously not want to run ads, say, from the ONDCP. So rather than make an argument that could be made in defense of the statute, we made a decision—I ultimately made the decision that the better course was simply to decline to defend the statute rather than make an argument that seemed to be likely at odds with Congress's true intent in that case.

Senator FEINGOLD. Thank you, that was helpful.

A last question, Mr. Chairman.

I am sure you know, Mr. Clement, that one of the most important historical decisions ever made by a Solicitor General had nothing to do with arguing before the Supreme Court. I am old enough to remember—I don't know if you are; I don't think you—in October 1973, Robert Bork served in the office you will fill if you are confirmed.

When President Nixon ordered the Attorney General, Elliot Richardson, and his deputy, William Ruckelshaus, to fire Watergate Special Prosecutor Archibald Cox, they refused and resigned. Robert Bork, as the third-ranking person in the Department, carried out the order.

What do you think you would do if faced with a similar situation?

Mr. CLEMENT. Well, Senator, that is a very difficult question, and I think it is a situation that one Solicitor General did face and I think every other Solicitor General would hope that they would not face, and so I certainly hope it never comes to that. And I think it would really have to depend on the situation that prompted the particular crisis, if you will, that led to that situation.

I can imagine a situation where my best judgment would be that with all the respect I would have for the Attorney General and the Deputy Attorney General, I would have a different view of matters. And I can certainly imagine situations where I would have the same view that they would have of matters and take a similar step.

I would add that my obligations may be potentially relieved in one respect, which is, as I understand it, the Associate Attorney General is now in the structure who would be the third person to face that particular decision before I would. So there would at least have to be sort of three fallen soldiers, if you will, before the decision would come to my desk.

And that would obviously have an influence because then I would be—if it came to me, I would already have the benefit of the

thought process of three senior Justice Department officials whom I certainly would respect.

Senator FEINGOLD. But you can certainly imagine a situation where resignation would be the only proper course, could you not?

Mr. CLEMENT. Absolutely.

Senator FEINGOLD. Thank you, Mr. Chairman.

Senator COBURN. Do you have any further questions?

Senator FEINGOLD. No, Mr. Chairman.

Senator COBURN. The record will remain open for one week for any follow-up questions. It will end at 6:00 p.m. on Wednesday, May 4.

I have no further questions. The meeting is adjourned. Thank you for being here.

Mr. CLEMENT. Thank you.

[Whereupon, at 9:56 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Questions for Paul D. Clement
Nominee to be Solicitor General of the United States
Submitted by Senator Richard J. Durbin

1. On April 28, 2004, during the oral argument in *Rumsfeld v. Padilla*, Justice Ginsburg noted that some governments engage in "mild torture," and you replied, "our Executive doesn't." You added:

> You have to recognize that in situations where there is a war footing – where the government is on a war footing, that you have to trust the Executive to make the kind of quintessential military judgments that are involved in things like that.

The next day, April 29, 2004, the Abu Ghraib prison abuses became public.

a) When did you first become aware that U.S. personnel might have been involved in abuses at Abu Ghraib prison?
b) When did you first become aware that the Administration had approved the use of coercive interrogation techniques at Guantanamo Bay?
c) When did you first become aware of the August 1, 2002, memo from the Justice Department's Office of Legal Counsel to White House Counsel Alberto Gonzales (DOJ torture memo), which narrowly construed the anti-torture statute (18 U.S.C. Section 2340A)?
d) Were you involved in reviewing the legality of any interrogation techniques or in reviewing the DOJ torture memo? If so, please provide a detailed description of your involvement.

ANSWER: I did not become aware that the United States armed forces might have been involved in abuses at Abu Ghraib prison until after the oral arguments in Hamdi and Padilla when stories about the abuses were widely reported in the national news media. Moreover, although I was aware, consistent with the openly acknowledged position of the Defense Department, that detainees at Guantanamo were interviewed without access to counsel and so were questioned under circumstances that presumably would be deemed "coercive" under the Fifth Amendment if they occurred in the context of domestic law enforcement, I was not aware of any particular allegations of abuse at the time of the oral arguments in Hamdi and Padilla. In this regard, I should emphasize that the habeas petitioners in Hamdi and Padilla were detained at the time of the Supreme Court arguments in Charleston, South Carolina, rather than Guantanamo.

In another exchange with Justice Ginsburg during the Padilla oral argument, I specifically averted to the possibility of particular instances of abuse. "[J]ust as in every other war, if a U.S. military person commits a war crime by [committing] some atrocity on a harmless, you know, detained enemy combatant or a prisoner of war, that violates our own conception of a what's a war crime. And we'll put that U.S. military officer on trial in a court mar[tial]." In

addition, I did not become aware of the August 1, 2002, memo from the Justice Department's Office of Legal Counsel to the White House Counsel until after the oral arguments in Hamdi and Padilla. As a result, I had no occasion to review the legality of any interrogation techniques or to review the August 1, 2002, memo before it issued.

2. The DOJ torture memo concludes:

> In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. Section 2340A [the anti-torture statute] as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority. ... Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.

a) Do you agree with this analysis?
b) Do you believe that the President has the power to set aside laws by invoking his Commander-in-Chief authority?
c) Do you believe that the anti-torture statute or any other statute governing the treatment of detainees is unconstitutional?
d) Can you assure me that, if you are confirmed as Solicitor General, you will not in any circumstances argue to the U.S. Supreme Court that the President is not required to comply with the anti-torture statute or other laws that currently govern the treatment of detainees?

ANSWER: I believe the quoted language is from the August 1, 2002, memo from the Office of Legal Counsel, which has been withdrawn and does not represent the views of the Administration or the Office of Solicitor General. I do not believe that it is accurate to say that the President can "set aside" laws that Congress has duly enacted. That said, it may be possible for Congress to enact a law that so intrudes on the President's constitutional authority that it violates Article II of the Constitution. For example, a hypothetical statute restricting the power of the President to veto legislation may impermissibly infringe on a core Executive power granted exclusively to the President. Although I have not studied the subject exhaustively, I have no present belief that any existing statutes related to torture or the treatment of detainees are unconstitutional, and if confirmed as Solicitor General I would apply the same standard in this area as in all others and defend any federal statute that does not unconstitutionally interfere with the President's Article II powers so long as reasonable arguments exist in defense of the statute.

3. During the oral argument in *Hamdi v. Rumsfeld*, on April 28, 2004, you said:

> I think that the United States is signatory to conventions that prohibit torture and that sort of thing. And the United States is going to honor its treaty obligations ... It's also the judgment of those involved in this process that the last thing you want to do is to torture somebody or try to do something along those lines.

Indeed, the United States has ratified several treaties that absolutely prohibit the use of torture and cruel, inhuman, or degrading treatment. Additionally, Section 1091(b)(1) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375), which I authored, provides, "It is the policy of the United States to ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States."

a) Do you believe that U.S. personnel can legally engage in torture or cruel, inhuman, or degrading treatment under any circumstances? If so, how do you reconcile this with the applicable treaties and laws, particularly the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Section 1091(b)(1) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005?

b) Can you assure me that, if you are confirmed as Solicitor General, you will not in any circumstances argue to the U.S. Supreme Court that U.S. personnel are permitted to engage in torture or cruel, inhuman or degrading treatment?

ANSWER: The United States is committed to complying with its obligations under the Convention Against Torture and, consistent with section 1091(b)(1) of the Defense Authorization Act, I understand that it is the policy of the United States to ensure that detainees are not subject to treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States. Torture is a serious crime under United States law, and the President has made clear that torture will not be condoned or tolerated, and that potential violations of the anti-torture statute will be investigated and, if the facts warrant it, prosecuted.

As stated by the Attorney General in his confirmation hearing, it is U.S. policy that U.S. personnel will not engage in cruel, inhuman or degrading treatment in violation of U.S. obligations under the Convention Against Torture, and as the Attorney General also stated, the Administration wants to be in compliance with the substantive standard incorporated into Article 16 of the Convention Against Torture even if such compliance is not legally required. If confirmed, my duty as Solicitor General would be to represent the interests of the United States in the Supreme Court and to uphold the rule of law. I cannot anticipate every conceivable set of circumstances in which questions about the scope or judicial enforceability of such provisions could arise. They could, for example, arise in a criminal prosecution brought by the United States pursuant to the anti-torture statute. But whatever the ultimate scope of any particular provision or the extent to which any

provision is judicially enforceable at the behest of any particular litigant, I understand that the United States is committed to complying with all of its obligations under the Convention Against Torture. Moreover, if confirmed as Solicitor General I would apply the same standard in this area as in all others and defend any federal statute that does not unconstitutionally interfere with the President's Article II powers so long as reasonable arguments exist in defense of the statute.

4. During the oral argument in *Hamdi v. Rumsfeld*, you said, "Article V of the Geneva Convention does not apply here." You also claimed that Hamdi received "a tremendous amount of process."

a) Please describe the process Hamdi has received from the government.

U.S. military regulations provide detailed procedures for Article 5 tribunals. For example, persons whose status is to be determined shall be advised of their rights at the beginning of their hearings; allowed to attend open sessions and provided with an interpreter if necessary; allowed to call witnesses if reasonably available, and to question witnesses called by the tribunal; have a right to testify or otherwise address the tribunal, and not be compelled to testify. Following the hearing of testimony and the review of documents and other evidence, the tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination, and a written report of the tribunal decision is to be completed in each case.

b) Has Hamdi been provided with the process outlined in these regulations? If not, how do you justify your statement that he has been provided with "a tremendous amount of process"?

ANSWER: As the oral argument transcript in Hamdi indicates, the process I referred to during the oral argument included multiple levels of military screening in Afghanistan and Guantanamo Bay, as well as an annual review process that the military was implementing to ensure that detainees were not being detained longer than was necessary for military purposes. The screening process was further set forth on pages 3 and 4 of the government's brief in the case:

U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. Those taken into U.S. control are subjected to a multi-step screening process to determine if their continued detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, i.e., whether the individual "was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the

> **United States." Dep't of Defense, Fact Sheet: Guantanamo Detainees <www.defenselink.mil/news/ Feb2004/d20040220det.pdf.> (Guantanamo Detainees). Individuals who are not enemy combatants are released.**
>
> **Individuals who are determined to be enemy combatants are sent to a centralized facility in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews with the detainee. That screening team looks at the circumstances of capture, assesses the threat that the individual poses and his potential intelligence value, and determines whether continued detention is warranted. Detainees whom the U.S. military determines have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba, or to another facility. A general officer reviews the screening team's recommendations. Any recommendations for transfer for continued detention are further reviewed by a Department of Defense review panel. Approximately 10,000 individuals have been screened in Afghanistan and released from U.S. custody.**

As I also explained to the Court during oral argument, even if Article V of the Geneva Convention had been applicable, it would not have required multiple levels of review or the type of annual review the military was implementing. I stated, for example, that:

> **[A]lthough Hamdi did not receive an Article V hearing because it was inapplicable, he did receive military process. When he was originally turned over to the United States forces by the Northern Alliance, our military allies, there was a screening process on the ground in Afghanistan. Now, that process screened out 10,000 individuals out of U.S. custody. So he received that process. Now, to be sure, it's a military process, but it is the kind of process that prisoners of war and enemy combatants have always gotten.**
>
> **Now, because of the nature of this war, Hamdi got additional process. And it's important to point out that this Article V process that other prisoners of war traditionally get is a one-shot deal. It's done off the battlefield and that's it. You are under detention for the remainder of the battle. And there's no reason for Congress to have to go in with a new resolution. You are there for the remainder of the war. Now, in this context, because we recognize that there are some unusual aspects of this war, and also because the United States military has no interest in detaining any individual who is not an enemy combatant or who does not present a continuing threat, when Hamdi got to Guantanamo, he was given additional screening processes. That screened him in as well. Did not screen him out.**

5. The Geneva Conventions govern the status and treatment of detainees in an armed conflict. The U.S. government has long held that, as a party to the Geneva Conventions, it is legally bound by their terms. All captured combatants and civilians are protected by the Geneva Conventions. The Red Cross's official commentary on the Conventions explains:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can fall outside the law.

Captured combatants are presumed to be POWs, and must be treated as such, unless and until determined otherwise by a competent tribunal in an individualized proceeding (an "Article 5" tribunal). The U.S. government has long abided by this principle. The Judge Advocate General Handbook states, "When doubt exists as to whether captured enemy personnel warrant POW status, Art. 5 Tribunals must be convened."

a) Why do you believe that the government is not required to conduct an Article 5 tribunal for Hamdi?

b) Do you disagree with the Red Cross' view that, "Every person in enemy hands must have some status under international law"?

ANSWER: Hamdi was captured while bearing arms with a Taliban militia unit in Afghanistan, and the Taliban fighters like Hamdi were conclusively determined by the President to be unlawful combatants not entitled to POW status under the Third Geneva Convention. Because there was no doubt as to Hamdi's status under the Convention, it is the position of the United States that there was no need to convene an Article 5 tribunal. In any event, Hamdi is no longer in U.S. custody. After he agreed not to rejoin the enemies of the United States and agreed to several other conditions, he was transferred to Saudi Arabia, where I understand that he was released from custody subject to certain travel restrictions and reporting obligations. The District Court on remand from the Supreme Court dismissed his habeas corpus petition with prejudice.

As the President has made clear, our nation has been and will continue to be a strong supporter of Geneva and its principles. The position of the United States, however, is that the protections of the Geneva Conventions do not apply to all persons in all conditions. Regardless of the precise scope of the Geneva Conventions, the President has directed that, as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. Please provide a list of all cases in which the U.S. Department of Justice has participated as an *amicus curiae* party before the U.S. Supreme Court or a U.S. Court of Appeal during the Bush Administration. Please provide a capsule summary of the substance of each case, the party or parties you represented, the positions and arguments advanced by the U.S. Department of Justice, the outcome of the case, and the specific nature of your participation in the case.

ANSWER: In answering this question, I relied on the Office of the Solicitor General's internal recordkeeping system for information on Supreme Court filings, and the recordkeeping systems of the litigating divisions of the Department of Justice for court of appeals filings. Based on those systems, a list of the Supreme Court cases in which the government has participated as an *amicus curiae* since January 20, 2001, has been generated and is attached as Attachment D. Immediately following this list, I have included the following information for each case for which information was not separately provided in answer to Question 1 from Senator Kennedy: (1) the syllabus from the Supreme Court's decision, where a decision has issued, and (2) a capsule summary of the government's position. For information about the other Supreme Court cases in which the government has participated as an *amicus curiae* since January 20, 2001, I refer you to my response to Question 1 from Senator Kennedy (and Attachments A to C thereto). Cases in which the government participated as an *amicus curiae* are marked on the attached lists with a "Y" in the "amicus" column. A list of the federal court of appeals cases in which the government has participated as an *amicus curiae* since January 20, 2001, assembled based on the recordkeeping systems of the litigating divisions, is attached as Attachment E. The Office of the Solicitor General does not maintain copies of the *amicus curiae* briefs filed in those cases, but, where available, I have provided capsule summaries of the government's position in those cases prepared by the litigating divisions.

7. In how many cases has the Justice Department's Civil Rights Division made *amicus* brief recommendations to the Office of the Solicitor General during the Bush Administration? In how many cases did the Civil Rights Division make *amicus* brief recommendations to the Office of the Solicitor General during the Clinton Administration? Please provide a year-by-year breakdown.

ANSWER: For a list of the Supreme Court cases originating in the Civil Rights Division in which the government has participated as an *amicus curiae* since January 20, 2001, I refer you to my response to Question 1 from Senator Kennedy (and Attachments A to C thereto) and to my response to your Question 6. Cases originating from the Civil Rights Division are marked on the attached lists with "Civ Rts" in the "division" column. For a list of the federal court of appeals cases originating in the Civil Rights Division in which the government has participated as an *amicus curiae* since January 20, 2001, I refer you to my response to your Question 6. Cases originating from the Civil Rights Division are again marked on the attached list with "Civ Rts" in the "division" column. A list of the Supreme Court and federal court of appeals cases originating in the Civil Rights Division in

which the government participated as *amicus curiae* from January 20, 1993, to January 20, 2001, is attached as Attachment F. On the basis of those lists, a year-by-year breakdown of the number of cases originating in the Civil Rights Division in which the government has participated as an *amicus curiae* is as follows:

	Supreme Court	Courts of Appeals	Total
1993	6	6	12
1994	4	13	17
1995	7	10	17
1996	6	20	26
1997	4	18	22
1998	11	18	29
1999	9	22	31
2000	6	15	21
2001	4	12	16
2002	7	12	19
2003	8	9	17
2004	5	6	11
2005 (to date)	0	3	3

With regard to the recommendations made by the Civil Rights Division to the Office of the Solicitor General in those and other cases, I refer you to my response to your Question 9.

8. Please list all cases during the Bush Administration in which the Justice Department's Civil Rights Division made an *amicus* recommendation to the Office of the Solicitor General. Please provide a capsule summary of the substance of each case and the positions and arguments recommended by the Civil Rights Division, and indicate whether and why the Solicitor General accepted or rejected the Civil Rights Division's recommendation.

For a list of the Supreme Court cases originating in the Civil Rights Division in which the government has participated as an *amicus curiae* since January 20, 2001, I refer you to my response to Question 1 from Senator Kennedy (and Attachments A to C thereto) and to my response to your Question 6. Cases originating from the Civil Rights Division are marked on the attached lists with "Civ Rts" in the "division" column. For a list of the federal court of appeals cases originating in the Civil Rights Division in which the government has participated as an *amicus curiae* since January 20, 2001, and for capsule summaries of the government's position in those cases, I refer you to my response to your Question 6. Cases originating from the Civil Rights Division are again marked on the attached list with "Civ Rts" in the "division" column. With regard to the recommendations made by the Civil Rights Division to the Office of the Solicitor General in those and other cases, I refer you to my response to your Question 9.

9. In how many cases during the Bush Administration have the political appointees in the Office of the Solicitor General overruled or rejected the recommendations of career attorneys in the Office of the Solicitor General? Please provide a capsule summary of the substance of each case and the positions and arguments recommended by the career attorneys, and indicate why the political appointees rejected the career attorney's recommendation.

In determining whether the government should pursue an appeal from an adverse decision or participate as an *amicus curiae* in a case in which the government is not currently a party, the Office of the Solicitor General solicits recommendations from the responsible litigating division in the Department of Justice and from all other interested government departments and agencies. An Assistant to the Solicitor General and a Deputy to the Solicitor General review those recommendations and make recommendations of their own to the Solicitor General, who has the responsibility for making the final decision, based on an evaluation of the merits of the government's proposed position and the strength of the government' s institutional interests in the litigation. The Office of the Solicitor General does not maintain statistics concerning the requested information in any readily retrievable form, in part because the Office makes no distinction about the appointment status of the lawyers in the affected agencies, litigating divisions, or in this Office who make recommendations. Rather, decisions are made based on evaluation of the strengths of the legal arguments and an evaluation of the interests of the United States as reflected in the varied and sometimes contradictory statutory responsibilities of affected agencies. That decision-making process depends heavily on legal analysis, which is typically intertwined with client communications, and the candid and confidential assessments of the strengths and weaknesses of the legal arguments. In addition, the decision-making process typically involves ongoing give and take and, where there is disagreement in the initial recommendations, often involves meetings where the goal and sometimes the result is to obtain a consensus position that accommodates the interests that initially produced disparate initial recommendations.

10. In the Supreme Court cases *Gratz v. Bollinger* and *Grutter v. Bollinger*, the U.S. Department of Justice filed *amicus* briefs and argued that the affirmative action programs of the University of Michigan and its law school were not narrowly tailored and were unconstitutional. According to press reports, there were disagreements within the Bush Administration as to what position to take in these historic cases.

a) What position regarding compelling interest and narrow tailoring did you advocate the government take with respect to each program? Please explain.
b) Did the White House advocate a different position than the one advocated by the Office of the Solicitor General? If so, please explain the nature of the different positions.

ANSWER: Based on my recollection and a review of the Office's files, I did not submit a written recommendation to former Solicitor General Olson in those cases advocating a particular position on the compelling interest and narrow tailoring questions. I did, however, participate in the cases and review and comment on drafts of briefs and assisted former Solicitor General Olson in preparing for oral argument. In deciding whether to participate as an *amicus curiae* and which arguments to make in those cases, I understand that former Solicitor General Olson followed the traditional practice of the Office and solicited recommendations from government entities inside and outside of the Department of Justice that had an interest in the issues presented in the cases, such as the Department of Education. That process resulted in a determination by former Solicitor General Olson that the interests of the United States were best served by participating in those cases and taking the positions set forth in the government's briefs. I included my name on the briefs filed in that case.

11. According to a May 3, 2005 article in the *Washington Post*, you just filed a brief with the Supreme Court in which you vigorously defended the constitutionality of the Solomon Amendment – a federal law that requires universities to give military recruiters equal access to university resources as other employers even if the university disagrees with the military's ban on openly gay members. Would it be your belief that universities should be required to provide equal access to military recruiters even if the military were to adopt a policy banning people of color, people of a particular religion, disabled people, or women? Please explain.

ANSWER: The Office of the Solicitor General has a long tradition of defending the constitutionality of congressional enactments whenever a reasonable legal argument can be made in their defense. We have defended the constitutionality of the Solomon Amendment pursuant to that policy. If Congress enacted legislation requiring universities that accept federal funding to provide equal access to military recruiters even if the military were to adopt a policy banning, for example, racial minorities, the primary constitutional problem would lie with the underlying policy of racial discrimination by the military. Presumably in such a scenario, a constitutional challenge would be brought against that policy of racial discrimination, no reasonable argument could be mounted in its defense, and the courts would quickly strike it down. The equal access issue will likely arise only in situations in which the underlying action by the military has been held to be lawful by the courts, which would not be the case in this hypothetical question.

12. Your Senate questionnaire indicates that you are a member of and frequent speaker to the Federalist Society, whose mission statement asserts: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree with this statement? Please explain.

ANSWER: I should clarify that I am not currently a member of the Federalist Society. I discontinued my membership in that society and in most other outside

groups when I joined the Department in February 2001. I had not previously focused on the quoted statement. I would not describe the law schools and legal profession as strongly dominated by any particular orthodoxy in part because organizations like the Federalist Society have provided forums for varying views on important legal questions.

13. You stated in your Senate questionnaire that you have never played a role in a political campaign. On December 10, 2000, you filed an *amicus* brief on behalf of Florida voters in support of the position taken by the Bush-Cheney campaign. What contact if any did you have with officials from the Bush-Cheney campaign, prior to the filing of your *amicus* brief? For example, did any officials from the Bush-Cheney campaign ask you to file your brief? Did you contact any officials from the Bush-Cheney campaign to coordinate positions or strategy in the course of the *Bush v. Gore* litigation?

ANSWER: I worked on amicus briefs in the Supreme Court filed in the two Supreme Court cases arising out of the 2000 Presidential election. In both cases, the brief was filed on behalf of numerous Florida voters. I do not recall having contact with any officials from the Bush-Cheney campaign about the briefs during that period, although I cannot rule out the possibility that I discussed a legal issue with a lawyer for a party or amicus who in turn had a position with the Bush-Cheney campaign. I should also add that I was one of ten lawyers on the brief and did not serve as the counsel of record, and I do not know what contacts, if any, others on the brief may have had with officials from the Bush-Cheney campaign.

14. An April 26, 2005 *Legal Times* article entitled "How to Get a Job at the Justice Department" states that "the path to a plum job at the Justice Department is a narrow one, likely to include membership in the Federalist Society, a degree from a prestigious law school, a clerkship for an influential conservative judge and a stopover at a law firm with Republican ties." The article indicates that men benefit far more than women as a result of these hiring criteria, and that a list provided by the Justice Department indicates that only eight of the top 49 political appointees are filled by women. The article states that only one of the five new hires in your office since summer 2004 – when you became the Acting Solicitor General – is a woman.

a) Why do you believe that women are so underrepresented in your office and throughout the political ranks of this Justice Department?
b) How many female and African-American attorneys have been hired by the Office of the Solicitor General during the Bush Administration? How many total attorneys has your office hired during this period?
c) If you are confirmed, what efforts will you make to increase gender and racial diversity in the Office of the Solicitor General?

ANSWER: Our office has not had occasion to hire any new attorneys since I became the Acting Solicitor General. The Office only has 16 assistants to the Solicitor General. Last spring and summer, based on decisions made before I became Acting Solicitor General, the Office hired six new attorneys, including two

women and one racial minority. One of those female attorneys has since left the Office to relocate to New York. Even with that departure, the Office is now more diverse than it was on January 20, 2001. At that time, the Office employed four women and no racial minorities. We now employ three women (it had been four until one left this spring) and two racial minorities (Asian American). Of the ten lawyers hired during the Bush Administration, two women were hired as well as two racial minorities (both Asian American). As the Office of Personnel Management has stressed, "[t]he Federal Government strives to be a model employer by building and maintaining a workforce that reflects the rich diversity of the Nation." <http://www.opm.gov/Diversity/guite.htm> The Office, in recent years, has taken steps, which I would certainly continue if confirmed, to try to achieve those goals. For example, the Office has broadened the extent to which openings in the office are advertised, in order to ensure that the broadest possible group of interested attorneys becomes aware of job opportunities. Our Bristow fellowship program, under which we hire four recent judicial clerks as one-year fellows, is also a helpful outreach tool. This year, two of the four Bristow fellows are women, and fully half of the Bristows hired throughout the Bush Administration have been women. The former Bristows are one source of qualified applicants - two current Assistants were former Bristows - and so these efforts should pay dividends in the future. Over time, I think that the diversity of our office will continue to grow in light of such efforts and the increasing diversity of those hired to serve as law clerks by the Supreme Court and the courts of appeals.

15. In 2003, the White House Office of Faith-Based and Community Initiatives issued a publication entitled "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved." This booklet contains the following statements:

> President Bush will continue to work to make clear that faith-based organizations that receive Federal funds retain their civil rights to base employment decisions on their beliefs and vision. At the Federal level, this means that the Administration will support changes to laws, like the Workforce Investment Act and the Head Start statute, that currently prevent religious organizations that participate in these programs from taking religion into account when hiring. . . . To make matters even more complicated, a number of States and localities have statutes, regulations, and ordinances that contain express language prohibiting discrimination on the basis of religion and/or sexual orientation. Most of these laws exempt religious organizations that receive government funds, but some do not. . . . The President will urge the courts to provide guidance on whether faith-based organizations are required to comply with State and local ordinances that restrict their ability to participate in Federally funded formula and block grant programs.

a) Do you believe that faith-based organizations should be able to discriminate in hiring on the basis of religion, even for government-funded positions? Why or why not?

ANSWER: As I understand it, Title VI of the Civil Rights Act of 1964, which bars discrimination in federally funded programs, does not include religion among its protected classifications. Accordingly, Title VI would not prohibit faith-based organizations from taking religion into consideration in hiring and staffing decisions. Similarly, Congress specifically provided in Section 702 of Title VII of the Civil Rights Act of 1964 that religious organizations may take religion into consideration when making hiring and staffing decisions, and nothing in Title VII withdraws the Section 702 exemption from entities receiving federal funding. The Supreme Court upheld the constitutionality of Section 702 against an Establishment Clause challenge in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987). So long as an aid program comports with the requirements of the Establishment Clause, I am not aware of any other federal prohibition on faith-based organizations receiving federal funds choosing to take religion into consideration in hiring and staffing decisions.

b) Do you believe that faith-based organizations should be required to comply with state and local ordinances, including those regarding (1) civil rights and nondiscrimination and (2) health and safety? Why or why not?

ANSWER: As a general proposition, faith-based organizations should comply with the laws of the states and localities in which they operate, including those regarding civil rights and nondiscrimination and health and safety, unless those laws themselves violate federally protected rights, or are pre-empted by federal law. Congress generally has substantial discretion to determine the extent to which federal statutes preempt state and local laws.

Written Questions to Paul Clement
Nominee to be Solicitor General
From Senator Edward M. Kennedy

General

1. For each case in which you played a role while working in the Office of the Solicitor General beyond merely authorizing the litigation, please provide a summary of the issues in the case, the litigants, the positions and arguments advanced by the U.S. Department of Justice, the outcome of the case, and the specific nature of your participation (including whether you reviewed or helped draft the briefs, conducted oral argument or helped prepare other counsel for oral argument, or met with outside litigants or interested parties).

   ANSWER: In answering this question, I relied on the Office of the Solicitor General's internal record-keeping system for information on Supreme Court filings. A list of the Supreme Court cases in which I have presented argument on behalf of the United States during my tenure in the Office of the Solicitor General is attached as Attachment A. A list of the Supreme Court cases that I have supervised at the merits stage during my tenure as Acting Solicitor General is attached as Attachment B. A list of the Supreme Court cases that I have supervised at the merits stage during my tenure as Deputy Solicitor General is attached as Attachment C. The latter two lists include cases in which the United States participated as an *amicus curiae* at the certiorari stage. With regard to the cases listed in Attachment A, my participation has typically entailed reviewing the government's written brief prior to submission, conducting moot courts (and occasionally attending moot courts for counsel for parties whom the United States was supporting as *amicus curiae*), and preparing for and presenting oral argument. With regard to the cases listed in Attachment B, my participation has typically entailed reviewing the government's written brief prior to submission and attending oral argument. With regard to the cases listed in Attachment C, my participation has typically entailed reviewing the government's written brief prior to submission, attending moot courts prior to argument (and occasionally attending moot courts for counsel for parties whom the United States was supporting as *amicus curiae*), and attending oral argument. It is the policy of the Office of the Solicitor General generally to meet with all outside litigants who express a desire to do so; the Office does not retain systematic records of those meetings.

   Immediately following each list of cases, I have included the following information for each case: (1) the question or questions presented; (2) where available from the Supreme Court's website, a list of participating counsel; (3) the syllabus from the Supreme Court's decision, where a decision has issued; and (4) a capsule summary of the government's position.

In addition, I presented argument on behalf of the United States in a limited number of cases in the lower courts, as follows:

In re Cheney, Nos. 02-5354, 02-5355, 02-5356 (D.C. Cir.): On January 27, 2005, I presented oral argument on behalf of petitioners in In re Cheney. The question presented was whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*, can be construed to authorize discovery of the process by which the Vice President and other senior advisers gathered information to advise the President, based on an allegation in a complaint that the advisory committee was not constituted as the President directed and the advisory group itself reported.

Catimbang v. Ashcroft, No. 03-71957 (9th Cir.): On May 13, 2004, I presented argument on behalf of the Attorney General as respondent in Catimbang v. Ashcroft. The question presented was whether substantial evidence supported the Board of Immigration Appeals' determination that the petitioner was not entitled to asylum.

Al-Marri v. Rumsfeld, No. 03-3674 (7th Cir.): On February 18, 2004, I presented argument on behalf of the appellees in al-Marri v. Rumsfeld. The question presented was similar to the jurisdictional question presented before the Supreme Court in Padilla v. Rumsfeld, No. 03-1027. The appellees took a position similar to the one taken in Padilla.

United States v. Moussaoui, No. 03-4792 (4th Cir.): On December 3, 2003, and on rehearing on June 3, 2004, I presented argument on behalf of the United States as appellant in United States v. Moussaoui. The questions presented were (1) whether the Compulsory Process Clause provides a defendant the right to secure aliens captured and held as enemy combatants abroad; (2) whether the district court erred in failing properly to evaluate whether the Government's paramount interest in national security outweighed the defendant's asserted interest in eliciting testimony from the enemy combatants, and in failing to apply the correct legal standards in concluding that the combatants will provide material, exculpatory testimony; (3) whether, assuming the Compulsory Process Clause extends to the combatants, the Government's proposed substitutions provide the defendant with substantially the same ability to make his defense as would the depositions ordered by the court; and (4) whether, assuming the Compulsory Process Clause extends to the combatants, the Government's proposed substitutions satisfy any independent requirements imposed by the Eighth Amendment.

Padilla v. Rumsfeld, Nos. 03-2235(L), 03-2438(CON.) (2d Cir.): On November 17, 2003, I presented oral argument on behalf of the Secretary of Defense as respondent-appellant-cross-appellee in Padilla v. Rumsfeld. The questions presented were substantially the same as the questions presented before the

Supreme Court in Padilla v. Rumsfeld, No. 03-1027. The Secretary of Defense took a position similar to the one taken in the Supreme Court.

Gherebi v. Bush, No. 03-55785 (9th Cir.): On August 11, 2003, I presented oral argument on behalf of the President and Secretary of Defense as respondents-appellees in Gherebi v. Bush. The first question presented was similar to the question presented before the Supreme Court in the consolidated cases of Rasul v. Bush, No. 03-334, and Al Odah v. United States, No. 03-343. The second question presented was the jurisdictional question presented before the Supreme Court in Padilla v. Rumsfeld, No. 03-1027. The appellees took a position similar to the one taken in Padilla and Rasul and Al Odah.

Charles v. Verhagen, No. 02-3572 (7th Cir.): On May 15, 2003, I presented oral argument on behalf of the United States as intervenor in Charles v. Verhagen. The questions presented were (1) whether Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-l, is a valid exercise of Congress's Spending Clause powers; (2) whether section 3 of the RLUIPA is a valid exercise of Congress's Commerce Clause powers; and (3) whether section 3 of the RLUIPA violates the Establishment Clause of the First Amendment. The United States took the position that the RLUIPA is constitutional along the lines of the position of the United States before the Supreme Court in Cutter v. Wilkinson, a case I also argued.

Al Odah v. United States, Nos. 02-5251, 02-5284 & 02-5288 (D.C. Cir.): On December 2, 2002, I presented oral argument on behalf of the appellees in Al Odah v. United States. The question presented was similar to the question presented before the Supreme Court in the consolidated cases of Rasul v. Bush, No. 03-334, and Al Odah v. United States, No. 03-343. The appellees took a position similar to the one taken in the Supreme Court.

Hamdi v. Rumsfeld, No. 02-7338 (4th Cir.): On October 28, 2002, I presented oral argument on behalf of the respondents-appellants in Hamdi v. Rumsfeld. The question presented was similar to the question presented before the Supreme Court in Hamdi v. Rumsfeld. The appellees took a position similar to the one taken in the Supreme Court.

Coalition of Clergy, Lawyers, and Professors v. Bush, No. 02-55367 (9th Cir.): On July 8, 2002, I presented oral argument on behalf of respondents-appellees in Coalition of Clergy, Lawyers, and Professors v. Bush. The first question presented was whether the Coalition lacked next-friend standing to assert claims on behalf of detainees. The second question presented was similar to the jurisdictional question presented before the Supreme Court in Padilla v. Rumsfeld, No. 03-1027. The third question presented was similar to the question presented before the Supreme Court in the consolidated cases of Rasul v. Bush, No. 03-334, and Al Odah v. United States, No. 03-343. With respect to the first question, I argued that the Coalition lacked next-friend standing. With respect to

the second and third questions, I presented arguments similar to those presented in the Supreme Court.

Hamdi v. Rumsfeld, No. 02-6895 (4th Cir.): On June 25, 2002, I presented oral argument on behalf of respondents-appellants in Hamdi v. Rumsfeld. The question presented was whether the district court properly ordered the United States military to allow the federal public defender to meet with the detained enemy combatant in private and without military personnel present.

Padilla ex rel. Newman v. Rumsfeld, No. 02 Civ. 4445 (S.D.N.Y.): In 2002, I presented oral argument on behalf of respondents in Padilla ex rel. Newman v. Rumsfeld. The questions presented were the same as the questions presented before the Supreme Court in Padilla v. Rumsfeld. I presented arguments similar to those presented in the Supreme Court.

Walker v. Cheney, No. 02-0340 (D.D.C.): On September 27, 2002, I presented oral argument on behalf of defendants in Walker v. Cheney. The first question presented was whether the district court had jurisdiction over the Comptroller's action under 31 U.S.C. 716 seeking to compel the production of documents from the Vice President. If the court concluded that it did have jurisdiction, the second question presented was whether the Vice President was subject to suit under Section 716.

Coalition of Clergy v. Bush, No. 02-570 (C.D. Cal.): In February 2002, I presented oral argument on behalf of respondents in Coalition of Clergy v. Bush. The first question presented was whether the Coalition lacked next-friend standing to assert claims on behalf of the detainees. The second question presented was similar to the jurisdictional question presented before the Supreme Court in Padilla v. Rumsfeld. The third question presented was similar to the question presented before the Supreme Court in the consolidated cases of Rasul v. Bush and Al Odah v. United States. With respect to the first question, I argued that the Coalition lacked next-friend standing. With respect to the second and third questions, I presented arguments similar to those presented in the Supreme Court.

Rasul v. Bush, Nos. 02-299, 02-828 (D.D.C.): On June 26, 2002, I presented oral argument on behalf of defendants in Rasul v. Bush. The question presented was similar to the question presented before the Supreme Court in the consolidated cases of Rasul v. Bush and Al Odah v. United States. The appellees took a position similar to the one taken in the Supreme Court.

2. What will your practice if you personally disagree with the government's litigation position in a case for which you or your office is responsible?

ANSWER: If confirmed, I anticipate that the Office would file briefs defending regulations or statutes that embody policy positions with which I

might disagree, to the extent I have a personal view at all. The role of the Solicitor General is to make legal judgments, not to second-guess policy judgments. In the context of statutes, for example, the personal policy views of the Solicitor General should not influence the judgment as to whether reasonable arguments can be made in the statute's defense. As for the legal judgments themselves, the Attorney General and the President certainly have the power to overrule the Solicitor General. As former Solicitor General Seth Waxman put the point at a symposium about the Office of the Solicitor General at the Brigham Young University Law School, while Article II of the Constitution is dedicated to the President's powers and responsibilities, "the Framers managed to make it all the way through all the articles of the Constitution without even conceiving of a solicitor general, let alone bothering to mention an attorney general." At the same time, the President and the Attorney General are both best served when they have confidence in the judgments of the Solicitor General and therefore do not find occasion to overrule the Solicitor General. Ideally, that confidence makes it unnecessary for the Attorney General or the President to form an independent legal judgment on all but the most momentous matters that the Solicitor General must address. In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion, the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call. Of course, the President ultimately has the right under the Constitution to have his Solicitor General file the brief he wants filed. At the same time, he does not have the right to insist that I file any particular brief. I can certainly imagine situations in which I would resign before filing a brief that I thought outside the bounds of proper advocacy, and I can imagine other situations in which the handling of a series of briefs would lead me to resign. At the same time, I would not be interested in embarking on this service if I thought such scenarios were likely to come to pass.

First Amendment and Religious Liberty

1. In your view, does the Constitution permit religious organizations to discriminate in its employment practices based on religion in programs or positions that are financed with federal funds? If so, on what basis, and under which circumstances? Do believe that there are any constitutional limits to such discrimination in employment with federal funds?

ANSWER: The Establishment Clause of the First Amendment of the Constitution prohibits the federal government from funding religious entities in a manner that has the effect of establishing religion. The Court generally

applies a context-specific test to determine whether a funding program violates the Establishment Clause. Generally, aid, which is secular in nature, can be provided in ways that avoid Establishment Clause difficulties if it is distributed without reference to religion and checks exist to avoid its diversion to religious purposes. The Supreme Court held in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), that the exemption of certain religious organizations from the religious discrimination provisions of Title VII does not run afoul of the Establishment Clause. Although I have not exhaustively considered the matter, that case suggests that a reasonable argument could be advanced to support comparable exemptions narrowly drafted as not causing an otherwise valid spending program to violate the Establishment Clause.

2. In Locke v. Davey, you filed a brief arguing that the First Amendment's Establishment Clause, Free Exercise, and Free Speech clauses and the Equal Protection Clause of the Fourteenth Amendment, prevented the state of Washington from denying a scholarship to a student who wanted to use the money to train for the clergy at a Bible college. Please explain your view of the difference, if any, in the constitutional requirements governing whether a state may provide school vouchers for use at religious institutions, and the constitutional requirements governing whether a state must do so. In your view, are there circumstances in which states are required by federal law or the U.S. Constitution to fund religious training or instruction at religious schools even if their state legislatures choose not to do so? Please explain in detail.

   ANSWER: **As the United States stated in its amicus brief in Locke v. Davey, there is a firmly established constitutional principle that prohibits the government from treating persons differently based on their religion or religious beliefs. In Locke, the Supreme Court held that the State of Washington could deny a state scholarship to a man who wanted to use that scholarship toward a ministry degree at a religious college. The Court relied on the fact that there was a long historic tradition of states assiduously avoiding funding the education of clergy, and a relatively small burden on the scholarship recipient in this particular case arising from disparate treatment. The Court's decision in Locke was premised on the view that Washington could have funded the training without violating the federal Constitution. Accordingly, Locke represents an example of the differences between what a State may do to fund religious training and what it must do. Although I have not studied the matter exhaustively and Establishment Clause analysis is remarkably context specific, I am not presently aware of a federal law that would compel the funding of religious training like that at issue in Locke.**

Administration's Detention Policy/Role of Courts

Far too often, this Administration has been using fear of terrorism as a pretext to trample on the most basic human rights of our society. In United States v. Hamdi, a case you argued for the government, the Supreme Court rejected the Administration's view that U.S. citizens and foreign nationals seized as potential terrorists could be denied all access to courts or lawyers indefinitely. In so ruling, Justice Sandra Day O'Connor said that the Court has "made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." The ruling was a loud repudiation of the government's position that its actions are beyond the rule of law.

Essentially, you argued that the administration power to wage war was absolute. Yet, the Court said that:

> "We have no reason to doubt that the courts, faced with these sensitive matters, will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns."

Many of us are disturbed by the Administration's extreme view of expansive executive power reflected in the position taken in Hamdi, United States v. Rasul, and United States v. Padilla.

1. What role did you play in formulating the Administration's position in Hamdi, Rasul, and Padilla? Do you agree with the position that was ultimately reached?

   ANSWER: Former Solicitor General Olson was asked by the Attorney General and others to take a lead role in litigating many of the cases arising out of the response to the attacks of September 11th. Many of the major decisions that shaped the litigation – such as decisions to take enemy combatants, find the Geneva Convention inapplicable to al Qaeda, and to process and screen captured enemy combatants without initially providing hearings under Article V of the Geneva Convention – were taken without any input from this Office. As litigation was filed and progressed, lawyers from the office were consulted concerning the litigation risks of certain steps or proposed modifications of policies adopted by the Department of Defense. The ultimate policy decisions were made by the policymakers; not the litigators in the Office of the Solicitor General. The response to the attacks of September 11th raised many novel legal issues. On many of the issues, the lawyers had little by way of judicial precedent to assist the assessment of the legal arguments beyond a few World War II-era precedents. In the end, I felt that we had valid legal arguments to defend the policies adopted in response to the attacks of September 11th, and I included my name on briefs advancing those arguments.

2. As the nominee to be the Country's Chief Supreme Court litigator, your views about the proper balance of power between the branches are especially important.

Do you believe the Supreme Court reached the correct conclusions in these cases? Please explain your answer for each case.

ANSWER: The Supreme Court has now substantially added to the body of judicial precedent on these subjects by issuing its decisions in Rasul, Hamdi and Padilla. I fully accept the Court's determinations in those cases. Those cases also leave important questions unanswered. Rasul explained that the statutory predicate for one of the Court's World War II precedents had been undermined by domestic habeas cases, and held that the federal courts have habeas jurisdiction over petitions filed by aliens abroad. As a result of that decision, judges in the District of Columbia District Court have exercised habeas jurisdiction. Individual judges have reached different conclusions about the scope of the substantive rights that may be vindicated through the filing of such a habeas petition. In Padilla, the Court found that the District Court for the Southern District of New York lacked jurisdiction over Padilla's habeas petition, and now that case is proceeding in the District of South Carolina and the Fourth Circuit. The parties have different views about the meaning of some aspects of the Hamdi decision. But that is understandable. The Hamdi case settled important questions about the President's authority to detain enemy combatants, but it also indicated that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."

I am worried that the Administration has not learned anything from these decisions about the limits on Presidential power. For example, the legal position advanced by the administration continues to be a far-reaching view of executive power unfettered by judicial review. Late last year in a Guantanamo habeas case, made possible by the Rasul and Hamdi rulings, a Justice Department lawyer told a federal appeals court that, even if, hypothetically, officials were torturing or summarily executing prisoners, the courts would have no role whatsoever in ensuring that the government follows the law.

3. Do you agree with that view? Did you or your office authorize it to be expressed as the government's position in court? Please explain your answer.

ANSWER: I am not aware of the statement to which your question refers. Indeed, I am not aware of a hearing before a federal appeals court late last year in a case involving a habeas corpus petition by a detainee at Guantanamo Bay, Cuba. To my knowledge, the first post-Rasul argument involving a habeas petitioner held in Guantanamo before a federal courts of appeals occurred in April of this year (Hamdan). Moreover, although the Solicitor General authorizes the filing of appeals, the Solicitor General or acting Solicitor General is rarely in a position to authorize or even consider potential answers that other lawyers might give to questions that may arise in the give and take of oral argument. In any event, I do not understand the government's position to be that there is no role for federal court involvement in habeas corpus actions challenging the detention of enemy

combatants. In the habeas corpus actions filed on behalf of Jose Padilla and Yaser Hamdi, for example, the government did not take the position that federal courts lack jurisdiction or authority to entertain habeas claims. The government has taken the position, consistent with existing law, that certain claims that have been raised by some of the detainees, for example, claims arising under the International Covenant on Civil and Political Rights, are not cognizable because those Conventions do not create judicially enforceable private rights, but instead rely exclusively on diplomatic processes as the sole means of enforcement.

The Administration's vision of executive authority is so troubling because it appears to be so pervasive, corrected only where a court steps in, like the cases above, or when the Administration is embarrassed. For example, in the case of the now infamous Bybee torture memorandum, President Bush based his interrogation policy for two years on the theory that any anti-torture statute that interfered with the President's policy on interrogation of enemy combatants was unconstitutional.

The Bybee torture memo has been withdrawn. But, until December 30, 2004, it was the President's policy governing countless interrogations and resulted in countless incidents of abuse.

5. I have to believe that when the Office of Legal Counsel drafted the Bybee Torture Memo, they consulted with the Office of the Solicitor General – the office that would have to defend the policy in the Supreme Court if it was challenged. Did you have any role in reviewing, contributing to, approving or otherwise facilitating the Bybee Torture Memo or the policy it embodied? Please explain the nature of your contributions or other involvement. What do you know about its development and adoption?

   ANSWER: I was not aware of the August 1, 2002, Memorandum from Jay Bybee to the Counsel to the President until well after it was finalized, and indeed did not become aware of it until after the oral arguments in Padilla and Hamdi. My lack of involvement in the formulation of that legal memorandum and the policies and reasoning therein reflects the standard division of labor within the Department of Justice. Within the Department of Justice, the Office of Legal Counsel typically provides legal counsel about contemplated policies that are not involved in litigation. The Office of the Solicitor General handles litigation involving legal challenges to policies once they are implemented and challenged in the courts.

6. Although the Bybee Torture Memorandum was withdrawn on December 20, 2004, the Administration has not explicitly rejected the position that the President can exercise a "Commander-in-Chief" override of laws he doesn't like. Do you believe that the President has the power under the Constitution to override laws on the detention and interrogation of detainees? If so, under what circumstances?

ANSWER: I do not believe that it is accurate to say that the President can "override" laws that Congress has duly enacted. That said, it may be possible for Congress to enact a law that so intrudes on the President's constitutional authority that it violates Article II of the Constitution. For example, a hypothetical statute restricting the power of the President to veto legislation may impermissibly infringe on a core Executive power granted exclusively to the President. Although I have not studied the subject exhaustively, I have no present belief that any of the existing statutes related to the detention and interrogation of detainees is unconstitutional and, if confirmed as Solicitor General, I would apply the same standard in this area as in all others and defend any federal statute that does not unconstitutionally interfere with the President's Article II powers so long as reasonable arguments exist in defense of the statute.

7. Congress has repeatedly passed laws prohibiting the torture or maltreatment of detainees, including:

    - Anti-Torture Statute
    - Federal War Crimes Act
    - Uniform Code of Military Justice
    - Convention Against Torture
    - International Covenant on Civil and Political Rights

    Do you believe that the President has authority to violate these treaties and statutes?

    ANSWER: Under Article II, section 3 of the Constitution, the President has a responsibility to "take Care that the Laws be faithfully executed." Generally, this means that the President will enforce laws enacted by the Congress, and the Solicitor General will defend the constitutionality of such statutes as long as a reasonable argument can be made in the statute's defense. Nonetheless, it may be possible for Congress to enact a law that so intrudes on the President's constitutional authority that it violates Article II of the Constitution. For example, a hypothetical statute restricting the power of the President to veto legislation may impermissibly infringe on a core Executive power granted exclusively to the President. The President's obligation to uphold the Constitution could, in such extraordinary circumstances, require him to decline to enforce a law that was itself unconstitutional. Under the Clinton Administration, the Office of Legal Counsel characterized as "unassailable" the proposition that the President has authority to decline to enforce unconstitutional statutes. That said, although I have not studied the subject exhaustively, I have no present belief that any of the existing statutes or treaties you cite is unconstitutional. The extent to which some of these provisions are judicially enforceable may vary, however. For example, the Justice Department has argued, consistent with

its ratification history and relevant reservations, that the International Covenant on Civil and Political Rights (ICCPR) is not judicially enforceable.

Questions for Paul Clement from Senator Patrick Leahy

1. You have been serving as Acting Solicitor General for the better part of a year already, and if you are confirmed, you could be the Solicitor General for three years or more. As the Solicitor General, who is your client? Is it the President? Is it the United States? Is it the people of the United States? How do you define your duties to that client? Who speaks for that client?

ANSWER: As a general matter, the Solicitor General's client is the United States. At the beginning of every amicus brief filed in the Supreme Court, the Solicitor General must articulate the "interest of the United States," not the interest of the President or of a particular executive branch agency. At the same time, there may be particular cases in which the Solicitor General has an attorney-client relationship with a particular government entity. So, for example, if a case concerns the validity of a particular regulation of the Equal Employment Opportunity Commission (EEOC), there is a sense in which the EEOC is the client. As former Solicitor General Drew Days noted at a symposium on the Office of the Solicitor General at the Brigham Young University Law School, "When it comes to the question of who is the client, it really is a matter of analyzing the situation and reasoning through a situation to determine: Are there federal laws involved? Are there federal interests at issue?" In all events, even in a situation in which the Office represents a particular federal agency, like the EEOC, the Solicitor General must always remember that he represents and speaks for the broader interests of the United States.

2. You are a lawyer, and when a case comes to your desk, you look at it, evaluate its merits, and come to a conclusion about whether to pursue the case at all, what the appropriate outcome should be if you do pursue it, and what the best legal strategy is to reach that outcome. (A) What do you do if the Attorney General disagrees with you, about whether to pursue a case at all, or about the outcome you believe should be achieved, or about the legal arguments you propose to make in order to achieve it? (B) What do you do if the White House disagrees? (C) Who has the final call in the Bush Administration about which cases to pursue in the Supreme Court? About the desired outcome? About the legal arguments? (D) How do you resolve disagreements about whether to pursue a case, what outcome to pursue, and what arguments to use? (E) Under what circumstances, if any, would you resign as the result of a disagreement with the Attorney General or the White House about the appropriate handling of case?

ANSWER: The Solicitor General ultimately answers to both the Attorney General and the President. The Attorney General and the President, thus, certainly have the power to overrule the Solicitor General. As former Solicitor General Seth Waxman put the point at that same B.Y.U. forum, while Article II of the Constitution is dedicated to the President's powers and responsibilities, "the Framers managed to make it all the way through all the articles of the Constitution without even conceiving of a solicitor general, let alone bothering to mention an attorney general." At the same time, the President and the Attorney General are both best served when they have confidence in the judgments of the Solicitor General and therefore do not find occasion to overrule the Solicitor General. Ideally, that confidence makes it unnecessary for the Attorney General or the President to form

an independent legal judgment on all but the most momentous matters that the Solicitor General must address. In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion, the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call. Of course, the President ultimately has the right under the Constitution to have his Solicitor General file the brief he wants filed. At the same time, he does not have the right to insist that I file any particular brief. I can certainly imagine situations in which I would resign before filing a brief that I thought outside the bounds of proper advocacy, and I can imagine other situations in which the handling of a series of briefs would lead me to resign. At the same time, I would not be interested in embarking on this service if I thought such scenarios were likely to come to pass.

3. The Solicitor General enjoys a special status in the Supreme Court. Please explain whether you think the S.G. owes the Court anything more than the "average" lawyer there, whether you think the duty of candor higher on the SG than on other lawyers and whether you feel any special obligation to the Court?

ANSWER: Certainly, every lawyer admitted to the Supreme Court is sworn in as an officer of the Court and owes a duty of candor to the Court. That said, as I indicated in my opening statement, the Solicitor General does have a special relationship with the Court and does owe the Court a special duty of candor. That reality reflects the facts that the Solicitor General is far and away the most frequent litigant before the Supreme Court and that the Solicitor General represents the interest of the United States. As former Solicitor General Sobeloff put the point, the Solicitor General is "an advocate for a client whose business is not merely to prevail in the instant case. My client's business is not to achieve victory, but to establish justice."

4. The Solicitor General chooses, and shapes, the United States' arguments in the Supreme Court. Advertently or inadvertently, he thus acts as a policy maker, in an important sense, as well as a litigator. What special considerations do you bring to that role?

ANSWER: Lawyers in the Office of the Solicitor General can often have the most salutary effect on policy judgments by leaving the policymaking to the policymakers. In the case of constitutional challenges to statutes, the policy views of lawyers in the Office of the Solicitor General should not influence the decision to defend statutes when reasonable arguments are available. With respect to regulations in cases in which a preferred policy is at odds with the extant regulation, it may fall to the Solicitor General to suggest that the proper way to implement the policy preference is a new regulation, not further litigation over the scope of the old one. But the formulation of the policies themselves is, in my view, best left to Congress or the agencies.

5. Justice Kennedy and other federal judges have come under attack recently for discussing foreign laws and authorities in their judicial opinions. Some have gone so far

as to call for Justice Kennedy's impeachment for citing international norms in his opinions. I'm interested in your views on this. (A) Is it wrong for judges to consider foreign sources when examining domestic issues? (B) Would it be constitutional for Congress to tell the federal courts not to consider such sources? Would it be appropriate? (C) Have you ever cited a foreign source to a U.S. court to support your interpretation of U.S. law? Has your office done this in any case you can recall over the last four years?

ANSWER: Foreign law sources may be relevant, although the degree of relevance certainly depends on the issue. For example, in interpreting a treaty – even a treaty with domestic effect – a court might well be interested in how our treaty partners have construed the same treaty. Moreover, in light of our role as advocates before the Court and the reality that at least some members of the Court find foreign law more or less relevant depending on the context, our office has occasionally cited foreign law sources. For example, in Clark v. Martinez, No. 03-878, recidivist criminal aliens argued that their detention violated federal and international law. In support of the government's argument that no established principle of international law precluded the detention, we cited a decision of an Australian court that had rejected a similar challenge.

If Congress enacted a law directing the federal courts not to consider such sources, the office would defend the constitutionality of the statute as long as a reasonable argument could be made in its defense. The constitutionality of such legislation might depend on the specific text of the legislation. Consideration of that question would no doubt be advanced by an evaluation not only of the specific text of the statute, but also any analysis conducted by the Office of Legal Counsel in evaluating the statute and advising the President on its constitutionality for purposes of his analysis of whether to sign it as well as the legal arguments advanced in any pleadings filed in conjunction with the constitutional challenge. As Solicitor General, my role would be to advance the interests of the United States, not my personal views, and previous statements of my personal views might be used against the United States' interests, either to seek my recusal, to skew my consideration of what position the United States should take, or to impeach the arguments eventually advanced by the United States.

6. A recent *New York Times* editorial had this to say about judicial activism: "When conservatives complain about activist judges, they talk about gay marriage and defendants' rights. But they do not mention the 11th Amendment, which has been twisted beyond its own plain words into a states' rights weapon to throw minorities, women and the disabled out of federal court. ... The Supreme Court's conservative majority regularly overturns laws passed by Congress, like the Violence Against Women Act and the Gun-Free School Zones Act." Do you agree with the Court's new, expansive view of the 11th Amendment? Will you commit to defending Acts of Congress from 11th Amendment challenges?

ANSWER: The Office of the Solicitor General has a long tradition of defending the constitutionality of congressional enactments whenever a reasonable legal argument can be made in their defense. That includes statutes that are challenged under the Eleventh Amendment. In Tennessee v. Lane, we recently persuaded the Supreme Court to reject an Eleventh Amendment challenge to the application of Title II of

the Americans with Disabilities Act to state defendants. The victory in Lane came despite the Court's earlier invalidation, on Eleventh Amendment grounds, of efforts to apply Title I of the same statute to state defendants. I argued the Lane case myself.

Likewise, in Nevada v. Hibbs, the United States successfully defended the family-care provisions of the Family and Medical Leave Act against Eleventh Amendment challenge. I worked on the brief in Hibbs. I also personally argued for the United States in Federal Maritime Commission v. South Carolina Ports Commission, which presented the question whether a State's sovereign immunity bars the Federal Maritime Commission from administratively adjudicating a complaint brought by a private party against the State. The United States lost that case, and the statute was held unconstitutional, by a 5-4 vote.

I have also defended other federal statutes against other federalism-related challenges. For example, I successfully argued in defense of provisions of the transportation laws against a Tenth Amendment attack in Pierce County v. Guillen. Likewise, I argued on behalf of the United States in seeking to overturn the Ninth Circuit's invalidation of the Controlled Substances Act on Commerce Clause grounds in Ashcroft v. Raich. If confirmed as Solicitor General, I would continue to defend such statutes against constitutional, including Eleventh Amendment, challenges.

SUBMISSIONS FOR THE RECORD

News From:

U.S. Senator Russ Feingold

506 Hart Senate Office Building
Washington, D.C. 20510-4904
(202) 224-5323

http://www.senate.gov/~feingold

Contact: **Trevor Miller**
(202) 224-8657

Statement of U.S. Senator Russ Feingold
Introduction of Paul D. Clement
Nominee for Solicitor General

April 27, 2005

Mr. Chairman, it is my pleasure to introduce to the Committee Paul Drew Clement, who the President has nominated to serve as Solicitor General of the United States. As we all know, the position of Solicitor General is an extremely important post in our government. It is the third-ranking position in the Department of Justice, but because the Solicitor General serves as the voice of the United States government at the United States Supreme Court, the position comes with extra stature and responsibility.

Paul Clement, a son of Wisconsin, is well qualified to carry out these singular responsibilities. He is a graduate of Cedarburg High School outside of Milwaukee, a *summa cum laude* graduate of Georgetown University's School of Foreign Service, and received his J.D., *magna cum laude*, at Harvard Law School, where he was an editor on the law review. He also received a Masters degree from Cambridge University in England.

After his graduation from law school in 1992, Mr. Clement clerked for Judge Laurence Silberman on the D.C. Circuit and for Supreme Court Justice Antonin Scalia. He has worked in private practice for the firms Kirkland & Ellis and King & Spaulding. In between his stints at those firms, he was then-Senator John Ashcroft's Chief Counsel on this Committee for two years. From the beginning of the Bush Administration in 2001, Mr. Clement has been the Principal Deputy Solicitor General, and has served as the Acting Solicitor General since the recent departure of Ted Olson from that position.

He has argued 26 cases before the Supreme Court over the past four years, including some of the highest profiles cases of the past few terms such as *Tennessee* v. *Lane*, *United States* v. *Booker*, and the *Hamdi* and *Padilla* cases. Paul is regarded as a truly outstanding oral advocate, one of the best in the country today.

You can see from this resume that Paul has accomplished quite a lot in his still young career. If confirmed, he will be the youngest Solicitor General in over 50 years, and only three other occupants of the office in its history have been younger than him. One of them was William Howard Taft, who became Solicitor General when he was only 32 years old.

Mr. Chairman, I agreed to introduce Paul Clement to the Committee not because of this impressive resume, and certainly not because he worked as an intern during college for the Wisconsin Senator whom I defeated in the 1992 election. No, I am doing this because of how he carried out his responsibilities in another case that he argued before the Supreme Court, *McConnell v. FEC*, the case testing the constitutionality of the Bipartisan Campaign Reform Act, sometimes referred to as the McCain-Feingold bill.

I'm not sure how many people remember that when McCain-Feingold passed the Senate there was some doubt and concern about how vigorously the Justice Department would defend it in court. I sought and received pledges from both the Attorney General and the Solicitor General in their confirmation hearings that they would defend the law if Congress passed it.

When the time came for oral argument, Ted Olson defended Title I, the soft money ban, and Paul Clement argued in favor of the constitutionality of Title II, the provisions dealing with issue ads. Seth Waxman, Solicitor General in the Clinton Administration, represented the bill's principal sponsors in the argument. That was truly a legal Dream Team. And Paul's performance was superb, every bit as good as his two senior colleagues. He argued for 40 minutes without notes, and with complete command of both the intricacies of the statute and the legal precedents bearing on the case. In the end, as we all know, the Supreme Court upheld all of the major provisions of our bill, including Title II, which most legal observers believed was the most susceptible to constitutional challenge.

So Mr. Chairman, it is based on personal experience that I can say with confidence that Paul Clement will faithfully execute his responsibilities as Solicitor General. I am sure there will be times when I will disagree with the positions he and his office will make. That internship with Sen. Kasten he held long ago is probably a good indicator of that. But I am certain that Paul will perform his duties with professionalism and integrity, and I am honored to appear on his behalf today. Thank you Mr. Chairman.

###

Statement of Senator Herb Kohl
Senate Judiciary Committee
April 27, 2005

Herb Kohl

Mr. Chairman,

Thank you for the opportunity to introduce Paul Clement to the Committee today. As we all know, Mr. Clement is no stranger to the Senate Judiciary Committee having served as counsel to then-Senator John Ashcroft.

Paul's nomination to be Solicitor General is one that I can proudly support. He has served with distinction as the Acting Solicitor General since he took over that position last July. He has represented the government well and performed his job professionally.

Paul is a native of Cedarburg, Wisconsin and a member of the Wisconsin Bar. While this background may be sufficient to qualify him for this position, he has also compiled an impressive academic and professional resume. After graduating from Georgetown University and Harvard Law School, he clerked on both the D.C. Circuit and the United States Supreme Court.

His professional credentials include significant appellate experience in the federal courts both before and during his tenure in the Solicitor General's office where he first worked as the Principal Deputy Solicitor before becoming the Acting Solicitor. His extensive experience includes 25 arguments before the Supreme Court including such notable cases as U.S. v. Booker on the constitutionality of the federal sentencing guidelines; the Hamdi and Padilla cases on the power of the Executive Branch in wartime; and McConnell v. FEC on the Bipartisan Campaign Reform Act.

Many Solicitors General have gone on to important positions on the federal bench. While Paul may eventually earn such a distinction, any future nomination would need to be judged on its merits at that time.

Mr. Chairman, I appreciate the opportunity to support Mr. Clement's nomination and wish him the best in a role we already know he will perform well. Thank you.

Statement of Senator Patrick Leahy
On the Nomination of Paul Clement to be
Solicitor General of the United States
April 27, 2005

I am pleased to be able to join my colleagues from Wisconsin in welcoming Mr. Clement to the Committee this morning. The position of Solicitor General of the United States, to which he is nominated, is an important and unique one in our system of government. The Solicitor General is not merely another legal advocate whose mission is to advance the narrow interests of a client, or merely another advocate of his President's policies. Rather, the Solicitor General is responsible for the integrity of our laws, and must use his or her judgment and legal skills to that higher purpose. For this reason the Solicitor General has often been called the "10th Justice" of the Supreme Court.

On this Committee, Republicans and Democrats have reviewed nominations to the position of Solicitor General seeking the highest levels of independence and integrity, as well as legal skills. The Solicitor General must argue with intellectual honesty before the Supreme Court and represent the interests of the Government and the American people for the long term, and not just with an eye to short-term political gain. It is our obligation here on this Committee to help the Senate determine whether a nominee understands and will live up to this extraordinary role. From Benjamin Bristow in 1870, to William Howard Taft and Charles Evans Hughes, Jr., from Robert Jackson to Archibald Cox, Thurgood Marshall and Erwin Griswold, we have had some extraordinary people serve this country as our Solicitors General.

Mr. Clement's academic and legal record is impressive. He has attended prestigious universities, worked for well-known judges and law firms, and served in all three braches of the Federal Government, including a stint as a staffer on this Committee. But I must note that the judges for whom he clerked, and the politicians whom he has staffed as well as the Attorney Generals he has served, have been among the most conservative this nation has ever seen, and among the most ideological. He has been an active member of the Federalist Society, working hard for their conservative agenda. He used his considerable legal skills to assist one of the far-right interest groups file an amicus brief in the Supreme Court in the case of Bush v. Gore, and he has participated in some of the most controversial legal cases of the last four years.

This does not mean he that cannot aspire to be the kind of Solicitor General that Jackson, Cox, Marshall and Griswold were. We know Mr. Clement from his time here in the Senate, and many of us have had a good and trusting relationship with him. The Solicitor General cannot allow politics to trump the law. I look forward to hearing from the nominee that he will challenge the political forces in this Administration when their interests diverge from his responsibilities to safeguard the integrity of the law as Solicitor General.

#####

SENATE COMMITTEE ON THE JUDICIARY
HEARING ON NOMINATION OF PAUL D. CLEMENT
STATEMENT OF CHAIRMAN F. JAMES SENSENBRENNER, JR.
CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY

APRIL 27, 2005

Paul Clement's unique professional qualifications, outstanding commitment to public service, and extensive legal and courtroom experience make him uniquely qualified to serve as Solicitor General of the United States.

Over the last four years, Mr. Clement has served in the Office of the Solicitor General with distinction, first as Principal Deputy Solicitor General, and later as Acting Solicitor General. While serving in the Office of the Solicitor General, Mr. Clement has argued 26 cases on behalf of the United States, generating an impressive track record on behalf of the American people. None of Mr. Clement's predecessors represented the United States on more occasions prior to their confirmation as Solicitor General.

Of no less importance, during this time Mr. Clement has earned the respect of his colleagues, courtroom opponents, judges and Justices before whom he has argued, and the broader legal community in which he serves.

The Solicitor General is the only Federal officer statutorily required to be "learned in the law." Mr. Clement meets and exceeds this prerequisite, and will bring credit to this important post. Mr. Clement's legal career is varied and accomplished, spanning a broad spectrum of the legal field. After graduating with distinction from Harvard Law School, where he served as editor of the Harvard Law Review, Mr. Clement clerked for Judge Silberman and Justice Scalia. He has served in private practice as lead appellate lawyer in a major law firm, as Chief Counsel to the Senate Judiciary Subcommittee on the Constitution, Federalism and Property Rights, and serves in academia as an Adjunct Professor at Georgetown University.

Mr. Clement is a native of Cedarburg, Wisconsin, a city which I am privileged to represent. He is a graduate of Cedarburg High School. His proud parents (Gerald and Jean Clement) continue to reside in Cedarburg. Like all good Wisconsin natives, I understand that Mr. Clement is raising his three children as Packer fans.

Mr. Clement has argued a number of important cases on behalf of the United States, including several pertaining to the conduct of the war on terrorism. His outstanding legal reasoning and analysis have earned respect on both sides of the political spectrum. In a legal community that often emphasizes differences while diminishing the common organizing principles that unify it, Mr. Clement is both well-liked and well-respected. Moreover, Mr. Clement has a keen recognition that if confirmed, he will be the courtroom representative of *all* Americans. I urge his favorable consideration by this Committee and his confirmation by the full Senate.

○