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CONFIRMATION HEARINGS ON THE NOMINATIONS OF THOMAS PERRELLI NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES AND ELENA KAGAN NOMINEE TO BE SOLICITOR GENERAL OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

FEBRUARY 10, 2009

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EXECUTIVE NOMINATIONS

TUESDAY, FEBRUARY 10, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senators Cardin, Feinstein, Feingold, Whitehouse, Wyden, Klobuchar, Kaufman, Specter, Hatch, Kyl, Graham, and Coburn.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Committee will come to order. First, let me thank Chairman Leahy for allowing me to chair today's hearing.

Today we consider two important nominations for leadership positions in the Department of Justice. These are the nominations of Thomas Perrelli to be Associate Attorney General of the United States and Elena Kagan to be Solicitor General of the United States.

I agree with Chairman Leahy that this Committee should move quickly to continue to restore the morale and integrity of the Department. I am pleased that this Committee recently reported out Attorney General Eric Holder to be Attorney General of the United States with a strong, bipartisan vote of 17 to 2, and that the full Senate overwhelmingly confirmed his appointment shortly thereafter.

The Associate Attorney General is the No. 3 position at the Department of Justice. This official oversees a wide range of offices at the Justice Department, including the Civil Rights, Civil, Antitrust, Environment, and Tax Divisions, as well as the Office of Justice Programs.

Thomas Perrelli comes to this Committee with an impressive range of experience in both the private and public sectors. He served as counsel to Attorney General Janet Reno from 1997 to 1999. For the final 2 years of the Clinton Administration, he served as Deputy Assistant Attorney General, where he supervised the Federal Programs Branch of the Civil Division, representing nearly every Federal agency in complex civil litigation. In that role, Mr. Perrelli supervised a staff of 100 attorneys responsible for defending the constitutionality of Federal statutes, defending Federal agency actions and regulations, representing both the diplomatic and national security interests of the United States in courts of

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law, and conducting a wide range of other litigation. He also supervised the Department's Tobacco Litigation Team's lawsuit against major tobacco companies.

In the private sector, Mr. Perrelli worked for many years at the Washington law firm of Jenner & Block, handling a caseload including constitutional, intellectual property, and appellate cases, as well as a wide range of complex civil litigation matters.

Most recently, he served on President Obama's Justice Department Transition Team. He is a graduate of Brown University and Harvard Law School.

I also want to note for the record that Mr. Perrelli has received the endorsement of several law enforcement organizations, such as the Federal Law Enforcement Officers Association and the National Fraternal Order of Police, as well as the National Center for Missing and Exploited Children. These letters will be made part of our record.

Elena Kagan also comes to this Committee with a wide range of experience, having served as the dean of a law school, a law professor, a senior official at the White House, a lawyer in private practice, and a legal clerk for a Justice of the Supreme Court.

A graduate of Princeton University and Harvard Law School, Ms. Kagan clerked for Justice Thurgood Marshall on the Supreme Court and then worked as an associate at the Washington law firm of Williams & Connolly. While teaching law school at the University of Chicago, she took on another assignment as special counsel to Senator Joe Biden, a distinguished former Chairman of this Committee. Ms. Kagan assisted in the confirmation hearings of Supreme Court Justice Ruth Bader Ginsburg.

In 1995, Ms. Kagan served as President Clinton's Associate White House Counsel, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council. In the White House Counsel's Office, she acted as a lawyer for the White House policy councils and legislative offices, analyzing and drafting statutory language and executive actions, and offering policy advice. In the Domestic Policy Council office, she played a role in the executive branch's formulation, advocacy, and implementation of laws and policies in a wide variety of issues.

In 1999, Ms. Kagan left Government and began serving as a professor at Harvard Law School, teaching administrative law, constitutional law, civil procedure, and a seminar on legal issues and the Presidency. In 2003, she was appointed to serve as Dean of the Harvard Law School, becoming the first woman dean in the school's history. In her 5 years at Harvard Law School, Dean Kagan has overseen both the academic and non-academic aspects of the law school. I will enter into the record a letter from the deans of 11 major law schools in support of her nomination.

The Solicitor General of the United States holds a unique position in our Government. It is one of the few Government positions in which the occupant must be "learned in the law," pursuant to a statute enacted by Congress. The Solicitor General is charged with conducting all litigation on behalf of the United States in the Supreme Court and is often referred to as the "tenth Justice." Indeed, the Supreme Court expects the Solicitor General to provide the Court with candid advice during oral argument and the filing

of briefs on behalf of the United States. The office participates in about two-thirds of all the cases that the Court decides on the merits each year.

So it is indeed high praise for Dean Kagan that former Solicitors General Walter Dellinger and Ted Olson joined with six other Solicitors General of both parties in endorsing her nomination. I will make that letter also part of the record. It is very complimentary of our nominee.

At the same time, we expect the Solicitor General to exercise independent judgment from the Department of Justice, the Attorney General, and even the President of the United States. The office is charged with vigorously defending statutes duly enacted by Congress against constitutional challenges. The office also supervises all lower court appellate litigation and decides whether to appeal decision that are adverse to the Government and what position should be taken on the merits of the case.

So let me thank the two nominees for being willing to continue to serve their country. I also want to thank their families, and we will have an opportunity for them to introduce their families as the confirmation hearing continues. And at this time, let me recognize the Republican leader on our Committee, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. At the outset, may I say that your work on the Committee has been outstanding. You have been here a little more than 2 years, you come as an experienced lawyer, and now you are already the Chairman of the Committee—pardon me, Acting Chairman.

[Laughter.]

Senator CARDIN. It is a great country.

Senator SPECTER. Acting Chairman of the Committee, which is quite a testimonial to you. But we have worked together closely in the 2 years, and it is nice to work with a lawyer's lawyer, which you are, Senator Cardin.

Senator CARDIN. Thank you.

Senator SPECTER. I join you in welcoming the two nominees. Both present outstanding academic credentials, and in the situation with Dean Kagan, she is now the Dean of the Harvard Law School to supplement her outstanding academic work and professional work.

The Senate has a broad responsibility under the Constitution on confirmations to make inquiries beyond even extraordinary resumes like those presented here today. In evaluating President Obama's nominees, we see perhaps what is a cautionary word during the campaign when Candidate Obama had this to say about judges. Now, Solicitor General is a little different—substantially different, really, from a judge, as is the position of Associate Attorney General. But in trying to evaluate approaches, it is, I think, fair to look at philosophy.

This is what Candidate Obama had to say: "We need somebody who has got the heart, the empathy to recognize what it is like to be a young teen-age mom, the empathy to us understand what it is like to be poor or African American or gay or disabled or old. That is the criteria by which I am going to be selecting my judges."

Well, I agree with the need for consideration on the disadvantage, no doubt about it, on the categories identified by Candidate

Obama. But we also have to make an inquiry as to the commitment to the law and that nominees for key positions in the Department of Justice like judges have followed the law, that if there are to be changes made, it is well established as a matter of philosophical doctrine that it is up to the legislature to do that.

When Dean Kagan came to see me, I asked her about a number of her writings, and we will be going into those today. And she made a sharp distinction, which I understand, as to what a nominee may think about a given situation contrasted with the advocacy role, which she sharply distinguishes, and represents that she can be an advocate as Solicitor General on issues that she does not agree with philosophically.

Well, I understand that distinction, and the issue that inevitably arises is how effective is somebody who is arguing for something which they deeply disagree with, and Dean Kagan is a person who has very deep views. I cite only one in this introduction, and I talked to her about it. She was discussing the Solomon amendment on the issue of "Don't ask, don't tell," and I can understand the challenge to the underlying basis of the Solomon amendment. But this is what she said: "As dean, we instated military recruiters to the Harvard Law School because to do otherwise would have been to forfeit a great deal of Federal funding." And she noted that the "action caused her feet distress," and that she finds the military's policies to be "a profound wrong, a moral injustice of the first order."

Well, one consideration would be if you think of something as a moral injustice of the first order, how can you in good conscious be an effective advocate. And this bears on the ability to apply the law.

Now, Dean Kagan countered with a statement, well, the Solicitor General has the obligation to uphold the constitutionality of the law. There is a strong presumption of constitutionality. And I commented to her about a case when I was district attorney where the Pennsylvania statute treating women differently than men—they were given indeterminant sentences so that if they were convicted of larceny, for example, they went to a women's prison, and having served the maximum prescribed by statute, 5 years, they could be kept longer. And when I was asked to defend the statute, I refused. And they brought in the State Attorney General who defended the statute, and the statute was stricken.

But there is a real issue here as to the range of advocacy or perhaps the intensity of advocacy, so I make those very brief introductory comments, Mr. Chairman, to sort of set the parameters, and we have also the Associate Attorney General, and we have our responsibility to uphold, to make these inquiries under the Constitution to decide whether we should consent and approve the nominations.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator Specter.

At this time I will recognize Senator Jack Reed from Rhode Island for the purposes of introductions. Senator Reed, it is a pleasure to have you before our Committee.

STATEMENT OF HON. JACK REED, A UNITED STATES SENATOR FROM THE STATE OF RHODE ISLAND

Senator REED. Thank you, Mr. Chairman, and thank you, Ranking Member Specter. It is an honor to appear here this morning to introduce Dean Elena Kagan.

Dean Kagan and I both attended Harvard Law School, but it is obvious she is much younger and a much, much better lawyer. But I have been following her career with great pride since her days not only at Harvard, but as she clerked for Judge Abner Mikva on the U.S. Court of Appeals for the D.C. Circuit and for Justice Thurgood Marshall on the United States Supreme Court—two giants of American jurisprudence.

As the Chairman indicated, she went on to teach law at the University of Chicago Law School. She served in the Clinton administration, and then she returned to Harvard Law School in 1999.

During her tenure as Dean of the Harvard Law School, she has drawn acclaim as a pragmatic problem solver who could bridge ideological divides among the faculty and the student body. She hired new professors with diverse areas of expertise and views, and she ushered in a number of far-ranging student-oriented reforms to the law school. She has also won praise from current and former students who have served our country in uniform for creating an environment that is highly supportive of students who have served in the Armed Forces of the United States. I know that because I have met with many of these young men and women who served and now are students at or recent graduates of the Harvard Law School, and they are uniformly praiseful of Dean Kagan.

She is eminently qualified to become Solicitor General of the United States, and it is not just her impressive resume and brilliant mind. It is her wisdom and her temperament and her commitment to the Constitution.

In October 2007, Dean Kagan gave a speech at my alma mater, West Point. She was invited there to speak to the cadets, and she told the cadets that our Nation is most extraordinary because, as she said, we "live in a Government of laws, not of men and women."

As a touchstone for this speech, she used a place on the West Point campus called Constitution Corner. This is the place at which the cadets are reminded of their obligations as soldiers. One of the plaques at the site is etched with the phrase, a very simple phrase, "Loyalty to the Constitution." That was a watch word for all of us. She understands that it is our duty to the Constitution which is preeminent.

She spoke that day about how our law and our dedication to law, the rule of law, is especially during trying times. She used the examples of President Nixon's Attorney General, Archibald Cox, and President Bush's Attorney General, John Ashcroft, as examples of men who sought to uphold the rule of law in very trying circumstances and put doing the right thing above all else.

If confirmed, I believe General Kagan will be an outstanding Solicitor General. She brings exceptional qualifications to the job and will be a tough, fair, and powerful advocate for the Constitution and the people of the United States, and I comment her to this Committee, and I thank you all.

Senator CARDIN. Thank you very much, Senator Reed. I appreciate your being here.

At this time I would ask our witnesses to come forward, if they would, please. If you would stand in order to be sworn in. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. PERRELLI. I do.

Ms. KAGAN. I do.

Senator CARDIN. Thank you. Well, perhaps the best way to start is first to thank you all for being here, and I appreciate your families being here.

[Laughter.]

Senator CARDIN. Perhaps at this time it might be appropriate if you would introduce the members of your family. We have already heard from one.

[Laughter.]

Senator CARDIN. But if we could hear from the rest, it would be—so, Mr. Perrelli, if you would go first and perhaps introduce the members of your family who are here.

Mr. PERRELLI. Thank you, Senator. I think you have met my son, James, who I think will be excused momentarily, and this is my wife, Kristine. I have got my mother, Nancy, and my Aunt Lucy, who just celebrated her 90th birthday, from Barre, Vermont. I am also joined by my sister, Caryn; my brother-in-law, Scott. I have also got my brother-in-law Kevin, who made the trip from Madison, Wisconsin. I have got my extended family: Lieutenant Matthew Trivett of the Montgomery County Fire Marshal Bomb Squad, and Sergeant David Trivett of the Baltimore County Homicide Unit.

Thank you.

Senator CARDIN. Thank you.

Dean Kagan.

Ms. KAGAN. Well, Tom and I laughed because he brought all his family, and I left most of mine at home. But I have two wonderful brothers who are here, city public school teachers. I excused them from coming down. But my older brother's daughter, my niece Rachel, is here. She is graduating from college this year. She is looking forward to law school. I think she is going to be a splendid lawyer. And then I brought a little bit of family from Cambridge, you might say, some of my great friends from Harvard Law School: Charles Fried, a former Solicitor General himself, who is here; Jack Goldsmith, Dan Meltzer, John Manning, Martha Minow, Carol Steiker—all great friends of mine, and I very much appreciate their coming down to support me.

Senator CARDIN. Well, we welcome your families, and we know the sacrifices that they have to make in regards to your public service, and we thank them for that.

I want to acknowledge for the record that Senator Webb and Senator Warner wanted to be here to introduce Mr. Perrelli, but they were called upon on other Senate business, and we will allow their statements to be made part of the record.

Mr. Perrelli, we would be glad to hear from you.

STATEMENT OF THOMAS J. PERRELLI, TO BE ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. PERRELLI. Mr. Chairman, Senator Specter, and members of the Committee, thank you for giving me the opportunity to appear before you as the nominee for the position of the Associate Attorney General. I am grateful to the President and the Attorney General for giving me the opportunity to be considered for this post and to serve again in the Department of Justice, an organization that I revere.

I would like to thank the members of the Committee and their staffs who have met with me to start what I hope will be a dialog about the issues facing the country and the Department of Justice. There is deep knowledge in this Committee about the many challenges ahead, and I hope that I have the opportunity to work with you to overcome them.

I would like to thank Senators Webb and Warner for the statements of support that have been submitted for the record.

I would not be here today without the love of my family and a great deal of good fortune. I want to thank first the love of my life, my wife, Kristine, for all of her love, help, and support—especially now with a new baby arriving any day. She is here—and you have already my son, James.

I also want to thank my mother, Nancy Perrelli, who has been an inspiration to me for many years, not the least of which is all that I learned by watching her, as a single parent, work full days, take care of me and my sister, and go to law school at night.

Missing from the large contingent behind me is my father, also Tom Perrelli. He passed away in 2002 after a long struggle with cancer. But I think of him today because my father was one of the career professionals who are at the heart of the Department of Justice. He made his career there and, indeed, he refused to retire until only a day or two before he died because it was part of what defined him.

My own reverence for the Department began through him. As a college student,I worked summers at the Immigration and Naturalization Service, mainly on IT projects, but I had the opportunity to experience lots of different aspects of the Department, including getting to visit the men and women on the border in San Diego to learn the extraordinary challenges that they face and the remarkable job that they do.

In my time as a summer intern, I had the unusual opportunity to talk with then-Attorney General Meese, who was kind to stop several times to talk to me when he was exiting the building and I was waiting at the bus stop for a shuttle.

When I completed law school, I clerked for the Honorable Royce Lamberth of the U.S. District Court for the District of Columbia—himself a lifelong public servant and veteran of the Judge Advocate General Corps, and the U.S. Attorney's Office in DC. In that job, I saw the best of Government lawyers, prosecuting cases from Iran-contra to drug gangs on the streets of DC, and defending the United States in cases from the savings and loan crisis to environmental regulation of nuclear power plants.

All of those experiences left me with a deep appreciation for the Department—its mission and the extraordinary people who carry it

out. That appreciation increased exponentially later in my career when I first served first as Counsel to the Attorney General and later as Deputy Assistant Attorney General in the Civil Division. The men and women who serve in the Department from Administration to Administration, from law enforcement agents of the FBI, DEA, and ATF who put their lives on the line every day, to lawyers and staff whose sole goal is fair, evenhanded application of the law, and representation of the interests of the United States, are remarkable and deserve more praise than they ever receive.

I am honored to have been nominated to serve as Associate Attorney General and to have the opportunity to work again among the career professionals at the Department. But I have no illusions about the size of the task. The challenges that the Department faces today are enormous, and they derive from its mission, which has expanded greatly since September 11th, from the constraints on its resources, which have limited its ability, and from management and other problems that are perhaps self-inflicted.

My vision is a Justice Department of which all Americans can be proud—a Department that keeps America safe from threats foreign and domestic, a Department that at every level makes the evenhanded application of the law and the representation of the interests of the United States without regard to party or personal views a priority; a Department that works in partnership with State, local, and tribal authorities to most efficiently protect the public and make communities safe; a Department that is transparent and gives to the American public confidence that the rule of law and the Constitution are paramount; and a Department that works with this Committee and others in Government to collaborate on the many challenges ahead.

I look forward to answering your questions. Thank you, Mr. Chairman.

[The prepared statement of Mr. Perrelli appears as a submission for the record.]

[The Questionnaire of Mr. Perrelli follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

1. **Name**: Full name (include any former names used).

   Thomas John Perrelli

2. **Position**: State the position for which you have been nominated.

   Associate Attorney General

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Jenner & Block
   1099 New York Ave. NW, Suite 900
   Washington, DC 20001

   I currently reside in Arlington, Virginia.

4. **Birthplace**: State date and place of birth.

   3/12/1966, Falls Church, Virginia.

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Kristine Joy Lucius.
   Chief Counsel for Civil Justice and Deputy Staff Director
   Senate Committee on the Judiciary
   224 Dirksen Senate Office Building
   Washington, DC 20510

   We have one dependent child.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Harvard Law School, J.D. 1991 (attended from 9/88-6/91)

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Brown University, A.B. 1988 (attended from 9/84-5/88)

Took mathematics classes at George Mason University from 9/82-5/83 (no degree awarded)

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

May 2008 — present
Managing Partner
Jenner & Block LLP
1099 New York Ave. NW
Washington, DC 20001

June 2001 — May 2008
Partner; Managing Partner of D.C. Office since 2005
Jenner & Block LLP
601 Thirteenth St. NW
Washington, DC 20005

January 2001 — June 2001
Unemployed

September 1999 — January 2001
Deputy Assistant Attorney General, Civil Division
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

December 1997 — September 1999
Counsel to the Attorney General
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

November 1992 — December 1997
Associate
Jenner & Block LLP
601 Thirteenth St. NW
Washington, DC 20005

1992 — 2006

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Co-President (briefly) and Member
Brown Club of Washington/Brown Alumni Schools Program

September 1991 — September 1992
Law Clerk
Hon. Royce C. Lamberth
U.S. District Court for the District of Columbia
333 Constitution Ave. NW
Washington, DC 20001

May 1991 (estimated) — August 1991 (estimated)
Summer Associate
Wilmer Cutler & Pickering
2445 M Street NW
Washington, DC 20037

January 1991 (estimated) — May 1991 (estimated)
Teaching Assistant
Brown University Political Science Department
36 Prospect Street
Providence, RI 02912

September 1990 (estimated) — May 1991 (estimated)
Legal Methods Instructor
Harvard Law School
1563 Massachusetts Ave.
Cambridge, MA 02138

May 1990 (estimated) — August 1990 (estimated)
Summer Associate
Jenner & Block LLP
601 Thirteenth St. NW
Washington, DC 20005

September 1989 (estimated) — May 1990 (estimated)
Legal Methods Instructor
Harvard Law School
1563 Massachusetts Ave.
Cambridge, MA 02138

August 1989 — May 1991
Editor / Managing Editor
Harvard Law Review
1511 Massachusetts Ave.
Cambridge, MA 02138

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May 1989 (estimated) — August 1989 (estimated)
Summer Associate
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., NW
Washington, DC 20004

June 1988 (estimated) — August 1988 (estimated)
Summer Intern
Immigration & Naturalization Service
U.S. Department of Justice
4th and Eye Streets, NW
Washington, DC 20536

1986 (estimated) — present (uncertain if continues to exist)
Pro Scientia
Non-profit dedicated to raising scholarship funds for students of the classics.
I was a co-founder/president of this organization, which has not operated since the 1990s.
I have been unable to ascertain whether the organization exists in any form today.

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

   N/A

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   This list excludes honors or awards before 1984:

   Recognized as one of the leading media and entertainment lawyers in the United States by *Chambers & Partners USA, 2007-2008*

   Named to "40 under 40" by the *National Law Journal*, indicating recognition as one of the top 40 lawyers in the country under the age of 40, 2005

   Recipient of the Albert E. Jenner Pro Bono Award, 2005

   Recognized by *Lawdragon* as one of its 500 "New Stars, New Worlds," 2006

   Named Best Intellectual Property Lawyer in Washington, DC by *Washington Business Journal*, 2008

   Member of *Phi Beta Kappa*

   Freshman Math (1st) and Latin (2nd) prizes at Brown University

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National Scholar program at Brown University

National Merit Scholarship

Elks Club National Scholarship

National Cash Register Centennial Scholarship

Jostens National Scholarship

National Junior Classical League Rhea Miller Scholarship

Classical Association of the Middle West and South Scholarship

Virginia Junior Classical League Scholarship

W.T. Woodson High School "It's Academic" Scholarship

W.T. Woodson High School Latin Club Steven Greenwood Scholarship

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

American Bar Association
Bar of the District of Columbia
Virginia Bar

11. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Virginia (1991) (Associate status)
District of Columbia (1993)

Due to a late payment of my D.C. bar dues in 1998, my D.C. bar license was temporarily suspended. In late 1997, I left Jenner & Block and went to the Department of Justice as Counsel to the Attorney General. I arranged for changes of address and forwarding of my mail. At some point in the summer of 1998, the D.C. bar sent my dues notice to Jenner's D.C. office. It was not forwarded to me. Subsequently, the D.C. bar sent to Jenner's D.C. office reminder letters and at least two certified letters saying that my license would be suspended if I did not pay. Someone at Jenner signed for those certified letters, but none of the letters from the D.C. Bar were forwarded to me. A secretary at the firm found the letters in January of 1999 and informed me. I immediately contacted the D.C. Bar and was told that all I needed to do to return to good standing was send a letter with my dues, the normal late penalty, and an additional penalty. I did so and was reinstated

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to good standing. During the period when I was unaware that my license had been suspended, I was not appearing in court. I also continued to be an associate member of the Virginia bar during that period.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

This list does not include pro hac vice admissions for particular cases or admission to practice under provisions that generally allow attorneys representing the United States to practice (1999-2001).

U.S. Supreme Court (1996)
U.S. Court of Appeals for the Federal Circuit (2002)
U.S. District Court for the District of the District of Columbia (1994)
U.S. Court of Appeals for the District of Columbia Circuit (2003)
U.S. Court of Appeals for the Fourth Circuit (1991)
U.S. Court of Appeals for the Eighth Circuit (2003)
U.S. District Court for the District of Maryland (1996-97): membership lapsed upon my transition to government service; 2003-2007, membership lapsed when the case I was working on was completed
Supreme Court of Virginia (1991)

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Brown Club of Washington and Brown Alumni Schools Program: university alumni groups. I participated on the Brown Club from 1992 to 2006 and served briefly, I believe in 2003, as co-president. I have been involved in alumni interviewing and served as co-chair of my 10th reunion.

American Bar Association: professional organization. I joined in approximately 1993 and have renewed my membership annually.

Obama for America National Legal Coordinating Committee, Post-Election Litigation Group, National Finance Committee, and Mid-Atlantic Finance Committee

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Pro Scientia: Non-profit dedicated to raising scholarship funds for students of the classics. I was a co-founder/president of this organization, which has not operated since the 1990s. I have been unable to ascertain whether the organization exists in any form today.

Phi Beta Kappa, Rhode Island Chapter: member since 1987

Rock Spring Congregational United Church of Christ: member since 2007.

I have also made charitable contributions to a number of organizations that refer to donors as "members" but that require no apparent role other than making contributions and attending events or performances. These include Wolf Trap Center for the Performing Arts, the Kennedy Center, the Shakespeare Theatre, the Smithsonian, the Nature Conservancy, and Habitat for Humanity.

b. Please indicate whether any of these organizations listed in response to 12(a) above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

No

13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

I have done my best to identify articles responsive to this question through searches of publicly available electronic databases.

Defending Lanham Claims Against Expressive Works and Raising a Defense Based on the First Amendment, Media Law Resource Bulletin (Jan. 2004)

Piracy Battles Online, Copyright World (Feb. 2003)

9th Circuit Denies Dustin Hoffman's Publicity Claim, National Law Journal (Oct. 22, 2001) (with co-author)

Case Note, Search and Seizure — Suspicionless Drug Testing, 103 Harv. L. Rev. 592 (1989)

Case Comment, Section 1983: Golden State Transit Corp. v. Los Angeles, 104 Harv. L. Rev. 339 (1990)

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In law school, I was an editor of and eventually Managing Editor of the *Harvard Law Review* from 1989 to 1991. I did cite checking on the *Harvard Civil Rights-Civil Liberties Law Journal* and the *Harvard Journal on Legislation* in 1988-89. I have provided copies of articles written by me for these publications, but not the entirety of the publications over this four year period.

In college, I was an editor of and eventually Editor-in-chief of the *Critical Review*, which provided student-written reviews of courses. I was also an editor of and eventually Editor-in-Chief of *Clio*, which published undergraduate history papers. I have not provided copies of those publications.

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

N/A

While at Brown University, I worked on the Educational Policy Committee and the College Curriculum Council, which undertook a review of the school's curriculum. I do not have copies of any recommendations that may have been made.

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

I have done my best to identify testimony, statements, and other communications responsive to this question through searches of publicly available electronic databases. Attached please find the following materials:

Transcript of Public Hearing, Judicial Review Commission on Foreign Asset Control (Oct. 3, 2000).

Meeting Summary from CDC, "Interagency Committee on Smoking & Health: Advertising Issues — Legal Perspective" (Oct. 26, 2000).

Letter from Thomas J. Perrelli, Counsel to the Attorney General, to Hon. E. Norman Veasey, Chair of the Ethics 2000 Commission, and to M. Peter Moser, Chair of the ABA Ethics Commission (April 19, 1999).

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and

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> readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

I have done my best to identify speeches and presentations responsive to this question through searches of publicly available electronic databases.

I give regular business or management presentations within the firm at partners' meetings and in my role as managing partner.

I have also given occasional talks or participated in panel discussions on copyright infringement, attorney-client privilege, and crisis management. I do not have copies of speeches or transcripts, but I am providing notes from any panel discussions that I have been able to locate.

As a high school student, I gave speeches in the context of leadership roles in various clubs and organizations -- principally the Latin Club, Math Team, the Virginia Junior Classical League, and the National Junior Classical League -- as well as at my high school graduation.

Since college, I have occasionally done presentations to prospective applicants to Brown University and their parents, as well as presentations to Brown alums about topics such as working in Washington and career planning. All of these have been in Washington D.C., except I did one large panel discussion in Providence, Rhode Island. None of these speeches have involved anything political or otherwise controversial.

I have given toasts at small events -- weddings, showers, birthday dinners, etc.

I have given the eulogy at three funerals:

> 1) Maureen O'Donnell, my high school Latin teacher; this funeral was in 1989 in Fairfax, Virginia. There was some television coverage of that event, including briefly my eulogy, because Mrs. O'Donnell was well-known figure in the community. I am attaching an article from The Washington Post regarding Mrs. O'Donnell's funeral, titled "Legacy of Honor" (Mar. 24, 1989).
>
> 2) Thomas N. Perrelli, my father; the funeral was in July of 2002 in Fairfax, VA.
>
> 3) Stanley Wolcott, my uncle; the funeral was in December of 2003 in Barre, VT.
>
> If the Committee is interested in notes from the eulogies, I can search for them.

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As an associate at Jenner & Block, I have no recollection of having given speeches.

As a DOJ official, I generally did not give speeches at outside events; I did do the occasional presentation at trainings or other events internal to the government. I do not have notes or transcripts of such presentations but am attaching a meeting summary published by the CDC regarding advertising issues.

As a partner at Jenner & Block, the following are external presentations that I remember:

1) I was on a panel concerning crisis management for the Counsel-to-Counsel program, which brings together law firm lawyers and in-house counsel for panel discussions on specific topics (usually about 25 people). That event was at the Sofitel Hotel in New York City on May 11, 2005. I am attaching an article from Corporate Legal Times regarding this presentation, titled "Corporate Crises Thrust GCs Into the Spotlight" (Sept. 2005 — Corporate Legal Times). I am also attaching my notes from it, titled "Crisis Management" (May 11, 2005 — New York, NY).

2) I was on a panel concerning attorney-client privilege for the Counsel-to-Counsel program at the Ritz-Carlton Georgetown in Washington, D.C, on October 12, 2006. I am attaching my notes from this presentation, which was titled, "Managing Attorney-Client Communications in a Time of Eroding Privilege." The notes are titled "Privilege and Lawyers Wearing Multiple Hats" (Oct. 12, 2006 — Washington, D.C.).

3) I was on a panel at the D.C. Bar Health Law and Litigation Sections on the Schiavo case on June 10, 2005, at the D.C. Bar Conference Center. Other panelists were academics with differing viewpoints. I am attaching my notes from that presentation, titled "Schiavo Presentation" (June 10, 2005 — Washington, D.C.).

4) I spoke at an Association of Corporate Counsel continuing legal education breakfast titled, "Life After Grokster," in McLean, Virginia, on September 13, 2005, regarding the Supreme Court's decision in *MGM v. Grokster*, a case concerning copyright infringement by peer-to-peer file-sharing services. I was one of the counsel who represented MGM and the major motion picture studios and record companies in that case. I have not been able to locate notes from this discussion.

5) I was on two panel discussions immediately after the Grokster decision came out. The first was at a D.C. Bar Association discussion on July 6, 2005. The second was at the Museum of Television & Radio Media Center in New York on July 12, 2005, titled, "The Implications of the Grokster Decision," concerning copyright infringement and new technologies. Other panelists included general counsels of major content providers. I have not been able to locate notes from these panel discussions. However, I am attaching an article from Washington Internet

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Daily titled "Everyone Generally Relieved, Post-'Grokster,' But Lower Court Interpretation Feared" (July 7, 2005 — Washington Internet Daily), which discusses the first presentation, and an article from Daily Variety, titled "Grokster Ruling Stirs Dissent" (July 14, 2005 — Daily Variety), that discusses the second.

6) I was on two panel discussions on the *MGM v. Grokster* case during the week of its March 29, 2005 Supreme Court oral argument. One was at George Washington University School of Law, and the other was at the University of the District of Columbia. Other panelists included the Register of Copyrights and representatives of the Electronic Frontier Foundation. I have not been able to locate notes for these two panels.

7) I did a CLE for the Georgia Bar titled, "What's Keeping You Up At Night — Or Should Be: Things Every In-House Counsel Should Know About Internet File-Trading," during a seminar on December 11-12, 2003 at the Swissotel in Atlanta. I am attaching that presentation's materials, titled, "What's Keeping You Up At Night — Or Should Be: Things Every In-House Counsel Should Know About Internet File-Trading" (Dec. 11-12, 2003 — Atlanta, GA).

8) I was on a panel with Professor Jonathan Zittrain of Harvard Law School before the Boston Bar Association in 2004. The panel concerned copyright and new technologies. I have not located notes from this panel discussion.

9) I was a participant in a small meeting for clients and potential clients entitled "What Medical Societies, Other Health Care Organizations, and Their Members Need to Know," with other Jenner & Block attorneys, regarding HIPAA's privacy requirements. The presentation was on December 11, 2001 in Washington, D.C. I have not found any notes from my portion of the session.

10) I moderated a panel discussion on copyright and new technologies at the Corporate Legal Times Superconference in Chicago in 2006. My role was limited to facilitating discussion. I have not located notes from this panel discussion.

11) I recently did a panel discussion on law firm management for Bisnow. Other panelists included other managing partners at D.C. firms. I have not located notes from this panel discussion, but I am providing two write-ups from the session sent to Bisnow subscribers: "Laterals on Discount" (Dec. 9, 2008 — Bisnow) and "Obama Era Predictions" (Dec. 1, 2008 — Bisnow).

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these

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interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have occasionally talked to reporters on issues related to my practice, as well as the recent presidential campaign. I have done my best to identify articles in which I am quoted directly that are responsive to this question through searches of publicly available electronic databases.

"High Court's Hot Cases," Corporate Counsel (Sept. 2001)

Claude R. Marx, "Democrats Vow Lawsuit over State's Congressional Redistricting," *Intelligencer Journal (Lancaster, PA)* (Jan. 5, 2002)

Mark Skertic, "Stooges Get the Last Laugh," *Chicago Sun-Times* (Jan. 8, 2002)

Vanessa Blum, "Why Bush Won't Let Go: To the White House, the Paper Fight with Congress is Part of a Bigger Plan to Restore Presidential Power," *Legal Times* (Feb. 4, 2002)

Dave Davies, "Dem Court Victory May Help GOP," *Philadelphia Daily News* (Apr. 10, 2002)

Brian Ford, "Supreme Court Asked To Take Over Redistricting," *Associated Press State & Local Wire* (Apr. 11, 2002)

Brian Ford, "Redistricting Pact Called Unlikely," *The Tulsa World* (Apr. 12, 2002)

Brian Ford, "House OKs GOP-Crafted Bill," *The Tulsa World* (May 24, 2002)

Tim Talley, "State Supreme Court Gets Congressional Redistricting Case," *Associated Press State & Local Wire* (June 20, 2002)

Marie Price, "OK Supreme Court Expected To Rule on Redistricting Soon," *The Journal Record (Oklahoma City, OK)* (June 21, 2002)

Tom Schoenberg, "DOJ's $289 Billion Tobacco Claim," *Legal Times* (Feb. 3, 2003)

"Longhorns on the Lamb," *Dow Jones Factiva* (Oct. 1, 2003)

Jenner & Block's Pro Bono Team Wins Major Victory in Right To Die Case, *PR Newswire* (May 7, 2004)

Tony Mauro, "In Right-To-Die Case, a Question of Timing," *Legal Times* (Sept. 6, 2004)

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Randy Nieves Ruiz, "Court Sides with Husband who Wants Wife Taken off Life Support," *Agence France Presse English Wire* (Sept. 23, 2004)

"Florida Court Strikes Down 'Terri's Law,'" *CNN.com* (Sept. 23, 2004)

Jan Crawford Greenburg, "Legal Action as Extraordinary as Case Itself," *Orlando Sentinel* (Mar. 23, 2005)

Jan Crawford Greenburg, "Schindlers Argue New Law's Intent," *Chicago Tribune* (Mar. 23, 2005)

Jan Crawford Greenburg, "Parents Face Challenges in U.S. Supreme Court," *Chicago Tribune* (Mar. 24, 2005)

Jan Crawford Greenburg, "With High Court's Ruling, Legal Battle over Schiavo's Fate Nears End," *Chicago Tribune* (Mar. 24, 2005)

Jan Crawford Greenburg, "Courts Resist Yielding to Power of Congress," *Chicago Tribune* (Mar. 25, 2005)

"Jenner & Block Set To Argue Landmark Supreme Court Copyright Case," *PR Newswire* (Mar. 29, 2005)

Jonathan Ringel & Vaness Blum, "Judges under Fire after Schiavo Death," *Legal Times* (April 4, 2005)

Jonathan Ringel & Vanessa Blum, "Standing Tall: In Aftermath of Schiavo Case, a Steadfast Judiciary Comes under Increased Pressure from Congress," *Broward Daily Business Review* (Apr. 7, 2005)

John Thor-Dahlburg, "Fighting for a Principle, for Free; Both Sides in the Terri Schiavo Case Received Substantial Financial Support from People who Believed in a Cause" *Los Angeles Times* (April 17, 2005)

"Everyone Generally Relieved, Post-'Grokster,' But Lower Court Interpretation Feared," *Washington Internet Daily* (July 7, 2005)

William Triplett, "Experts Clash over P2P Ruling," *Daily Variety* (July 13, 2005)

"Grokster Ruling Stirs Dissent," *Daily Variety* (July 14, 2005)

Scott M .Gawlicki, "Corporate Crises Thrust GCs Into the Spotlight," *Corporate Legal Times* (Sept. 2005)

Hilary Lewis, "Building an Entertainment Beast in D.C.," *Legal Times* (Oct. 10, 2005)

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Hilary Lewis, "Anatomy of a Practice: Washington, DC's Jenner & Block Builds Music and Movie Client Base," *Entertainment Law & Finance* (Nov. 2005)

Michael Levenson & Jonathan Saltzman, "At Harvard Law, A Unifying Voice: Classmates Recall Obama as Even-Handed Leader," *Boston Globe* (Jan. 28, 2007)

Anna Schneider-Mayerson, "It's Obamalot!" *New York Observer* (Mar. 12, 2007)

"Leading Copyright & New Media Lawyer Steven R. Englund Joins Jenner & Block," PR Newswire (July 24, 2007)

"What's Up at Jenner & Block," *Bisnow Business* (July 27, 2007), *available at* http://www.bisnow.com/archives_lfw/index_jennerbloch.html

Edward Luce & Demetri Sevastopulo, "Obama's Journey: He Gets It," *FT.com* (Nov. 5, 2008)

"Obama Era Predictions," *Bisnow* (Dec. 1, 2008)

Carrie Budoff Brown, "School Buds: 20 Harvard Classmates Advising Obama," *Politico* (Dec. 5, 2008)

"Laterals on Discount," *Bisnow* (Dec. 9, 2008)

Stephen Dinan & Jerry Seper, "Obama's Justice Pick Draws Fire of Pro-Lifers," Washington Times (Jan. 6, 2009)

14. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

September 1999 — January 2001
Deputy Assistant Attorney General
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530
Appointed by Attorney General Janet Reno

December 1997 — September 1999
Counsel to the Attorney General
United States Department of Justice

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950 Pennsylvania Ave. NW
Washington, DC 20530
Appointed by Attorney General Janet Reno

September 1991 — September 1992
Law Clerk to the Honorable Royce C. Lamberth
United States District Court for the District of Columbia
333 Constitution Ave. NW
Washington, DC 20001
Appointed by the Honorable Royce C. Lamberth

In addition, as noted above, I was a summer intern at the Immigration and Naturalization Service

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Obama for America National Legal Coordinating Committee, Post-Election Litigation Group, National Finance Committee, and Mid-Atlantic Finance Committee: I served as a volunteer lawyer and did fundraising, February 2007-November 2008.

District Nominating Convention, Arlington, VA. Attended local nominating convention for the Democratic presidential primary, 2008.

John Kerry Campaign/Democratic National Committee: I was a volunteer lawyer for the campaign on election protection matters (October 2004-November 2004).

Jenner & Block PAC: I have not held any position overseeing my law firm's political action committee, but I am one of many people who have input on its contributions.

15. **Legal Career:** Please answer each part separately.

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

i. 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;

Law Clerk for the Honorable Royce C. Lamberth, United States District Court for the District of Columbia, 9/1991-9/1992

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

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N/A

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

11/1992-11/1997
Jenner & Block
601 13th Street NW, Suite 1200 (old address)
Washington, DC 20005

11/1997-9/1999
Counsel to the Attorney General
Office of the Attorney General
United States Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20001

9/1999-1/2001
Deputy Assistant Attorney General
Civil Division
United States Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20005

6/2001-5/2008
Jenner & Block
601 13th Street NW, Suite 1200 (old address)
Washington, DC 20005

5/2008-present
Jenner & Block
1099 New York Ave. NW, Suite 900 (new address)
Washington, DC 20001

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

As a junior associate at Jenner & Block (roughly 1992-94), I worked on a wide variety of constitutional and appellate cases. As a mid-level/senior associate at Jenner & Block (roughly 1994-97), I worked primarily on a large intellectual property litigation and on various matters arising out of the 1996 Telecommunications Act.

As Counsel to the Attorney General (1997-99), I assisted the Attorney General in overseeing the civil litigation components of the Department of Justice and also worked

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on a variety of special projects, including professional responsibility issues for DOJ attorneys, Native American issues, especially law enforcement in Indian Country, and tobacco policy.

As Deputy Assistant Attorney General (1999-2001), I supervised the Federal Programs Branch of the Civil Division, which defends the agencies of the federal government in important constitutional, regulatory, national security, personnel and other litigation. I also had partial supervisory responsibility over the Tobacco Litigation Team.

As a partner at Jenner & Block, I initially worked on a variety of redistricting cases and other litigation matters (2001-2002). Since 2003, I developed a practice representing record companies, motion picture studios, and other creative content providers in litigation concerning intellectual property rights, including rate-setting for statutory copyright licenses before the Copyright Royalty Board. That has been the majority of my practice from 2004. Since 2005, I have also served as Managing Partner of the D.C. Office of Jenner & Block.

ii. your typical clients and the areas, if any, in which you have specialized.

As a partner, I have focused on complex litigation, especially litigation with a governmental or public policy focus. Most recently, I have focused in the area of intellectual property, especially copyright and the challenges to copyright owners brought about by the dissemination of their content on the Internet and other digital media. In that context, my clients have been record companies and motion picture companies, including their trade associations (the Recording Industry Association of America and the Motion Picture Association of America) and a collective representing record companies and recording artists (SoundExchange, Inc.).

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

The vast majority of my practice has been in litigation (likely 90%). As an associate at Jenner & Block (1992-97), I appeared in court rarely, though with increasing frequency as the years went on, including serving as co-lead counsel in a jury trial in the District of Maryland in 1995 (as well as related motions practice) and motions practice related to litigation concerning the Telecommunications Act of 1996.

As Counsel to the Attorney General (1997-99), I did not appear in court or other proceedings.

As Deputy Assistant Attorney General (1999-2001), I appeared in court occasionally in sensitive matters and to support litigators under my supervision and I argued summary judgment motions in *State of Connecticut Department of Environmental Protection v. Occupational Safety & Health Administration*, a District of Connecticut case involving the effect of the 11th Amendment on the authority of Administrative Law Judges at the Department of Labor in cases involving state entities.

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As a partner at Jenner & Block, I was counsel in a 4-week state court bench trial and a 4-week federal three-judge court bench trial in Texas in 2001. I was lead counsel in state court in a 2-week trial in Oklahoma City, OK in 2002.

I was on a partial leave from my firm in 2002 to take care of my ailing father.

In 2004, I appeared frequently in numerous federal courts throughout the country representing record companies in digital copyright litigation.

In 2005, I began a series of cases before the Copyright Royalty Board, which resulted in 2 trials in 2006 (in which I appeared frequently in court), 3 trials in 2007 (in which I made only a brief appearance in court), and 2 trials in 2008 (which I supervised, but in which I did not appear).

i. Indicate the percentage of your practice in:
   1. federal courts;

      60%

   2. state courts of record;

      10%

   3. other courts.

      30%

ii. Indicate the percentage of your practice in:
   1. civil proceedings;

      95%

   2. criminal proceedings.

      5%

d. 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.

   i. What percentage of these trials were:
      1. jury;

1 trial — co-lead counsel; tried to a verdict (and settled prior to appeal)

      2. non-jury.

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6 trials — 1 chief counsel, 5 co-counsel with others serving as lead counsel (I have excluded here 4 trials in which I was co-counsel and played a significant managerial role, but did not appear in court)

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

My firm has a substantial practice before the Supreme Court and I have been co-counsel on a number of cases. Copies of briefs that I have been able to locate are provided as follows:

Brief of Appellants, *Johnson v. DeGrandy*, No. 92-519 (Apr. 21, 1993)

Reply Brief of Appellants, *Johnson v. DeGrandy*, No. 92-519 (1993)

Brief Amici Curiae of Bolley Johnson and Peter R. Wallace, *Shaw v. Gerson*, No. 92-357 (1992-93)

Brief for Respondent, *Swint v. Chambers County Commission*, No. 93-1636 (Sept. 30, 1994)

Supplemental Brief for Respondent, *Swint v. Chambers County Commission*, No. 93-1636 (Dec. 15, 1994)

Petition for Writ of Certiorari, *American Library Association v. Reno*, No. 94-1653 (1994-95)

Reply Brief for Petitioners, *American Library Association v. Reno*, No. 94-1653 (1994-95)

Brief of Amici Curiae American Society of Addition Medicine et al., *City of Edmonds v. Washington State Building Council*, No. 94-23 (1994-95)

Brief for Appellees National Association of Broadcasters and Association of Local Television Stations, *Turner Broadcasting System, Inc. v. FCC*, No. 95-992 (June 17, 1996)

Brief for Respondent, *McMillian v. Monroe County, Alabama*, No. 96-542 (Feb. 20, 1997)

Brief for Respondents Milberg Weiss Bershad Hynes & Lerach, *Lexecon Inc. v. Milberg Weiss Bersha Hynes & Lerach*, No. 96-1482 (Aug. 18, 1997)

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Brief of Amicus Curiae Tanana Chiefs Conference in Support of Respondents, *State of Alaska v. Native Village of Venetie Tribal Government*, No. 96-1577 (1997-98)

Appellee's Motion To Affirm, *Balderas v. Texas*, No. 01-1196 (Mar. 21, 2002)

Brief of Amicus Curiae Recording Industry Association of America in Support of Respondent, *Eldred v. Ashcroft*, No. 01-618 (Aug. 5, 2002)

Conditional Cross-Appellees' Motion To Dismiss, *Jubelirer v. Vieth*, No. 02-135 (Aug. 13, 2002)

Appellants' Brief Opposing Motions To Dismiss or Affirm, *Jubelirer v. Vieth*, No. 01-1873 (Aug. 13, 2002)

Appellees' Motion To Affirm, *Vieth v. Jubelirer*, Nos. 01-1817 & 01-1823 (2002)

Jurisdictional Statement, *Vieth v. Jubelirer*, No. ____ (Apr. 25, 2003)

Brief for Appellants, *Vieth v. Jubelirer*, No. 02-1580 (Aug. 29, 2003)

Appellants' Brief Opposing Motions To Affirm, *Vieth v. Jubelirer*, No. 02-1580 (June 9, 2003)

Brief in Opposition of Respondents, *Veneman v. Montana Wilderness Association*, Nos. 03-109 and 03-123 (Sept. 24, 2003)

Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Petitioner, *Robinson v. Montana*, No. 03-9432 (Apr. 19, 2004)

Petition for Writ of Certiorari, *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.*, No. 03-1579 (May 24, 2004)

Reply Brief on Petition for Writ of Certiorari, *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.*, No. 03-1579 (Aug. 30, 2004)

Brief for Motion Picture Studios and Recording Company Petitioners, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, No. 04-480 (Jan. 24, 2005)

Reply Brief for Motion Picture Studios and Recording Company Petitioners, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, No. 04-480 (Mar. 18, 2005)

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Respondent Michael Schiavo's Opposition to Application for Injunction, *Schiavo ex rel. Schindler v. Schiavo*, No. 04A-825 (Mar. 24, 2005)

16. **Litigation**: Describe the ten (10) 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.

The cases I have listed below I include as the most "significant" for different reasons -- some because of the public nature of the case and the importance of the issues involved and others because of the significance to my career.

Turner Broadcasting System, Inc. v. Federal Communications Commission

This was the one of the first matters (if not the first) I worked on when I became an associate at Jenner & Block, and it became a case that went to the U.S. Supreme Court twice. The case involved a challenge to the "must carry" provisions of the Cable Act, which require cable providers to carry local broadcast television signals. Initially, the United States refused to defend the constitutionality of the statute, and our client, the National Association of Broadcasters, intervened to defend the statute. I was a junior associate on the team, but played a significant role in developing expert testimony used in the case and had the opportunity to take my first deposition. The case was litigated before a three-judge panel in the district court and then to the U.S. Supreme Court, where I had the opportunity to draft portions of the brief. The case was remanded for further proceedings, and then returned to the Supreme Court again (my primary involvement with the case was in the first district court and Supreme Court proceedings). Ultimately the Supreme Court upheld the statute.

COURT	DOCKET NO.	KEY DECISIONS
D.D.C. (Williams, Jackson, Sporkin)	Nos. 92-2247, 92-2292, 92-2494, 92-2495, 92-2558	819 F. Supp. 32 (1993)
U.S. Supreme Court	No. 93-44	512 U.S. 622 (1994)
D.D.C. (Williams, Jackson, Sporkin)	Nos. 92-2247, 92-2292, 92-2494, 92-2495, 92-2558	910 F. Supp. 734 (1995)
U.S. Supreme Court	No. 95-992	520 U.S. 180 (1997)

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PRINCIPAL COUNSEL	
John Tyler/Jim Gilligan U.S. Department of Justice Civil Division Federal Programs Branch 20 Massachusetts Ave. NW Washington, DC 20530	Bruce D. Sokler, 202-434-7303 Mintz Levin 701 Pennsylvania Ave. N.W. Washington, DC 20004
H. Bartow Farr, III, 202-775-0184 Farr & Taranto Suite 800 1220 19th Street, N.W. Washington, DC 20036	Robert D. Joffe, 212-474-1448 Cravath, Swaine & Moore LLP Worldwide Plaza 828 Eighth Avenue New York, NY 10019-7475
Bruce J. Ennis, Jr. (co-counsel) *Deceased*	*Additional counsel available on public docket and identified in decisions listed above.*

Smith v. DeLozier

This lawsuit was brought by a young woman who had been secretly videotaped by a superior at a Montgomery County pool while she was undressing. The case involved allegations of sexual harassment and other tort claims. This was the first case that I took to trial as co-lead counsel. The case was tried before a jury and resulted in a verdict for the plaintiff, my client. It was subsequently settled on appeal.

COURT	DOCKET NO.	KEY DECISIONS
D.Md. (Messitte)	No. PJM 94-309	Jury Verdict — Dec. 8, 1995

PRINCIPAL COUNSEL	
Carol Garfiel Freeman, 202-354-3371 14 Accord Ct. Potomac, MD 20854	Jodie L. Kelley (co-counsel), 202-752-1611 3900 Wisconsin Ave., N.W. Washington, DC 20016
Hon. Sharon Veronica Burrell, 240-777-9296 Circuit Court for Montgomery County Suite 150 27 Courthouse Square Rockville, MD 20850	*Additional counsel available on public docket.*

United States v. Philip Morris

This is the United States' lawsuit against the major tobacco companies based on Medicare and Medicaid repayment statutes and the civil RICO statute. The case alleges a decade-long conspiracy among the tobacco companies and related entities to defraud the

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public about the health effects of cigarettes and the addictiveness of nicotine and to market cigarettes to minors. Although I did not appear in court on the matter, I was very involved in tobacco policy matters, including efforts to enact federal legislation concerning tobacco in 1998, when I served as counsel to the Attorney General, and I served in a supervisory capacity over the lawsuit in 1999-2001 while I served as Deputy Assistant Attorney General in the Civil Division.

COURT	DOCKET NO.	KEY DECISIONS
D.D C. (Kessler)	No. 99-2496	116 F. Supp. 2d 131 (2000) 153 F. Supp. 2d 32 (2001) — *I was no longer involved at this stage.*
PRINCIPAL COUNSEL		
Timothy M. Broas, 202-282-5750 Winston & Strawn LLP 1700 K Street, N.W. Washington, DC 20006 W. Neil Eggleston, 202-383-8140 555 13th Street, N.W. Washington, DC 20004	Dan K. Webb, 312-558-5856 Winston & Strawn LLP 35 W. Wacker Drive Chicago, IL 60601 J. Patrick Glynn, 202-616-4200 Torts Branch, U.S. Department of Justice P.O. Box 340 Benjamin Franklin Station Washington, DC 20044	

State of Connecticut Department of Environmental Protection v. Occupational Safety & Health Administration

During my time as Deputy Assistant Attorney General, I appeared in court only occasionally, as it was and remains my view that career attorneys at DOJ should argue that vast majority of cases in the lower federal courts. I did appear in court to represent the United States in one case concerning the effect of the 11th Amendment on the authority of Administrative Law Judges at the Department of Labor in cases involving state entities. This was one of a series of cases raising similar issues that were being handled by the Federal Programs Branch of the Civil Division. I argued the case in district court in Connecticut.

COURT	DOCKET NO.	KEY DECISIONS
D. Conn.	No. 3:99CV2291 GLG	138 F. Supp. 2d 285 (D. Conn. 2001), *aff'd in part and rev'd in part*, 356 F.3d 226 (2d Cir. 2004)

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PRINCIPAL COUNSEL	
Carla R. Walworth, 212-318-6466 Paul, Hastings, Janofsky & Walker LLP Park Avenue Tower 75 E. 55th Street, First Floor New York, NY 10022	Mark T. Quinlivan (co-counsel), 202-514-3346 U.S. Department of Justice Civil Division, Room 7128 20 Massachusetts Ave., N.W. *Additional counsel available on public docket and identified in decisions listed above.*

Texas Redistricting

Jenner & Block represented Democratic voters in litigation concerning the redistricting of Texas following the 2000 Census. The state legislature deadlocked, throwing redistricting into the courts. I was one of the trial counsel (there were many given the multitude of parties in the case) with a primary role in developing expert testimony on, among other things, the factors that courts consider in redistricting cases, the fairness of various proposed plans, and historical factors that might influence how districts should be drawn. There was a four-week trial in state court, which resulted in a decision that essentially vindicated the arguments of our clients that the court should draw a plan similar to the one that the prior legislature had drawn a decade before. That decision was vacated by the Texas Supreme Court, which also indicated that there was insufficient time for the state courts to complete their work before the federal courts had to conduct hearings. Subsequently, the case was tried again before a three-judge federal court in a second four-week trial. The three-judge panel also adopted the approach advocated by our clients and drew a redistricting plan that it believed made the least change over the decade-old, legislatively enacted plan. That decision, *Balderas v. Texas*, was affirmed by the U.S. Supreme Court.

COURT	DOCKET NO.	KEY DECISIONS
Texas Supreme Court (*Perry v. Del Rio*)	Nos. 01-0728, 01-0810, 01-0827	66 S.W.3d 239 (2001)
E.D. Tex. (*Balderas v. Texas*) (Higginbotham, Hannah, Ward)	No. Civ. A 6:01-CV-158	(per curiam) Nov. 14, 2001, *summarily aff'd*, 536 U.S. 919 (2002)
U.S. Supreme Court (*Balderas v. Texas*)	No. 01-1196	536 U.S. 919 (2002)
E.D. Tex. (*Session v. Perry*) (Higginbotham, Hannah, Ward)	No. Civ. A 2:03-CV-354	298 F. Supp. 2d 451 (E.D. Tex. 2004)
E.D. Tex. (*Henderson v. Perry*) (Higginbotham, Ward, Rosenthal)	No. Civ. A 2:03-CV-354	399 F. Supp. 2d 756 (E.D. Tex. 2005)
U.S. Supreme Court (*LULAC v. Perry*)	Nos. 05-204, 05-254, 05-276, 05-439	548 U.S. 399 (2006)

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Litigation over these issues also occurred to a less significant extent in other courts as described in the decisions referred to here.	
PRINCIPAL COUNSEL	
J. Gerald Hebert (co-counsel), 202-736-2200 Campaign Legal Center 1640 Rhode Island Ave., N.W. Suite 650 Washington, DC 20036	Hon. Morris L. Overstreet, 713-313-7126 Thurgood Marshall School of Law Texas Southern University 3100 Cleburne St. Houston, TX 77004
Jonathan D. Pauerstein, 210-225-5000 Tuggey Rosenthal Pauerstein Sandoloski Agather LLP 755 East Mulberry, Suite 200 San Antonio, TX 78212	Richard Edwin Gray III, 512-482-0061 Gray & Becker, P.C. 900 West Ave. Austin, TX 78701
Nina Perales, 210-224-5476 Mexican American Legal Defense Fund 110 Broadway Suite #300 San Antonio, TX 78205	Andy Taylor, 713-222-1817 x11 Andy Taylor & Associates, P.C. 405 Main Street, Suite 200 Houston, TX 77002
	Additional counsel available on public docket and identified in decisions listed above.

Oklahoma Redistricting

Jenner & Block represented the Speaker of the state legislature of Oklahoma in litigation concerning the redistricting of Oklahoma following the 2000 Census. The Governor and the legislature deadlocked and a state court was called upon to redraw the districts. I served as lead counsel, developing much of the expert testimony, conducting the trial, and doing the closing argument in a trial that lasted approximately two weeks. The state trial court ultimately ruled against my clients and adopted a plan favored by other parties. The case was appealed to the Oklahoma Supreme Court, which affirmed.

COURT	DOCKET NO.	KEY DECISIONS
Oklahoma County District Court (*Alexander v. Taylor*) (Robertson)	No. CJ-2002-855	May 31, 2002
Supreme Court of Oklahoma (*Alexander v. Taylor*)	No. 97,836	51 P.3d 1204 (2002)
W.D. Okla. (*Edwards v. Keating*) (Seymour, Russell, Cauthron)	No. 5:02-cv-00306-R	June 5, 2002

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PRINCIPAL COUNSEL	
Don G. Holladay (co-counsel), 405-236-2343 Holladay Chilton & Degiusti PLLC 204 North Robinson, Suite 1550 Oklahoma City, OK 73102	Fred A. Leibrock, 405-235-4100 Phillips Murrah P.C. Corporate Tower — Thirteenth Floor 101 N. Robinson Oklahoma City, OK 73102
Andrew W. Lester, 405-844-9900 Lester, Loving & Davies, P.C. 1701 S. Kelly Edmond, OK 73013	Lee Slater, 405-608-0914 2601 Northwest Expressway, Suite 210-West P.O. Box 14785 Oklahoma City, OK 73113
	Additional counsel available on public docket and identified in decisions listed above.

Terri Schiavo Litigation

In 2003, I began representing Michael Schiavo in his role as guardian of Terri Schiavo in litigation concerning her right to remove the feeding tube which was keeping her alive. At the time I became involved in the matter, the Florida courts had fully and finally litigated the question of Ms. Schiavo's wishes under procedures prescribed by the Florida legislature -- through multiple trials, appeals and petitions to the Florida Court of Appeals, the Florida Supreme Court, and the U.S. Supreme Court. In 2003, however, the Florida legislature enacted a law that gave the Governor of Florida authority to make decisions about Ms. Schiavo's treatment, in contravention of her wishes as conclusively determined by the Florida courts. At that time, in conjunction with counsel who had represented Ms. Schiavo in the prior proceedings in state court, we sought an injunction to invalidate the Florida law as a violation of the Florida Constitution and its separation of powers. That case was litigated in the state trial court, through the court of appeals, and ultimately to the Florida Supreme Court, which ruled 9-0 that the statute was unconstitutional. I and a team I supervised at Jenner & Block had the primary role in drafting the briefs on these constitutional issues.

In 2005, when all of the litigation over the state statute was resolved, Congress enacted legislation that authorized Ms. Schiavo's parents to go to federal court in the matter. The meaning of that federal statute, its constitutionality, and the likelihood of success of the claims brought by Ms. Schiavo's parents were litigated through federal district court, the 11th Circuit Court of Appeals, and the U.S. Supreme Court twice in less than two weeks. In addition, there were ongoing state court proceedings and habeas proceedings in another federal court. I and a team that I supervised at Jenner & Block worked 24 hours a day and drafted virtually all of the briefs in that litigation, including multiple briefs before the 11th Circuit and the U.S. Supreme Court, which were drafted in a matter of hours. Ultimately, the district court found there was no basis for overturning the decisions of the Florida courts; the 11th Circuit affirmed, and the United States Supreme Court denied a stay on multiple occasions.

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COURT	DOCKET NO.	KEY DECISIONS
Fla. 6th Circuit Court (*Schiavo v. Bush*) (Baird)	No. 03-008212-CI-20	2003 WL 22762709 (Nov. 4, 2003)
Fla. 2d Dist. Court of App. (*Bush v. Schiavo*) (Fulmer, Davis, Wallace)	No. 2D03-5244	861 So. 2d 506
Fla. 2d Dist. Court of App. (*Bush v. Schiavo*) (Fulmer, Davis, Wallace)	No. 2D03-5123	871 So. 2d 1012 (2004)
Fla. 6th Circuit Court (*Schiavo v. Bush*) (Baird)	No. 03-008212-CI-20	2004 WL 980028 (2004)
Fla Supreme Court (*Bush v. Schiavo*)	No. SC04-925	885 So. 2d 321 (2004)
Fla. 6th Circuit Court (*In re Guardianship of Schiavo*) (Greer)	No. 90-2908-GD-003	2005 WL 459634 (2005)
Fla. 2d Dist. Court of App. (*In re Guardianship of Schiavo*) (Altenbernd, Fulmer, Wallace)	No. 2D05-968	916 So. 2d 814 (2005)
M.D. Fla. (*Advocacy Center for Persons with Disabilities, Inc. v. Schiavo*) (Merryday)	No. 8:03-cv-2167	2003 U.S. Dist. LEXIS 19949 (2003)
M.D. Fla. 2005 (*Schiavo ex rel. Schindler v. Schiavo*) (Whittemore)	No. 8:05 Civ. 530	357 F. Supp. 2d 1378 (2005)
M.D. Fla. (*Schiavo ex rel. Schindler v. Schiavo*) (Whittemore)	No. 8:05-CV-530	358 F. Supp. 2d 1161 (2005)
11th Circuit Court of Appeals (*Schiavo ex rel. Schindler v. Schiavo*) (Carnes, Hull, Wilson)	No. 05-11556	403 F.3d 1223 (2005)
11th Circuit Court of Appeals (*Schiavo ex rel. Schindler v. Schiavo*) (Carnes, Hull, Wilson)	No. 05-11628	403 F.3d 1289 (2005)
11th Circuit Court of Appeals (*Schiavo ex rel. Schindler v. Schiavo*) (en banc)	No. 05-11628	404 F.3d 1270 (2005)
U.S. Supreme Court (*Bush v. Schiavo*)	No. 04-757	543 U.S. 1121 (2005)
U.S. Supreme Court (*Schiavo ex rel. Schindler v. Schiavo*)	No. 04-825	544 U.S. 945 (2005)
U.S. Supreme Court (*Schiavo ex rel. Schindler v. Schiavo*)	No. 04-844	544 U.S. 957 (2005)
Litigation over these issues is also reflected in related decisions of these courts, as described in the decisions referred to here.		

PRINCIPAL COUNSEL	
George J. Felos, 727-736-1402 Felos & Felos, P.A. 2210 Harbor View Drive Dunedin, FL 34698	Kenneth L. Connor, 703-669-3377 Wilkes & McHugh, P.A. 50 Catoctin Circle N.E., Suite 203 Leesburg, VA 20176

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Patricia Fields Anderson, 727-363-6100 Anderson & Brodersen, P.A. 7116 Gulf Boulevard, Suite D St. Pete Beach, FL 33706 Jay Alan Sekulow, 1-800-296-4529 American Center for Law & Justice P.O. Box 90555 Washington, DC 20090	David C. Gibbs, III, 727-399-8300 Gibbs Law Firm, P.A. 5666 Seminole Boulevard, Suite Two Seminole, FL 33772 *Additional counsel available on public docket and identified in decisions listed above.*

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.

The Grokster case involved the legality, under U.S. copyright law, of peer-to-peer file sharing services, which facilitate the downloading of movies, music, and other copyrighted material without authorization. The Ninth Circuit had issued a ruling that essentially allowed these services to operate -- a ruling that was devastating to the music and movie industries, among others. The Supreme Court determined to take the case and, in the most significant copyright decision in years, held that such services can be held liable for contributory copyright infringement under traditional principles that hold responsible those who aid and abet unlawful conduct. I was part of the team of drafters of the briefs before the Supreme Court and worked with other parties to explain to the public the importance of the decision.

COURT	DOCKET NO.	KEY DECISIONS
U.S. Supreme Court	No. 04-480	545 U.S. 913 (2005)
Decisions in other courts preceded and followed the decision in which I was primarily involved.		

PRINCIPAL COUNSEL	
Russell Frackman (co-counsel), 310-312-2000 Mitchell Silberberg & Knupp LLP 11377 West Olympic Blvd. Los Angeles, CA 90064 Fred Von Lohmann, 415-436-9333 Electronic Frontier Foundation 454 Shotwell Street San Francisco, CA 94110	Thomas Hentoff (co-counsel), 202-434-5000 Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005 Richard G. Taranto, 202-775-0184 Farr & Taranto 1220 19th Street, NW Washington, DC 20036 *Additional counsel available on public docket and identified in decision listed above.*

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McDonnell Douglas Corp. v. United States

In 1991, the United States terminated a contract with General Dynamics and McDonnell Douglas for a stealth aircraft, known as the A-12. The United States alleges that the contractors were terminated for poor performance, requiring the contractors to repay billions to the government. The contractors allege that the United States had no basis for terminating the contract without paying for work done to date and that the United States owes the contractors billions. The case is one of the largest and most significant government contracts cases in history, involving core questions about the government's authority to terminate contracts and issues concerning the state secrets privilege, given the sensitive nature of the technology at issue.

The suit was filed in 1991 and the case has been litigated up and down from the Court of Federal Claims with both sides having won apparent victory at one point or another. In 2003-04, I took over a primary role in developing General Dynamics' arguments on appeal from a loss before the Court of Federal Claims. The contractors argued that the Court of Federal Claims had applied the wrong standard in analyzing the contractors' performance. The Federal Circuit agreed, reversing the decision to the Court of Federal Claims. The case was remanded and is now back before the Federal Circuit on a subsequent decision.

COURT	DOCKET NO.	KEY DECISIONS
Fed. Circuit Court of Appeals	No. 02-5034, 02-5035, 02-5046	323 F.3d 1006 (2003)
Decisions in other courts preceded and followed the decision in which I was primarily involved.		
PRINCIPAL COUNSEL		
Caryl A. Potter, III, 202-408-6340 Sonnenschein Nath & Rosenthal 1301 K Street, N.W. Suite 600, East Tower Washington, DC 20005	David Cohen Commercial Litigation Branch, Civil Division Department of Justice *Retired — current contact details unknown* *Additional counsel available on public docket and identified in decision listed above.*	

Webcasting and SDARS Rate-Setting Proceedings

I have served as primary outside counsel to SoundExchange, a collective of record companies and recording artists, since 2005. SoundExchange collects and distributes royalties under statutory copyright licenses, which require sound recording copyright owners to license their works to online radio stations, satellite radio companies, and cable television radio services. Since that time, I have represented SoundExchange in a series of trials before the Copyright Royalty Board, created by Congress in 2004, which sets rates and terms for these statutory licenses. This includes two trials in 2006 concerning rates to be paid by online radio stations (webcasters) and three trials in 2007 concerning satellite and cable television radio stations. In each group of cases, I played a leading role in managing the litigation and in developing expert and other testimony for the case.

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In the 2006 trials, I played a much more significant role at trial with fact and expert witnesses. Each of these cases resulted in significant increases in the royalty rates to be paid for the copyright licenses. Both cases are currently on appeal in the D.C. Circuit.

COURT	DOCKET NO.	KEY DECISIONS
Copyright Royalty Board (*Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service*)	No. 2005-5 CRB DTNSRA	72 Fed. Reg. 72253 (Dec. 20, 2007)
Copyright Royalty Board (*Digital Performance Right in Sound Recordings and Ephemeral Recordings*)	No. 2005-1 CRB DTRA	72 Fed. Reg. 24084 (May 1, 2007)
Copyright Royalty Board (*Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services*)	No. 2006-1 CRB DSTRA	73 Fed. Reg. 4080 (Jan. 24, 2008)
Copyright Royalty Board (*Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*)	No. 2006-3 CRB DPRA	73 Fed. Reg. 57033 (Oct. 1, 2008) (proposed)

PRINCIPAL COUNSEL	
Jay Cohen, 212-373-3163 Paul, Weiss, Rifkind Wharton & Garrison LLP 1285 Avenue of the Americas New York, NY 10019	Ken Steinthal, 650-802-3081 Weil Gotshal 201 Redwood Shores Parkway Redwood Shores, CA 94065
David D. Oxenford, 202-973-4256 Davis Wright Tremaine LLP 1919 Pennsylvania Ave., N.W. Suite 200 Washington, DC 20006	Bruce Rich, 212-310-8170 Bruce Meyer, 212-310-8013 Weil Gotshal 767 Fifth Avenue New York, NY 10153
Bruce Joseph, 202-719-7258 Karyn Albin, 202-719-4913 Wiley Rein LLP 1776 K Street NW Washington, DC 20006 Fernando Laguarda, 202-730-1308 Harris, Wiltshire & Grannis LLP 1200 Eighteenth St., NW 12th Floor Washington, DC 20036	Paul Fakler, 212-554-7632 Moses & Singer LLP The Chrysler Building 405 Lexington Avenue New York, NY 10174 *Additional counsel available on public docket and identified in decision listed above.*

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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 fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I was registered briefly as a lobbyist from 2002 to 2005 while I was a partner at Jenner & Block. An associate at the firm asked me to supervise him in a project on behalf of American victims of the East Africa bombings, who were seeking compensation similar to that provided to the 9/11 victims. Jenner & Block was not paid for this representation. I do not recall taking any action or meeting with any members of Congress or staff as part of this supervisory work. My recollection is that I gave advice to the associate on how to assist the victims and may have edited a letter or two. The lobbying registration was terminated in 2005.

18. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

In 1989-91, as a law student, I was an instructor in the Legal Methods program at Harvard Law School; this course taught legal writing and argument to first-year law students. In 1991, I was a teaching assistant in a course at Brown University called "The Politics of the Legal System." The course served as an introduction for college students to law and legal analysis. I have also occasionally been a guest speaker in courses taught by others. I also occasionally tutored students in high school and college.

19. **Deferred Income/ Future Benefits**: List the 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.

Under my firm's partnership agreement, any partner withdrawing from the firm is entitled to repayment of capital and a withdrawal benefit, pursuant to a specified formula. Under those provisions, I would be entitled to receive approximately $632,500 in returned capital (money I previously paid to the firm for my shares of the partnership) and approximately $768,200 as part of a withdrawal benefit. The precise amount of the withdrawal benefit may vary slightly depending on the exact date of my departure from the firm, because the benefit is calculated as a percentage of my compensation for the prior 12 months.

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In addition, because the firm retains a portion of my compensation from 2008 until its books are closed, I will receive the balance of my compensation for last year at that time (approximately April 2009).

20. **Outside Commitments During Service**: 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.

I have no current plans, commitments, or agreements.

21. **Sources of Income**: 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.)

See SF-278.

22. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

23. **Potential Conflicts of Interest**:

    a. Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

There are a number of litigation matters in which I have been involved that would be under the purview of the Associate Attorney General. These include litigation in which I have represented SoundExchange, a collective of record companies and recording artists, in litigation before the Copyright Royalty Board, which is represented by the Civil Division of the Department of Justice before the D.C. Circuit. If confirmed, I would recuse myself entirely from these matters. In addition, the Civil Division is representing the United States in litigation against General Dynamics concerning the A-12 contract; I have represented General Dynamics in this matter. If confirmed, I would wholly recuse from the matter. There may be other issues in which a potential conflict could arise; I have requested the opportunity to speak with DOJ ethics professionals as soon as possible to review my past work, my firm's work, and any financial arrangements to determine if there are other potential conflicts that require appropriate action; I will take the action recommended by DOJ ethics officials.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will follow all relevant rules concerning conflicts of interests and, if confirmed, will be guided by the determinations of ethics professionals at the Department of Justice. With

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respect to matters for which I know conflicts exist, I would inform relevant personnel that I am recused from such matters. As future matters arise, if I become aware that a potential conflict exists, I would consult with DOJ ethics professionals to determine the appropriate action and will be guided by their determinations.

24. **Pro Bono Work**: 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. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

I have worked on a wide variety of pro bono matters during my tenure in private practice. My firm, Jenner & Block, is annually honored as one of the law firms most committed to pro bono work. Representative work includes:

Representation in the Schiavo case (over 400 hours over several years)

Preparation of an amicus brief on behalf of the Reporters Committee for Freedom of the Press and other First Amendment groups, protecting journalists from state officials trying to restrict access to newspapers that had criticized them (30-35 hours)

Represented the Southern Utah Wilderness Alliance in litigation aiming to preserve its natural habitats (55-60 hours);

Defense of an attorney wrongfully accused of ethics violations (60-70 hours)

Preparation of an amicus brief on landlord-tenant issues for the Coalition for Nonprofit Housing and Economic Development (15-20 hours)

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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	$775,000 (see schedule)	Notes payable to banks-secured	None
U.S. Government securities-add schedule	None (see schedule)	Notes payable to banks-unsecured	None
Listed securities-add schedule	$824,000 (see schedule)	Notes payable to relatives	None
Unlisted securities--add schedule	None	Notes payable to others	None
Accounts and notes receivable:	None	Accounts and bills due	None[1]
Due from relatives and friends	None	Unpaid income tax	None
Due from others	None	Other unpaid income and interest	None
Doubtful	None	Real estate mortgages payable-add schedule	$1,000,000
Real estate owned-add schedule	$1,500,000 (see schedule)	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	None	Other debts-itemize:	None
Autos and other personal property	$25,000 (see schedule)		
Cash value-life insurance	$0 (see schedule)		
Other assets itemize:	$1,554,000 (see schedule)		
		Total liabilities	$1,000,000

[1] This excludes ordinary credit card debt and household expenses, which we pay monthly.

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		Net Worth	$4,678,000
Total Assets		Total liabilities and net worth	$3,678,000
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule)	No.
On leases or contracts	0	Are you defendant in any suits or legal actions?	No.
Legal Claims	0	Have you ever taken bankruptcy?	No.
Provision for Federal Income Tax	0		
Other special debt	0		

SCHEDULE OF ASSETS

ASSETS	
Cash on hand and in banks	
Checking, savings, liquid accounts	$600,000
Certificates of Deposits	$175,000
U.S. Government securities	
None (other than childhood savings bonds)	
Listed securities	
Bonds	
Pensacola, Florida Municipal Bonds	$20,000
Johnson County, KS Municipal Bonds	$10,000
Pembroke Pines, FL Municipal Bonds	$15,000
West Harris County, Tex Municipal	$21,000
Florida St. Department Municipal Bond	$20,000
Mutual Funds	
Allianz NFJ Large Cap Mutual Fund	$6,000
Calamos Market Neutral	$30,000
Columbia Marsico 21st Mutual Fund	$20,000
DWS Rreef Global Real Mutual Fund	$4,000
iShares Russell 1000 Mutual Fund	$4,000
Ivy Balanced Mutual Fund	$32,000
Ivy Global Natural Mutual Fund	$2,000
Nuveen Premium Inc. Municipal Fund	$1,000
Royce Pennsylvania Mutual Fund	$21,000
Templeton Global Bond Fund	$21,000
Thornburg International	$30,000
VA 529 Plan Allegheny Portfolio (college fund for son James	$8,000
Stocks	
Avon Products, Inc.	$3,000
Bank New York Mellon	$4,000
Baxter International Inc.	$2,000
Donaldson Co.	$4,000
Du Pont E I de Nemours	$1,000
Enbridge Inc.	$3,000
FPL Group Inc.	$2,000
General Mills	$6,000
Halliburton Co.	$2,000
Hewlett Packard Co.	$4,000

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Honeywell Intl.Inc.	$3,000
Int'l Business Machines	$2,000
McDonalds Corp.	$4,000
McKesson Corp.	$4,000
Nokia Corp.	$3,000
Pepsico Inc.	$4,000
PPL Corp.	$2,000
Procter & Gamble Co.	$5,000
SAP ADR	$3,000
Schlumberger Ltd.	$3,000
Smith-NPHW PLC	$3,000
Starwood Hotels and Resorts Worldwide	$1,000
Time Warner Inc.	$2,000
Torchmark Corp.	$2,000
United Technologies Corp.	$4,000
Vodafone Group PLC	$3,000
Waddell & Reed	$2,000
Waste Management Inc.	$4,000
Wyeth	$3,000
Retirement Accounts	
Principal Investors SAM	$5,000
Merrill Lynch Bank USA RASP Cash account	$1,000
Fidelity Growth Company Mutual Fund	$120,000
Davis NY Venture Fund	$104,000
NB Genesis Mutual Fund	$70,000
Fidelity Retirement Money Market	$40,000
Jenner & Block Defined Benefit Plan	$80,000
Thrift Savings Plan	$40,000
Fidelity Freedom 2030	$11,000
Unlisted securities	None
Accounts and notes receivable:	None
Due from relatives and friends	None
Due from others	None
Doubtful	None
Real estate owned	
House at 5809 N. 37th St., Arlington, VA 22207	$1,500,000
Real estate mortgages receivable	None
Autos and other personal property	
2003 Honda Accord	$10,000
2006 Toyota Prius	$15,000
Cash value-life insurance	
Term Life Insurance	$0
Other assets itemize:	
Partner Capital in Jenner & Block	$632,000
As a departing partner at Jenner & Block, I would be entitled to a withdrawal benefit calculated pursuant to the standard terms of the partnership agreement; the value of that benefit may vary slightly depending on my departure date from the firm.	$768,000

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A portion of my 2008 Jenner & Block compensation from 2008 will be paid in April of 2009 after the firm closes its books for 2008	$154,000
I have not included the value of any non-investment household or personal items, such as furniture, electronic equipment, jewelry;	
Total Assets	$4,678,000

AFFIDAVIT

I, _____, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

_____ (DATE)

_____ (NAME)

_____ (NOTARY)

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Senator CARDIN. Thank you very much.
Dean Kagan.

STATEMENT OF ELENA KAGAN, TO BE SOLICITOR GENERAL, U.S. DEPARTMENT OF JUSTICE

Ms. KAGAN. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, I am deeply honored to be sitting here today. And, of course, I am grateful. I am grateful to the President for nominating me to this important position. I am grateful to the Attorney General for supporting me and to the Committee for holding this hearing and considering my nomination. And I am particularly grateful to the many members on both sides of the aisle who met with me prior to this hearing. I enjoyed those talks, and I thank you for them.

I want to say a couple of words about two other people who are here today with me. I wish my parents could have lived to see this day. My father was a lawyer himself and took great pride in my professional accomplishments. He died about 15 years ago now, but he lived to see me clerk for the Supreme Court and become a professor at the University of Chicago, and he thought all of that was pretty great. My mother died just last summer, so her absence is particularly difficult for me. She grew up at a time when few women pursued high-powered professional careers, and maybe for that reason, she relished my doing so. She would have loved this day. Both my parents wanted me to succeed in my chosen profession. But more than that, both drilled into me the importance of service and character and integrity. And I pray every day that I live up to those standards.

I hope one other person is looking down on this hearing room today. As you know, I had the privilege of clerking for Justice Thurgood Marshall—the greatest lawyer, I think, of the 20th century. Justice Marshall had some awfully good jobs in his life. But he always said that the best, bar none, was being Solicitor General. I am sure that there were many reasons for that, but I have been thinking recently about one in particular. I think he must have been so deeply moved to walk into the most important court in this country when it was deciding its most important cases and to state his name and to say, "I represent the United States of America." And I think he would have liked that a former clerk of his would be nominated for the same job and, if confirmed, would be able to say those same most thrilling and most humbling words for a lawyer.

To have the opportunity to lead the Solicitor General's Office is the honor of a lifetime. As you know, this is an office with a long and rich tradition not only of extraordinary legal skill but also of extraordinary professionalism and integrity. That is due in large measure to the people who have led it, and I especially want to acknowledge Generals Olson and Clement and Garre for their absolutely superb service during these last 8 years. In a time of some difficulty for the Justice Department, they have maintained the highest standards of the office, and they have served their client, the United States of America, exceedingly well. And, of course, they have been joined in doing so by the career lawyers and the other public servants in the Solicitor General's Office. These men and

women have been justly called the "finest law firm in the country," and they represent the gold standard in Federal public service.

The Solicitor General's Office is unusual in our Government in owing responsibilities to all three of the coordinate branches in our system of separated powers. Because of this striking feature of the office, the Solicitor General traditionally, and rightly, has been accorded a large measure of independence.

Most obviously, of course, the Solicitor General reports to the Attorney General and, through him, to the President, and defends the regulations, policies, and practices of the executive branch when these are challenged. In this role, the Solicitor General is the principal advocate of the executive branch in the courts of the United States.

At the same time, the Solicitor General has critical, no less critical responsibilities to Congress—most notably, the vigorous defense of the statutes of this country against constitutional attack. Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made. And I pledge to continue this strong presumption that the Solicitor General's Office will defend each and every statute enacted by this body.

Finally, the Solicitor General's Office has unique obligations to the Supreme Court of the United States. It is frequently said that the Solicitor General serves as the 10th Justice. I believe Senator Cardin made reference to that phrase. Now, I suspect that the Justices think of the Solicitor General more as the 37th clerk. Regardless, the Solicitor General must honor the principle of stare decisis, must exercise care in invoking the Court's jurisdiction, and most important of all, must be scrupulously candid in every representation made to the Court. And in this sense, I completely agree with what Senator Specter just said: the most important of all the Solicitor General's responsibilities is to be true to the rule of law.

Mr. Chairman and members of the Committee, it would be an honor to serve as Solicitor General, and I commit that if the Senate sees fit to confirm me, I will do everything possible to live up to the great traditions, expectations, and responsibilities of the Solicitor General's Office.

Thank you very much.

[The prepared statement of Ms. Kagan appears as a submission for the record.]

[The Questionnaire of Ms. Kagan follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

1. **Name**: Full name (include any former names used).

   Elena Kagan

2. **Position**: State the position for which you have been nominated.

   Solicitor General

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Harvard Law School
   Cambridge, MA 02138

4. **Birthplace**: State date and place of birth.

   April 28, 1960. New York, New York.

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   Single; no children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Harvard Law School, 1983-86, J.D. 1986
   Worcester College, Oxford University, 1981-83, M.Phil 1983
   Princeton University, 1977-81, A.B. 1981

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services.

Include the name and address of the employer and job title or job description where appropriate.

Employment:

Professor and Dean, Harvard Law School, Cambridge, MA 02138, 1999-present (2003-present as dean, 2001-present as professor, 1999-2001 as visiting professor)

Deputy Assistant to the President for Domestic Policy, Executive Office of the President, Washington, D.C. 20502, 1997-99

Associate Counsel to the President, Executive Office of the President, Washington, D.C. 20502, 1995-96

Professor, University of Chicago Law School, 1111 E. 60th St., Chicago, IL 60637, 1991-97 (1991-94 as assistant professor)

Special Counsel, Senate Judiciary Committee, Summer 1993

Associate, Williams & Connolly, 725 12th St., Washington, DC 20005, 1989-91

Staff member, Dukakis for President Campaign, Boston, MA, 1988

Judicial Clerk, Hon. Thurgood Marshall, U.S. Supreme Court, 1987-88

Judicial Clerk, Hon. Abner Mikva, U.S. Court of Appeals for D.C. Circuit, 1986-87

Research Assistant, Professor Laurence Tribe, Harvard Law School, Cambridge, MA 02138, Summer 1986

Summer Associate, Paul Weiss Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, NY, NY 10019, Summer 1985

Summer Associate, Fried Frank Harris Shriver & Jacobson, One New York Plaza, NY, NY 10004, Summer 1984

Paralegal, Milbank Tweed Hadley & McCloy, 1 Chase Manhattan Plaza, NY, NY 10005, Summer1983

Board Memberships:

Member, Board of Trustees, Oxford University Press, Inc., 198 Madison Avenue, NY, NY 10016, 2008-

Member, Advisory Board, American Indian Empowerment Fund, 579 Main St., Oneida, NY 13421, 2008-

Member, Board of Directors, Equal Justice Works, 2120 L St., NW, Washington, D.C. 20037, 2008-

Member, Board of Directors, The Advantage Testing Foundation, 210 E. 86th St., NY, NY 10028, 2007-

Member, New York State Commission on Higher Education, 2007-08

Member, Board of Advisors, National Constitution Center's Peter Jennings Project for Journalists and the Constitution, 525 Arch St., Philadelphia, PA 19106, 2006-

Member, Research Advisory Council, Goldman Sachs Global Markets Institute, 85 Broad St., NY, NY 10004, 2005-08

Member, Board of Directors, American Law Deans Association, 2004-

Member, Board of Trustees, Skadden Fellowship Foundation, 4 Times Square, NY, NY 10036, 2003-

Member, Board of Directors, Thurgood Marshall Scholarship Fund, 60 E. 42nd St., NY, NY 10165, 2003-05

Member, Litigation Committee, American Association of University Professors, 1133 19th St., NW, Washington, D.C. 20036, 2002-03

Public Member, Administrative Conference of the United States, 1994-95

Member, Board of Governors, Chicago Council of Lawyers, 50 North Lake Shore Drive, Chicago, IL 60611 , 1993-95

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

None.

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Member, American Academy of Arts and Sciences, 2005-

Honorary Fellow, Worcester College, Oxford University, 2005-

Recipient, Arabella Babb Mansfield Award, National Association of Women Lawyers, 2008

Recipient, John R. Kramer Outstanding Law School Dean Award, Equal Justice Works, 2008

Recipient, 2003 Annual Scholarship Award of the American Bar Association's Section of Administrative Law and Regulatory Practice

Recipient, Class of 1993 University of Chicago Graduating Students' Award for Teaching Excellence

Recipient, Sachs Scholarship, Princeton University, 1981.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

As noted above (question 7), I am serving or have served on the boards of Equal Justice Works, the Skadden Fellowship Foundation, the National Constitution Center's Peter Jennings Project for Journalists and the Constitution, the American Law Deans' Association, and the Chicago Council of Lawyers.

I have served as a member of the Boston Bar Association Diversity Task Force.

I am a member of the American Bar Association.

In a questionnaire I submitted to the Senate in connection with a judicial nomination in 1999, I listed membership in the U.S. Association of Constitutional Lawyers, ABA Forum on Communications Law, and the Society of American Law Teachers, but I have no current memory of belonging to or participating in these organizations.

11. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

District of Columbia, 1989

New York, 1988

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2009

U.S. District Court for the District of Maryland, 1990 (inactive)

U.S. District Court for the District of Columbia, 1990 (provisional)

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Harvard Law School Alumni Association
Princeton University Alumni Association

In a questionnaire I submitted to the Senate in connection with a judicial nomination in 1999, I listed membership in the National Partnership for Women and Families as a result of charitable contributions. I have no current memory of whether such contributions ever made me a member of this organization.

b. Please indicate whether any of these organizations listed in response to 12(a) above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

No

13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

I have done my best to identify published writings and public statements through searches of publicly available electronic databases, as well as databases kept by Harvard Law School. I have found the following:

"Office of the White House Counsel" in Mark Green and Michele Jolin, eds., Change for America: A Progressive Blueprint for the 44th President (Basic Books 2009).

"Foreword" in Daniel Hamilton and Alfred Brophy, eds., Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz (Harvard 2009).

Harvard Law Revisited, 11 *The Green Bag* 475 (2008).

In Memoriam: Clark Byse, 121 *Harvard Law Review* 454 (2007).

Richard Posner, The Judge, 120 *Harvard Law Review* 1121 (2007).

In Memoriam: David Westfall, 119 *Harvard Law Review* 947 (2006).

Women and the Legal Profession – A Status Report (Leslie H. Arps Memorial Lecture), 61 The Record 37 (2006).

Chevron's Nondelegation Doctrine, 2001 *Supreme Court Review* 201 (with David J. Barron).

Presidential Administration, 114 *Harvard Law Review* 2245 (2001).

Libel and the First Amendment (Update), Encyclopedia of the American Constitution, Supplement II (2000).

Masson v. New Yorker Magazine, Inc., Encyclopedia of the American Constitution (2000).

Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 *University of Chicago Law Review* 413 (1996).

When A Speech Code Is A Speech Code: The Stanford Policy and the Theory of Incidental Restraints, 29 *University of California at Davis Law Review* 957 (1996).

Confirmation Messes, Old and New (Book Review), 62 *University of Chicago Law Review* 919 (1995).

Regulation of Hate Speech and Pornography After *R.A.V.*, 60 *University of Chicago Law Review* 873 (1993). An abbreviated version of this article appears in Laura Lederer and Richard Delgado, eds., The Price We Pay (Hill & Wang 1995).

A Libel Story: *Sullivan* Then and Now (Book Review), 18 *Law and Social Inquiry* 197 (1993).

For Justice Marshall, 71 *Texas Law Review* 1125 (1993).

The Changing Faces of First Amendment Neutrality: *R.A.V. v St. Paul, Rust v Sullivan*, and the Problem of Content-Based Underinclusion, 1992 *Supreme Court Review* 29.

Note, Certifying Classes and Subclasses in Title VII Suits, 99 *Harvard Law Review* 619 (1986).

In addition to these more formal publications, I write a "From the Dean" Column in each issue of the Harvard Law Bulletin, which is Harvard Law School's alumni magazine. These columns are as follows: Fall 2008, "Two Campaigns"; Summer 2008, "A Changing Climate of Environment"; Winter 2008, "A Curriculum Without Borders"; Summer 2007, "Con Law Takes Center Stage"; Spring 2007, "Corporate Governance in the new Global Economy"; Fall 2006, "Connecting to Practice"; Summer 2006, "Asian Journeys"; Spring 2006, "View from Chambers"; Fall 2005, "Negotiation, Advanced"; Summer 2005, "Criminal Law in Flux"; Spring 2005, "A Call to Public Service"; Fall 2004, "Law on the Front Lines."

Harvard Law School also has issued numerous news releases, in which I am quoted and almost all of which I edited, during the years of my deanship. They are as follows:

DATE	TITLE OF RELEASE
12/16/08	Six From HLS Win Prestigious Skadden Fellowships
12/12/08	Lawrence Lessig named professor of law at HLS, director of Harvard's Edmond J. Safra Foundation Center for Ethics
12/12/08	Lloyd E. Ohlin, expert in criminal justice, 1918-2008
10/23/08	Harvard Law School Celebrates Record-setting Capital Campaign
9/3/08	Henry E. Smith to join HLS faculty in 2009
8/7/08	John Goldberg to join HLS faculty
8/4/08	Kagan is honored for her work to encourage public service
6/11/08	Jonathan Zittrain appointed to tenured faculty position
6/5/08	Highlights from Commencement Exercises
5/13/08	Malone and Jacobs appointed clinical professors of law
5/7/08	Harvard Law Faculty votes for 'open access' to scholarly articles
4/30/08	Palfrey appointed as new head of Harvard Law School Library
4/29/08	Stuntz and Warren elected to American Academy of Arts and Sciences
4/14/08	Ashish Nanda will join HLS faculty as professor of practice
4/9/08	Oliveira Appointed Associate Dean and Dean for Development and Alumni Relations
4/7/08	Three young scholars join HLS faculty as assistant professors
3/20/08	Anne Alstott, expert on tax law and social welfare, will join HLS faculty
3/18/08	Harvard Law School launches new Public Service Initiative
2/19/08	Sunstein to join Harvard Law School faculty
1/24/08	Michael Klarman to join HLS faculty
12/13/07	Six From HLS Win Prestigious Skadden Fellowships
11/13/07	Pakistani chief justice to receive Harvard Law School 'Medal of Freedom'
10/9/07	Clark Byse, celebrated HLS professor of administrative law and contracts: 1912-2007
8/6/07	William Rubenstein joins HLS faculty
7/3/07	Robert E. Keeton, pioneer of insurance law and District Court judge: 1919-2007
6/14/07	Olara Otunnu receives Harvard Law School Association Award
6/11/07	Yochai Benkler joins HLS faculty
6/8/07	Highlights from Harvard Law School's Commencement
6/6/07	Bordone and Cox honored on Class Day
5/23/07	Robert H. Sitkoff joins HLS faculty
5/15/07	Gabriella Blum and James Greiner join HLS faculty
4/4/07	HLS adds five clinical professors
3/26/07	Kathryn Spier to join HLS faculty
3/22/07	Wasserstein Family Gives $25 Million to Harvard Law School for Academic Center
2/22/07	Human Rights Program announces new fellowship opportunity
2/11/07	Dean Elena Kagan praises incoming Harvard President Drew Gilpin Faust
1/16/07	Richard A. Musgrave, noted economist and pioneer in public finance: 1910-2007
1/2/07	Six from HLS win Skadden public interest fellowships
12/7/06	Noah Feldman to join Harvard Law faculty
10/6/06	HLS faculty unanimously approves first-year curricular reform
9/20/06	Webcast: Dean Kagan delivers 'State of the School' address
4/24/06	Fallon selected to join American Academy of Arts and Sciences

3/1/06	Associate Dean Scott Nichols to Conclude Service
1/18/06	Professor Arthur von Mehren, 1922-2006
12/6/05	HLS students win record number of public service fellowships
11/29/05	Harvard Law School launches new center to investigate intersections of health, technology and law
9/23/05	Webcast of Dean Kagan's 'state of the school' address
9/15/05	Celebration of Black Alumni begins this weekend
9/2/05	Dean Kagan announces hurricane relief efforts
8/30/05	Five new professors join HLS faculty
8/24/05	HLS to hold second Celebration of Black Alumni
6/21/05	Kirkland & Ellis Gift Honored by Renaming Major Harvard Law School Teaching Space
4/13/05	Statement of President Lawrence Summers and Dean Elena Kagan on Laurence Tribe
2/10/05	Renovations to Hemenway Gymnasium slated for summer 2005
1/3/05	Subramanian Joins Tenured Faculty
11/30/04	Statement by Dean Elena Kagan on the Solomon Amendment
10/6/04	Memorial Service for Archibald Cox
9/30/04	Harvard Law School Announces New Professorship Dedicated to Accounting and Statistics
9/23/04	Students and Faculty Connect in First-Year Reading Groups
9/8/04	Three Professors Join Tenured Faculty
8/4/04	Harvard Law School Chooses Architect for Northwest Corner
4/19/04	Ogletree Appointed Director of New Harvard Institute
12/11/03	School Wins Record Number of Skadden Fellowships
11/7/03	HLS Announces Environmental Law Fellowship
10/23/03	Celebrating a Legal Services Partnership
10/18/03	Fisher Named to Hale and Dorr Professorship
10/8/03	Professor Archibald Cox Honored
10/2/03	Vorenberg Fellowship Recipients Announced
7/1/03	Kagan Becomes Dean of Harvard Law School

Finally, as Dean of Harvard Law School, I not infrequently send e-mails to the community of students, staff, and faculty. I do not generally understand these communications to be publications of the kind requested here. But my e-mails on one subject – the Solomon Amendment – sometimes have been quoted, or reprinted in their entirety, in various public fora, so I am including all e-mails to the HLS community on that topic.

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

I cannot recall having prepared or contributed directly in the preparation of any such report. I have done my best to identify reports or policy statements of

organizations of which I was a member through searches of publicly available electronic databases.

The New York State Commission on Higher Education, on which I served, issued a Final Report of Findings and Recommendations in June 2008. The report is available at www.hecommission.state.ny.us.

The Boston Bar Association Diversity Leadership Task Force, on which I served, published a final report and recommendations on November 18, 2008. I am including it as an attachment.

The American Law Deans Association, on whose board I sit, issues occasional statements and reports about matters of concern to law schools. The principal subject concerns standards for ABA accreditation of schools. All these statements are available at www.americanlawddeans.org.

The Chicago Council of Lawyers, on whose Board of Governors I served from 1993 to 1995, regularly issues reports on judicial candidates and nominees in Illinois, as well as on other matters of interest to the local legal community. I participated in the Council's evaluation process for candidates for elective judicial office in Illinois, which formed the basis of at least one report of this kind.

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Again, I have tried to identify such statements through searches of publicly available electronic databases.

I have never provided formal testimony to any public body.

I joined a letter from Law School Deans, dated February 14, 2007, calling for an increase in the compensation of federal judges.

I joined a Statement of Law Deans, dated January 15, 2007, criticizing the remarks of Deputy Assistant Secretary of Defense Charles Stimson regarding legal representation of detainees at Guantanamo.

I signed a letter with three other law deans to Senator Patrick Leahy, dated November 14, 2005, opposing the Graham Amendment to the Department of Defense authorization bill insofar as it would have stripped the federal courts of jurisdiction to hear habeas petitions brought by detainees at Guantanamo.

I joined a Statement by Law School Deans, dated May 4, 2005, opposing threats of retaliation against federal judges and asserting the importance of an independent judiciary.

On September 10, 2002, I wrote a letter to Senator Patrick Leahy supporting Michael McConnell's nomination to the United States Court of Appeals for the Tenth Circuit. I also joined a group letter to this effect and participated in a Department of Justice Press Availability regarding the nomination.

On June 17, 2002, I provided a brief letter to Senator Paul Sarbanes concluding that a provision of the Public Company Accounting Reform and Investor Act of 2002 ("Sarbanes-Oxley") likely would survive a challenge brought under the Appointments Clause of Article II of the Constitution.

On April 12 and 13, 2001, I joined two group letters to senators supporting Peter Keisler's nomination to the United States Court of Appeals for the Fourth Circuit.

As Deputy Assistant to the President for Domestic Policy, I gave formal press briefings on the following occasions:

5/27/98	Welfare reform (with Secretary Donna Shalala and Eli Segal)
3/9/98	Tobacco legislation (with Chris Jennings)
2/13/98	Tobacco legislation (with General Barry McCaffery)
11/7/97	White House Conference on Hate Crimes (with Maria Echaveste)

Also as Deputy Assistant to the President for Domestic Policy, I briefed lieutenant governors on education and tobacco issues (2/22/99) and women mayors on domestic policy issues generally (1/26/99). I may have done other, similar briefings of this kind that do not appear in my calendar. I do not have notes for these briefings.

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

I have tried to identify, through the search of calendars, computer files, and hard files, as well as publicly available electronic databases, all talks I have given of the kind described. I am providing written texts and handwritten notes where I have them. In the many appearances I make as dean, I usually get some material from my staff and then speak either without any notes or with handwritten notes,

which I typically discard. Many of these events are reported on by university publications or taped by the law school. I am providing copies of any articles I have found on these events (where such articles exist, the list below states "press provided"), and I am indicating where tapes are on file at Harvard Law School.

DATE	DESCRIPTION	PLACE	COPY/TAPE/ PRESS
12/5/08	Remarks -- Alumni Lunch	NYC	
12/3/08	Remarks -- Faculty Chair Lecture (Cass Sunstein)	HLS	Tape at HLS
11/19/08	Remarks -- HLS Medal of Freedom Award Presentation to Pakistani Chief Justice Iftikhar Chaudhry	HLS	Press Provided Tape at HLS
11/18/08	Remarks -- Ames Moot Court Final Round Argument	HLS	
11/12/08	Welcome -- Islamic Legal Studies Program Workshop	HLS	
11/12/08	Remarks -- Introduced Francis W. Biddle Memorial Lecture given by Ian Ayres	HLS	Tape at HLS
11/10/08	Remarks -- Presentation of Gary Bellow Public Service Award	HLS	
10/29/08	Remarks -- Faculty Chair Lecture (Jon Hanson)	HLS	Press Provided Tape at HLS
10/25/08	Q&A with Dean -- HLS Alumni Reunions	HLS	Tape at HLS
10/24/08	Moderate Panel -- Supreme Insights: Examining the Future of America's Highest Court	HLS	Tape at HLS
10/24/08	Remarks -- HLS Capital Campaign Recognition Luncheon	HLS	
10/23/08	Remarks -- HLS Capital Campaign Celebration Dinner	HLS	Press Provided
10/17/08	Remarks -- Introduce Sandra Day O'Connor as part of HLS Charles Hamilton Houston Institute Conference	HLS	Press Provided Tape at HLS
10/16/08	Remarks -- Equal Justice Works Dinner, acceptance of Dean of the Year Award	Washington, DC	
10/15/08	Remarks -- Dinner Honoring HLS Heyman Fellows	Washington, DC	
10/15/08	Remarks -- Alumni Lunch	Washington, DC	
10/14/08	Welcome -- Introduce Supreme Court Moot Court Event	HLS	
10/14/08	Remarks -- Faculty Chair Lecture (Yochai Benkler)	HLS	Press Provided Tape at HLS
10/7/08	Remarks -- HLS Public Service Initiative Dinner	HLS	
10/6/08	Speech -- John W. King Lecture at New Hampshire Supreme Court	Concord, NH	Text Provided
10/2/08	Remarks -- Introduction to Herbert W. Vaughan Lecture given by Justice Scalia	HLS	Press Provided Tape at HLS
10/1/08	Moderate Panel -- The Financial Crisis: Causes and Cures	HLS	Press Provided Tape at HLS
9/27/08	Welcome -- Introduce Panel at Harvard University Gay and Lesbian Alumni Event	Harvard University	

9/26/08	Remarks -- Conference Honoring HLS Professor Morton Horwitz	HLS	Tape at HLS
9/23/08	Remarks -- Introduce "The Idea of Justice," a lecture by Amartya Sen	HLS	Press Provided
9/23/08	Remarks -- Program on Negotiation: Great Negotiator Award Presented to Christo and Jeanne Claude	Boston, MA	
9/22/08	Moderate Panel -- Dean's Forum: Inside the Laws and Policies of Televised Presidential Debates	HLS	Tape at HLS
9/22/08	Remarks -- introduce Deval Patrick at American Constitution Society event	HLS	Press Provided
9/21/08	Remarks -- HLS Alumni "Celebration 55": Presentation of Alumni Award to Congresswoman Jane Harman	HLS	Tape at HLS
9/20/08	Q&A with Ruth Bader Ginsburg -- HLS Alumni "Celebration 55"	HLS	Tape at HLS
9/19/08	Welcome and Remarks -- HLS Alumni "Celebration 55: Women's Leadership Summit"	HLS	Tape at HLS
9/19/08	Q&A with the Dean -- HLS Alumni "Celebration 55"	HLS	Tape at HLS
9/19/08	Remarks -- HLS Alumni Celebration 55: Presentation of Alumni Award to Rita E. Hauser	HLS	Tape at HLS
9/17/08	Remarks -- HLS Public Service Orientation	HLS	Tape at HLS
9/16/08	Remarks -- Faculty Chair Lecture (Noah Feldman)	HLS	Press Provided Tape at HLS
9/15/08	Speech -- HLS State of the School Speech	HLS	Text Provided
9/12/08	Remarks -- Microsoft 10 Years Later Conference	HLS	Tape at HLS
9/11/08	Remarks -- Faculty Comparative Law Conference	HLS	
9/9/08	Welcome -- HLS Intellectual Property Law Conference	Cambridge, MA	
9/9/08	Moderate Panel -- Dean's Forum: The Role of Courts in the War on Terror	HLS	Tape at HLS
9/2-10/08	Remarks -- First Year Student Welcome Dinners	HLS	
8/29/08	Speech -- Dean's Speech to New 1L and LLM Students	HLS	Text Provided
7/30/08	Remarks -- HLS Charles Hamilton Houston Institute, Thurgood Marshall Celebration	New York, NY	
6/14/08	Moderate Panel--American Constitution Society -- Celebrating Judge Patricia Wald	Washington, DC	
6/13/08	Moderate Panel--American Constitution Society, "Law & Justice Policies In A New Administration"	Washington, DC	Video at acslaw. org/node/6717
6/5/08	Speech -- HLS Commencement	HLS	Text Provided
6/4/08	Remarks--HLS Graduating Students Class Day	HLS	Tape at HLS
5/27/08	Remarks--Retirement Party for Professors Terry Martin and John Mansfield	HLS	
5/22/08	Welcome--HLS Leadership in Law Firms Conference	HLS	
5/15/08	Remarks--Berkman Center 10th Anniversary Event	HLS	Press Provided
5/3/08	Q & A with the Dean--Alumni Reunions	HLS	Tape at HLS
5/2/08	Remarks--Alumni Lunch	HLS	Tape at HLS

5/1/08	Remarks--Standing Committee of Judicial Conference Reception	HLS	
4/24/08	Remarks--Harvard University Native American Program Event	HLS	
4/18/08	Remarks--International Law Journal Conference	HLS	Tape at HLS
4/17/08	Remarks--Third Year Student Graduation Dinner	HLS	
4/15/08	Remarks--HLS Alumni Breakfast	Washington, DC	
4/11/08	Welcome--Carbon Offsets Conference Luncheon	HLS	
4/4/08	Remarks--Memorial Service for Professor Clark Byse	HLS	Text Provided
4/4/08	Remarks -- Introduce Robert Zoellick	HLS	
4/2/08	Remarks--Faculty Chair Lecture (Carol Steiker)	HLS	Tape at HLS
4/2/08	Remarks--Dinner Honoring HLS Kaufman Fellows	HLS	
3/31/08	Talk to federal judges re legal education	HLS	
3/19/08	Moderate Panel sponsored by ACS, Federalist Society on "Post-Partisanship"	HLS	
3/18-19/08	Remarks--Ames Moot Court Semi-Final Round Arguments	HLS	
3/15/08	Q & A with Dean--HLS Public Interest Reunion	HLS	Press Provided Tape at HLS
3/14-15/08	Remarks--Introduce Bryan Stevenson and Bill Weld at HLS Public Interest Reunion	HLS	Tape at HLS
3/14/08	Remarks -- Conversation with Jennifer Granholm at Public Interest Reunion	HLS	Press Provided Tape at HLS
3/11/08	Remarks -- Introduce Q&A with Justice Kennedy	HLS	Tape at HLS
3/10/08	Remarks--Dinner to Celebrate Justice Kennedy's 20th Year on the Supreme Court	HLS	
3/8/08	Panelist -- "Women and the Law" at the Peter Jennings Project Conference	Philadelphia, PA	Audio available http://feeds.feedburner.com/nccprograms
2/27/08	Remarks--Faculty Chair Lecture (George Triantis)	HLS	Tape at HLS
2/22/08	Remarks--HLS Black Law Students Association Spring Conference Alumni Lunch	HLS	
2/20/08	Moderate Panel -- "20 Questions with Anthony Lewis"	Harvard University	
2/19/08	Panelist-- HLS Democrats "Women in Politics" Panel	HLS	Tape at HLS
2/14/08	Remarks--Swearing-in Ceremony for Professor Mary Ann Glendon (U.S. Ambassador to the Vatican)	HLS	
2/4/08	Remarks--Faculty Chair Lecture (John Coates)	HLS	Tape at HLS
2/2/08	Panelist--Dean's Panel at Milbank Partner's Meeting	West Palm Beach, FL	
12/3/07	Remarks--Faculty Chair Lecture (Gerry Neuman)	HLS	Tape at HLS
11/14/07	Remarks--Ames Moot Court Final Round Argument	HLS	
11/13/07	Moderate Panel -- Dean's Forum: Dealing with Terrorism: What Congress and the President Should Do	HLS	Tape at HLS
11/8/07	Q & A with the Dean-- Alumni Leadership Conference	New York, NY	
11/7/07	Remarks--Alumni Dinner	HLS	

11/3/07	Remarks--Bellow Sacks Conference on Legal Services	HLS	
10/29/07	Remarks--Faculty Chair Lecture (Mark Tushnet)	HLS	Press Provided Tape at HLS
10/27/07	Q & A with the Dean--HLS Alumni Reunion	HLS	Tape at HLS
10/26/07	Remarks -- Conversation with Michael Kinsley at Reunion Event	HLS	Tape at HLS
10/24/07	Remarks--Dinner Honoring HLS Heyman Fellows	Washington, DC	
10/17/07	Speech--West Point Academy Keynote Address	West Point Academy	Text Provided
10/4/07	Remarks -- Introduced "Terrorism, Climate Change & Beyond" (Cass Sunstein)	HLS	
10/3/07	Remarks--Asian and Pacific American Law Students Association Dinner	HLS	
10/1/07	Remarks--HLS Alumnae Luncheon	New York, NY	
9/19/07	Remarks--HLS Public Service Orientation	HLS	Press Provided Tape at HLS
9/17/07	Speech--HLS State of the School Speech	HLS	Text Provided
9/17/07	Remarks--Faculty Chair Lecture (Janet Halley)	HLS	Tape at HLS
9/6/07	Remarks--Unveiling of Charles Hamilton Houston Portrait	HLS	Tape at HLS
9/3-11/07	Remarks--First Year Student Welcome Dinners	HLS	
8/31/07	Speech--Dean's Speech for New 1L and LLM Students	HLS	Text Provided
7/28/07	Moderate Panel--ACS National Convention, Congress & Balance of Power Panel	Washington, DC	Video at acslaw.org/Node/5196
7/26/07	Remarks--Leadership in Law Firms Reception	HLS	
6/14-15/07	Various Remarks and Q&A at HLS Alumni Events	Washington, DC	
6/7/07	Speech -- HLS Commencement	HLS	Text Provided
6/6/07	Remarks -- HLS Graduating Students Class Day Ceremony	HLS	Tape at HLS
5/31/07	Remarks -- American Bar Association Law School Development Conference: Soliciting Law Firms	Broomfield, CO	
5/24/07	Remarks -- HLS Program on the Legal Profession Executive Education Program	HLS	
5/23/07	Remarks -- HLS Retiring Faculty Reception	HLS	
4/28/07	Q&A with Dean -- HLS Alumni Reunion	HLS	Tape at HLS
4/26/07	Remarks -- Cox-Richardson-Coleman Public Service Award, received by Patrick Fitzgerald	HLS	
4/25/07	Remarks -- Dinner Honoring HLS Kaufman Fellows	HLS	
4/24/07	Remarks -- Federal Judicial Center Conference on Legal Education	HLS	
4/23/07	Remarks -- Program on Negotiation: Great Negotiator Award, received by Bruce Wasserstein	HLS	Tape at HLS
4/21/07	Remarks -- Latino Law and Public Policy Breakfast	HLS	
4/19/07	Remarks -- Supreme Court Advocacy Project Moot Court	HLS	

4/19/07	Remarks -- Gary Bellow Public Service Award Ceremony	HLS	
4/16/07	Remarks -- Faculty Chair Lecture (Ryan Goodman)	HLS	Tape at HLS
4/16/07	Remarks - Harvard Humanities Center Panel on Human Enhancement	Harvard University	
4/14/07	Remarks -- HLS Civil Rights & Civil Liberties Law Review Dinner	HLS	
4/13/07	Welcome -- ABA Conference: Children and the Law	HLS	Press Provided Tape at HLS
4/13/07	Welcome -- Harvard Law Journal on Law and Gender Conference on Title IX	HLS	Transcript Provided
4/9/07	Remarks -- Introduced John Dewey Lecture in the Philosophy of Law given by Robert George	HLS	Tape at HLS
4/7/07	Remarks -- HLS Charles Hamilton Houston Institute 150th Anniversary of Dred Scott Event	HLS	Press Provided Tape at HLS
3/20/07	Remarks -- Ames Moot Court Semi-Final Round Arguments	HLS	
3/19/07	Moderate Panel -- Petrie-Flom Conference on Proper Legal Limits on Human Enhancement	HLS	Press Provided
3/6/07	Remarks -- HLS/Appleseed Inaugural Lecture, given by Joel Klein	HLS	Tape at HLS
3/3/07	Introduce Panel -- HLS Lambda Conference on Don't Ask Don't Tell	HLS	Transcript Provided
2/20/07	Remarks -- Faculty Chair Lecture (Randall Kennedy)	HLS	
2/16/07	Remarks -- Women's Law Association Conference Dinner	HLS	
2/9/07	Welcome -- HLS Constitutional Law Conference	HLS	
2/6/07	Remarks -- Faculty Chair Lecture (William Stuntz)	HLS	
1/4/07	Panelist -- AALS Plenary Session on Academic Freedom	Washington, DC	Audio at www.aals.org/am2007/thursday/index.html#plenary
12/1/06	Welcome -- HLS American Society for International Law Conference	HLS	Press Provided
11/30/06	Remarks -- Q&A with Justice Scalia	HLS	Press Provided Tape at HLS
11/29/06	Remarks -- Dinner for Justice Scalia	HLS	
11/20/06	Moderate Panel -- Harvard Law Review Supreme Court Forum	HLS	
11/14/06	Remarks -- Ames Moot Court Final Round Argument	HLS	
11/8/06	Remarks -- HLS Alumni Dinner, introduced Jeffrey Toobin	New York, NY	
11/7/06	Remarks -- Faculty Chair Lecture (Joseph Singer)	HLS	Tape at HLS
11/3/06	Remarks -- Festschrift Dinner Honoring Professor Paul Weiler	HLS	
11/1/06	Remarks -- Introduced Francis W. Biddle Memorial Lecture given by Reva Siegel	HLS	Text Provided
10/28/06	Q&A with Dean -- HLS Alumni Reunion	HLS	Tape at HLS
10/28/06	Remarks -- HLS Alumni Reunion Lunch, introduced Justice Kennedy	HLS	Text Provided

10/25/06	Remarks -- Reception Celebrating Establishment of Rite E. Hauser Professorship of Human Rights and Humanitarian Law	HLS	Tape at HLS
10/19/06	Remarks -- Program on International Financial Systems Conference	HLS	
10/18/06	Remarks -- Dinner Honoring HLS Heyman Fellows	Washington, DC	
10/3/06	Remarks -- Introduced Oliver Wendell Holmes Lecture given by Bruce Ackerman	HLS	Tape at HLS
9/21/06	Remarks -- Introduce Aharon Barak	HLS	Press Provided Tape at HLS
9/20/06	Speech -- State of School Address	HLS	Text Provided
9/20/06	Remarks -- Gruber Foundation Dinner honoring Aharon Barak	HLS	
9/19/06	Remarks -- HLS Public Service Orientation	HLS	Press Provided Tape at HLS
9/8/06	Remarks -- Faculty Chair Lecture (Einer Elhauge)	HLS	Press Provided Tape at HLS
9/7/06	Welcome -- HLS Multi-Jurisdictional Mock Patent Trial	HLS	
9/7/06	Remarks -- HLS Petrie Flom Dinner on Law and Bioethics	HLS	
9/4-14/06	Remarks -- First Year Student Welcoming Dinners	HLS	
9/1/06	Speech -- Dean's Speech to New 1L and LLM Students	HLS	Text Provided
7/18/06	Remarks -- Middlesex Committee of the Women's Bar Association	MA	
6/8/06	Speech -- HLS Commencement	HLS	Text Provided
6/7/06	Remarks -- HLS Alumni Lunch	HLS	
6/7/06	Remarks -- HLS Graduating Student Class Day, introducing Linda Greenhouse	HLS	Press Provided Tape at HLS
6/3/06	Panelist -- Princeton Reunion Session on "The Roberts Court: Year One"	Princeton, NJ	
5/26/06	Q&A with the Dean -- Harvard Law School Association of Europe	Catania, ITALY	
5/22/06	Welcome -- Law Teaching Workshop for HLS Alumni	HLS	
5/15/06	Remarks -- HLS Faculty Retirement Celebration (Professors Herwitz, Shapiro, Sander)	HLS	
5/12/06	Remarks -- Introduce Paul Clement at Alumni Event at Supreme Court	Washington, DC	
4/29/06	Q&A with the Dean -- HLS Alumni Reunion	HLS	
4/28/06	Remarks -- Dinner Honoring Professor Frank Sander	HLS	
4/27/06	Remarks -- HLS Scholarship Recipient Dinner	HLS	
4/25/06	Moderate Panel -- Student Panel on Free Expression and Harassment	HLS	
4/24/06	Remarks -- Dinner honoring HLS Kaufman Fellows	HLS	
4/21/06	Welcome -- Breakfast for Annual Harvard Latino Law and Policy Conf	HLS	
4/21/06	Welcome -- Faculty Conference on Criminal Procedure	HLS	

4/19/06	Remarks -- Memorial Service for Professor Arthur von Mehren	HLS	Text Provided
4/12/06	Remarks -- Opening of Navajo Supreme Court Session	HLS	Press Provided Tape at HLS
4/11/06	Remarks -- HLS Law Firm Pro Bono Fair	HLS	
4/11/06	Remarks -- Presentation of Gary Bellow Public Service Award	HLS	
4/8/06	Moderate Panel -- LAMBDA Student Organization Panel on Relationship Between Law Schools and the Military	HLS	
4/5/06	Q & A -- A Conversation with Mark Warner	HLS	Tape at HLS
4/4/06	Remarks and Q&A -- Federal Judiciary Conference on Legal Education	HLS	
3/25/06	Panelist -- Yale Law Journal Symposium, Session on "Energy in the Executive: The Power of Unitary Leadership"	New Haven, CT	
3/21-22/06	Remarks -- Ames Moot Court Semi-Final Round Dinner	HLS	
3/20/06	Welcome -- Harvard Journal on Legislation Symposium, "Middle Class Crunch"	HLS	
3/20/06	Remarks -- Faculty Chair Lecture (David Rosenberg)	HLS	Tape at HLS
3/17/06	Welcome -- HLS Journal of Law and Technology Conference	HLS	
3/17/06	Welcome -- National Democratic Law Students Council Kick-Off Convention	HLS	Press Provided
3/11/06	Welcome -- HLS Black Law Students Association Annual Conference	HLS	
3/10/06	Welcome -- HLS Climate Policy Conference	HLS	
3/10/06	Moderate Panel -- Harvard Journal on Law and Gender conference on legal education and gender	HLS	
3/7/06	Welcome -- Speech by Massachusetts Lieutenant Governor Kerry Healey	HLS	
3/4/06	Welcome -- HLS International Law Journal Symposium	HLS	
2/25/06	Welcome -- UN Reform and Human Rights Conference	HLS	Press Provided Tape at HLS
2/22/06	Remarks -- Faculty Chair Lecture (Martha Minow)	HLS	
2/16/06	Welcome -- HLS Federalist Society and American Constitution Society Sponsored Moot Court	HLS	
2/11/06	Remarks -- HLS Alumni of the Americas Celebration	Miami, FL	
2/6/06	Remarks -- Memorial Service for Professor David Westfall	HLS	Text Provided
2/5/06	Remarks -- Dinner honoring HLS Skadden Fellows	HLS	
1/19/06	Remarks and Q&A -- HLS Alumni Association of Japan	Tokyo, JAPAN	
1/15/06	Remarks -- HLS Alumni Association of China	Beijing, CHINA	
1/11/06	Remarks and Q&A -- HLS Alumni Association of Korea	Seoul, KOREA	
12/3/05	Welcome--HLS Disability Law Workshop	HLS	

11/30/05	Remarks--HLS Petrie Flom Center Celebration	New York, NY	
11/17/05	Remarks--Ames Moot Court Final Competition	HLS	
11/16/05	Remarks--Faculty Chair Lecture (Allen Ferrell)	HLS	
11/12/05	Welcome -- ACS Regional Conference	HLS	Press Provided
11/9/05	Moderate Panel--Dean's Forum: Executive Power, Detention, and Interrogation	HLS	Tape at HLS
11/7/05	Speech--Leslie H. Arps Memorial Lecture on Women and the Law at the Association of the Bar of the City of New York	New York, NY	Text Provided
11/5/05	Welcome--HLS China Symposium	HLS	
11/4/05	Welcome--Panel on Director Liability, sponsored by HLS Corporate Governance Program	HLS	
11/3/05	Remarks--HLS Nuremberg Trials Conference on Pursuing Human Dignity	HLS	
11/2/05	Remarks--Alumni Dinner	New York, NY	
11/1/05	Remarks -- Great Lawyers Forum with Ted Wells	HLS	Press Provided
10/26/05	Welcome--Dinner Honoring HLS Heyman Fellows	Washington, DC	
10/22/05	Q & A with the Dean--Alumni Reunion Weekend	HLS	
10/19/05	Remarks--HLS Conference on Intellectual Property Law	HLS	
10/12/05	Remarks -- LAMBDA Student Event	HLS	
10/11/05	Remarks--Faculty Chair Lecture (Howell Jackson)	HLS	
10/8/05	Speech--American Academy of Arts & Sciences Induction Ceremony	HLS	Text Provided
10/5/05	Remarks--Great Lawyers Forum with Newton Minow	HLS	Tape at HLS
10/3/05	Moderate Panel--Dean's Forum: The U.S. Supreme Court's 2005 Term	HLS	Tape at HLS
10/2/05	Remarks--Alliance of Independent Feminists, Harvard Federalist Society, and Journal of Law & Public Policy Event	HLS	
9/29/05	Q & A with Dean--American Constitution Student Society	HLS	
9/28/05	Moderate Panel--Anglo-American Legal Exchange Panel (with Justices Breyer and Scalia and British counterparts)	HLS	Press Provided Tape at HLS
9/28/05	Remarks--Anglo-American Legal Exchange Dinner	HLS	
9/22/05	Speech--State of the School Address	HLS	Text Provided
9/19/05	Remarks--Federalist Society and American Constitution Society Moot Court	HLS	
9/17/05	Q & A with the Dean-Alumni Leadership Conference & Celebration of Black Alumni	HLS	
9/17/05	Remarks-- HLS Celebration of Black Alumni & Alumni Award to Barack Obama	HLS	Press Provided Tape at HLS
9/16/05	Remarks--HLS Alumni Leadership Conference Dinner	HLS	
9/15/05	Remarks--HLS Charles Hamilton Houston Institute Event	HLS	Tape at HLS
9/10/05	Remarks--HLS Black Law Students Association Luncheon	HLS	
9/9/05	Welcome-- HLS Public Service Student Orientation	HLS	

9/2/05	Speech--Dean's Speech to New 1L and LLM Students	HLS	
9/1-14/05	Remarks--First Year Student Welcome Dinners	HLS	
7/29/05	Moderate Panel-American Constitution Society-Commander-in-Chief Power in the 21st Century	HLS	Transcript provided
6/9/05	Speech -- HLS Commencement	HLS	Text Provided
6/8/05	Remarks -- HLS Alumni Lunch	HLS	
6/8/05	Remarks -- HLS Graduating Student Class Day	HLS	
6/1/05	Panelist -- New Realities of Fundraising at American Bar Association Conference	Jackson Hole, WY	
5/18/05	Remarks -- Federal Judicial Center Program at HLS (remarks on legal education today)	HLS	
4/29/05	Remarks -- HLS Federalist Society & HLS Journal of Law & Public Policy Banquet	HLS	
4/28/05	Remarks -- Dinner Honoring HLS Kaufman Fellows	HLS	
4/23/05	Remarks -- 8th Annual Harvard Latino Law and Policy Conference Breakfast	HLS	
4/16/05	Q&A with the Dean -- HLS Reunions	HLS	Tape at HLS
4/8/05	Remarks -- In Response to Paper Given by Yale Law School Professor Akhil Amar at Constitutional Law Conference	HLS	
4/8/05	Welcome -- HLS Student Conference on Women and War	HLS	
4/6-19/05	Remarks -- Third-Year Student Graduation Dinners	HLS	
3/24/05	Remarks -- Faculty Conference on Governance by Design	HLS	
3/22-23/05	Remarks -- Ames Moot Court Semi-Final Round Arguments	HLS	
3/19/05	Welcome -- Harvard Civil Rights-Civil Liberties Law Review 40th Anniversary Conference	HLS	
3/16/05	Remarks and Q&A -- HLS Students Law Teaching Colloquium	HLS	
3/12/05	Welcome -- Black Law Students Association Banquet	Harvard	
3/5/05	Moderate Panel -- International Law Journal Discussion on Professors Detlav Vagts and Henry Steiner	HLS	
2/26/05	Remarks -- Federalist Society Symposium Banquet	Cambridge, MA	
2/16/05	Remarks -- Dinner Honoring HLS Skadden Fellows	Harvard	
2/7/05	Remarks -- Faculty Chair Lecture (Richard Fallon)	HLS	
1/17/05	Panelist -- Free Speech in Wartime: Theoretical and Practical Perspectives	Rutgers Univ. Law School, Camden NJ	
1/10/05	Remarks -- California Alumni Capital Campaign Kickoff	Los Angeles, CA	
1/9/05	Remarks -- Capital Campaign Dinner, introduced Congresswoman Jane Harman	Los Angeles, CA	
1/8/05	Remarks -- West Coast Alumni Capital Campaign Kickoff	San Francisco, CA	

11/18/04	Remarks -- Ames Moot Court Final Round Argument	HLS	
11/17/04	Remarks -- Chicago Alumni Capital Campaign Kickoff	Chicago, IL	
11/15/04	Moderate Panel -- Dean's Forum: Perilous Times: Free Speech in Wartime - a Conversation with Geoffrey Stone	HLS	
11/8/04	Moderate Panel -- Dean's Forum: 9/11 Commission	HLS	
11/3/04	Remarks -- Radcliffe Women's Faculty Lunch	Harvard	
10/29/04	Moderate Panel -- Comparative Rationalities in European and U.S. Administrative Law	HLS	
10/28/04	Moderate Panel -- Equal Justice Works Conference, Session on Moral Lawyering	Washington DC	
10/27/04	Remarks -- HLS Capital Campaign Kickoff	Washington DC	
10/23/04	Q&A with the Dean -- HLS Alumni Reunion	HLS	
10/19/04	Remarks -- American Friends of Hebrew University Torch of Learning Award Lunch	NYC	Text Provided
10/16/04	Remarks -- Human Rights Program 20th Anniversary Reception	HLS	Text Provided
10/15/04	Remarks -- LAMBDA Student Event	HLS	Press Provided
10/14/04	Welcome -- Conference on The Past, Present & Future of Jewish Settlements in the West Bank and Gaza	HLS	Tape at HLS
10/12/04	Moderate Panel -- Letters to a Young Lawyer Discussion for First-Year HLS Students	HLS	
10/8/04	Remarks -- Archibald Cox Memorial Service	HLS	Text Provided
10/7/04	Remarks -- Dinner Honoring HLS Heyman Fellows	Washington DC	
10/5/04	Moderate Panel -- Dean's Forum: U.S. Supreme Court's 2004 Term	HLS	Tape at HLS
10/4/04	Remarks -- Presentation of Cox-Richardson-Coleman Public Service Award (honoring Senator Sheila Kuehl)	HLS	
10/4/04	Moderate Panel -- Women in Elected Office Discussion	HLS	
10/2/04	Welcome -- Just Democracy Organization Conference	HLS	
9/23/04	Remarks -- HLS Program on the Legal Profession Lunch	HLS	
9/23/04	Speech -- HLS State of the School Speech	HLS	Press Provided
9/22/04	Welcome -- Law Firm Pro Bono Fair	HLS	
9/21/04	Remarks -- HLS Public Service Orientation	HLS	
9/20/04	Remarks -- LLM Student Welcome Dinner	HLS	
9/6-14/04	Remarks -- First-Year Student Welcoming Dinners	HLS	
9/3/04	Speech -- Dean's Speech to New 1L and LLM Students	HLS	
8/5/04	Remarks -- Dinner Celebrating New Faculty Chair (Hieken Professorship of Patent Law)	HLS	
6/15-19/04	Welcome, Remarks -- HLS International Alumni Meeting	London, England	Press Provided

6/11/04	Remarks -- National Pre-Law Advisors Lunch	HLS	
6/10/04	Speech -- HLS Commencement	HLS	Text Provided
6/9/04	Remarks -- HLS Alumni Lunch	HLS	
6/9/04	Remarks -- HLS Graduating Students Class Day	HLS	
6/3/04	Remarks -- Dinner Celebrating New Faculty Chair (Robert C. Clark Professorship)	HLS	
5/15/04	Speech -- North American Meeting of Lex Mundi	Boston, MA	Text Provided
5/6/04	Remarks -- Boston Alumni Regional Campaign Kickoff	HLS	
5/4/04	Remarks -- Introduction to Lecture by Jeremy Waldron ("Safety, Security & Public Goods With Structure")	HLS	
4/29/04	Remarks -- Massachusetts Superior Court Judges Lunch	Dedham, MA	
4/29/04	Remarks -- Dinner Honoring HLS Kaufman Fellows	HLS	
4/24/04	Q&A with the Dean -- HLS Alumni Reunions	HLS	
4/23/04	Remarks -- Alumni Lunch	HLS	Tape at HLS
4/22/04	Remarks -- HLS Dinner For Scholarship Recipients	HLS	
4/21/04	Moderate Panel -- Dean's Forum on Faculty Book (David Kennedy: The Dark Side of Virtue)	HLS	Tape at HLS
4/13-17/04	Various Remarks -- Brown v. Board of Education at 50 Conference	HLS	Press Provided Tape at HLS
4/7-26/04	Remarks -- Third-Year Student Graduation Dinners	HLS	
3/17-18/04	Remarks -- Ames Moot Court Semi-Final Arguments	HLS	
3/16/04	Remarks -- Cox-Richardson-Coleman Public Service Award (honoring Senator Paul Sarbanes and Inspector General Glenn Fine)	HLS	Press Provided
3/11/04	Moderate Panel -- Dean's Forum on Faculty Book (Charles Fried: Saying What the Law Is: The Constitution in the Supreme Court)	HLS	Tape at HLS
3/7/04	Remarks -- HLS Black Law Students Association Brunch	HLS	
3/1/04	Remarks -- Talk to Federal Judicial Conference on Legal Education	HLS	
2/27/04	Remarks -- HLS Alumni of Florida Dinner	Miami, FL	
2/17/04	Moderate Panel -- Dean's Forum on Gender and the Classroom	HLS	Tape at HLS
2/11/04	Remarks -- Harvard Alumni of Illinois Lunch	Chicago, IL	
2/10/04	Remarks -- HLS Alumni of Houston Breakfast	Houston, TX	
2/9/04	Remarks -- HLS Alumni of Dallas Lunch	Dallas, TX	
2/5/04	Moderate Panel -- Dean's Forum on Goodridge v. Dept. of Public Health	HLS	Tape at HLS
1/30/04	Remarks -- HLS Alumni of New York Lunch	New York City, NY	
1/23/04	Remarks -- Dinner Honoring HLS Skadden Fellows	HLS	
1/22/04	Speech -- NYU New Building Dedication (speech on Dean Roscoe Pound's 1952 Speech "Legal Education in a Unified World")	New York City, NY	Text Provided

1/5/04	Remarks -- HLS Atlanta/Regional Alumni Lunch	Atlanta, GA	
12/8/03	Remarks -- Harvard Alumni of Illinois Lunch	Chicago, IL	
11/15/03	Remarks -- In Response to Paper Given by Professor Bruce Ackerman at Constitutional Law Conference	HLS	
11/13/03	Remarks -- HLS JD/MBA Reunion Dinner	New York City, NY	
11/12/03	Remarks -- Ames Moot Court Final Round Argument	HLS	
11/7/03	Remarks -- Environmental Law Conference	HLS	
11/6/03	Q&A with the Dean -- HLS Alumni of New Jersey	New Jersey	
10/30/03	Remarks -- HLS Alumni of Southern California Lunch	Los Angeles, CA	
10/28/03	Remarks -- HLS Alumni of Massachusetts Lunch	Boston. MA	
10/25/03	Q&A with the Dean -- HLS Alumni Reunions	HLS	
10/24/03	Remarks -- Hale & Dorr Legal Services Center 10th Anniversary	HLS	
10/23/03	Remarks -- HLS Law Teachers' Colloquium for Students	HLS	
10/20/03	Moderate Panel -- Dean's Forum: Beyond Bush & Estrada? Ideological Judges & the Confirmation Process	HLS	Tape at HLS
10/16/03	Remarks -- HLS Alumni Dinner	New York City, NY	
10/15/03	Remarks -- Faculty Chair Lecture (Terry Fisher)	HLS	Tape at HLS
10/14/03	Remarks -- Gary Bellow Public Service Award Reception	HLS	
10/10/03	Welcome -- LAMBDA Student Conference	HLS	Press Provided
10/9/03	Moderate Panel -- Dean's Forum on U.S. Supreme Court's 2003 Term	HLS	Tape at HLS
10/8/03	Remarks -- Unveiling of Archibald Cox Portrait	HLS	Press Provided Tape at HLS
10/2/03	Moderate Panel -- Letters to a Young Lawyer Discussion for First-Year HLS Students	HLS	Tape at HLS
9/22/03	Remarks - Faculty Book Party (Elizabeth Warren: The Two-Income Trap)	Washington, DC	
9/20/03	Remarks -- HLS Gay and Lesbian Alumni Reunion	Cambridge, MA	Press Provided
9/19/03	Remarks -- HLS Alumni Leadership Conference Lunch	HLS	
9/17/03	Speech -- HLS State of the School Speech	HLS	Text Provided
9/5/03	Remarks -- Introduce Warren Christopher	HLS	Press Provided
9/2-11/03	Remarks -- First-Year Student Welcome Dinners	HLS	
8/31/03	Remarks -- ColorLines Conference -- Plenary Session: The Future of Race in the Law	HLS	
8/29/03	Speech -- Dean's Speech to New 1L & LLM Students	HLS	
8/2/03	Moderate Panel -- American Constitution Society conference (Originalism, Orignal Intent, Original Meaning Panel)	Washington, DC	Transcript Provided
7/24/03	Remarks -- HLS Alumni Reception	Washington, DC	

6/21/03	Remarks on judicial review to Princeton Alumni	Williamsburg, VA	Notes Provided
2/24/03	Remarks on judicial review in administrative and constitutional law at academic conference	University of Minnesota Law School	Notes Provided
2/13/03	Remarks on Presidential Administration article	Florida State Law School	
1/5/03	Remarks on Presidential Administration article at academic conference (American Association of Law Schools)	Washington, DC	
10/18/02	Remarks on Congressional Interpretation of Constitution at academic conference	Williamsburg, VA	
3/12/02	Moderate Panel -- Journal of Legislation panel on affirmative action in higher education	HLS	
11/1/01	Remarks on executive review of regulation at American Bar Association conference	Washington, DC	Notes Provided
10/12/01	Remarks on paper by Professor Chris Schroeder on deliberative democracy at academic conference	Duke Law School, Durham, NC	
9/13/01	Remarks -- Yale Law School Legal Theory Workshop on Presidential Administration article	New Haven, CT	
4/21/01	Toastmaster and Introduce Merrick Garland at Harvard Law Review Banquet	Boston, MA	Text Provided
11/17/00	Remarks -- HLS Faculty Workshop on Presidential Administration article	HLS	Notes Provided
10/3/00	Debate with Charles Fried on presidential election at Harvard Kennedy School	Cambridge, MA	
4/5/97	Remarks on presidential appointment power at academic conference	Case Western Law School, OH	
5/16/96	Remarks on work of White House Counsel's Office to University of Chicago Alumni	Washington, DC	
5/9/96	Remarks on Work of White House Counsel's Office to Treasury Department lawyers	Washington, DC	
2/16/96	Remarks on Speech Codes at academic conference	University of California at Davis	Notes Provided
9/21/95	Remarks on Relationship Between First Amendment Doctrine and Technological Change at Libel Lawyers' Conference	McLean, VA	Notes Provided
8/2/95	Remarks on work of White House Counsel's Office to Sidley and Austin summer associates	Washington, DC	
4/28/95	Remarks on constitutionality of speaker-based restrictions at American Bar Association panel on communications law	Washington, DC	Notes Provided
12/3/94	Remarks on gender and legal education at academic conference	University of Chicago Law School	

11/5/94	Remarks on *Shaw v. Reno* at academic conference	University of Chicago Law School	
2/10/94	Remarks on First Amendment doctrine at faculty workshop	University of Chicago Law School	Notes Provided
11/15/93	Remarks on the judicial confirmation process to law school alumni	Chicago, IL	
10/23/93	Remarks on critical race theory to high school teachers	Chicago, IL	Notes Provided
10/16/93	Remarks on censorship in schools at Chicago Humanities Festival	Chicago, IL	Notes Provided
5/15/93	Remarks on hate speech at academic conference	University of Chicago Law School	
4/23/93	Remarks on First Amendment article at faculty workshop	St. Louis University Law School	
3/6/93	Remarks on hate speech at academic conference	University of Chicago Law School	
2/11/93	Remarks on Thurgood Marshall to law school alumni	Chicago, IL	
10/10/92	Moderate panel on press freedom at academic conference	University of Chicago Law School	
Fall 1992	Remarks on legal education to law school alumni	University of Chicago Law School	Notes Provided

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have tried to recall and search for interviews to the best of my ability. I have relied on a search of Nexis to accomplish this task for publications other than those associated with Harvard University. I have separately searched the archives of all Harvard publications. I list below (and provide) all articles I have found in which I am quoted, first from my search of Nexis and next from my search of Harvard publications:

These articles are from general publications:

DATE	PUBLICATION	HEADLINE
12/7/2008	New York Times	Harvard Lightning Rod Finds Path to Renewal With Obama

6/18/2008	States News Service	Ex-Treasury, Congressional Tax Expert Berman to Head Graduate Tax Program at BU Law School
3/19/2008	Boston Globe	Harvard Law plan good news for public sector/Tuition waiver makes choice more attractive
3/18/2008	New York Times	Harvard Law, Hoping Students Will Consider Public Service, Offers Tuition Break
Autumn 2007	The Journal of Blacks in Higher Education	The Decline in Black Enrollments at the Nation's Highest-Ranked Law Schools
10/31/2007	New York Times	Training Law Students for Real-Life Careers
1/17/2007	New York Times	At Berkeley Law, a Challenge to Overcome All Barriers
10/7/2006	New York Times	Harvard Law Decides to Steep Students in 21st-Century Issues
9/18/2005	Boston Globe	Obama urges alumni to help fight poverty/Gives speech at Harvard meeting of black grads
9/10/2005	Boston Globe	Elite Colleges' Welcome Brings Unexpected Boon
8/4/2005	Associated Press	Roberts Puts Harvard Law on Hot Streak
May 2004	The Metropolitan Corporate Counsel	New England and Boston - Law Schools; Harvard Law School: Progress on Many Fronts
6/15/2003	Boston Globe	Harvard Law School Launches Ambitious Fund-Raising Campaign
1/22/1999	Seattle Post-Intelligencer	State Joins Fight to Keep Tobacco Money From Feds
11/21/1998	The National Journal	Clinton and Tobacco: What Now?
11/12/1998	Newsday (New York)	A Weaker Settlement? New Tobacco Deal Not as Strong on Teen Smoking, Critics Say
10/1/1998	Associated Press	With Fear, Fascination, Lockhart Takes Press Secretary Role
8/15/1998	Los Angeles Times	Court Rules FDA Cannot Regulate Tobacco as Drug; Law: Appeals Panel's Decision Deals Key Blow to Clinton Administration's Fight to Curb Youth Smoking. Judges Say Congress Never Gave the Agency Jurisdiction.
8/15/1998	Newsday (New York)	Big Tobacco's Victory / Appeals Court Bars FDA Regulation
6/23/1998	Philadelphia Inquirer	Clinton to Survey Teen Smoking Habits / The President, Still Hoping for a Tobacco-Control Bill, Said the Data Would Reveal Which Ads Entice Children.
5/9/1998	Star Tribune (Minneapolis, MN)	Cost of National Deal Probably Just Went Up
4/3/1998	St. Petersburg Times (Florida)	As Clinton Returns, Foes Who Smelled Victory Taste Defeat

4/1/1998	New York Times	Heated Hearing Over the Fate of an Agency
3/31/1998	San Antonio Express-News (Texas)	Tobacco Bill Would Limit Annual Liability at $6.5 Billion
3/22/1998	Newsday (New York)	Tobacco Deal's Hazy Outlook. Working Out Details of the Tobacco Deal
1/30/1998	Los Angeles Times	Cigarette Execs Get Cool Reception at House Hearing; Tobacco: They Express Regret, Push for Ratification of Landmark Settlement. But Deal's Prospects Have Grown Cloudy.
1/29/1998	Los Angeles Times	National Perspective; Legislation; Proposed Tobacco Settlement Isn't Setting Congress on Fire; Some Lawmakers are Beginning to Gravitate Toward a Scaled-Back Alternative to the Sweeping Deal.
1/27/1998	Newsday (New York)	Disclosure of Targeting Teens Could Smother Smoking Deal
11/10/1997	Associated Press	Clinton Opens Hate Crime Conference
8/10/1997	Knight Ridder Washington Bureau	Clinton Wants Business to View Welfare Recipients as Untapped Resources
7/28/1997	Austin American-Statesman (Texas)	Clinton Tells States to Put Welfare to Work for Poor
7/28/1997	Charlotte Observer (North Carolina)	Funds for the Poor Should Go to Poor, Clinton Says
6/5/1997	New York Times	G.O.P. Backing Off a Deal to Restore Aid to Immigrants
8/12/1994	Associated Press	Mikva's Political Skills to be Tested as Clinton's New Counsel
1/16/1994	Chicago Tribune	In His Court; Mikva Brings a Politician's Perspective to the Federal Bench

These articles are from Harvard publications:

DATE	PUBLICATION	HEADLINE
12/18/08	Harvard Gazette	Lawrence Lessig Receives Two Harvard Appointments
10/27/08	Harvard Crimson	HLS Looks to Public Sector
10/1/08	Harvard Law Bulletin	Northwest Passage
10/1/08	Harvard Law Bulletin	A Fundamental Advantage
5/29/08	Harvard Gazette	Harvard Law School Campaign Surpasses Goal
5/22/08	Harvard Gazette	Affordable Harvard: A Year of Financial Aid Initiatives
5/15/08	Harvard Gazette	Harvard Elevates Study of Technology and Society
5/7/08	Harvard Crimson	Law School Adopts Open Access for Scholarship
4/24/08	Harvard Crimson	HLS Dean Joins Indian Fund Board
4/1/08	Harvard Law Bulletin	Intermission

4/1/08	Harvard Law Today	New Public Service Initiative Launched
4/1/08	Harvard Law Today	Celebration of Public Interest Draws More Than 700
4/1/08	Harvard Law Today	Three Standouts Headed for HLS
4/1/08	Harvard Law Today	Justice Kennedy Swings by for a Visit
4/1/08	Harvard Law Today	Elhauge Book Forum Brings Breyer to HLS
3/19/08	Harvard Crimson	HLS to Cut Tuition for Public Service
2/21/08	Harvard Gazette	Sunstein Joins HLS, Where Eminent Scholar Will Direct New Program
1/31/08	Harvard Law Record	Admin Announces New, Friendlier 3L Paper Requirement
1/1/08	Harvard Law Bulletin	A Curriculum of New Realities
1/1/08	Harvard Law Bulletin	At Home in the World
1/1/08	Harvard Law Bulletin	The Ultimate Cafeteria
1/1/08	Harvard Law Bulletin	He was Kingsfield, but also so much more'
11/29/07	Harvard Law Record	Dean Starts Program to Boost Practitioners Into Academia
10/1/07	Harvard Law Today	HLS Makes 11 New Faculty Appointments
5/18/07	Harvard Crimson	HLS to Reduce Library Purchases
5/1/07	Harvard Law Today	Wassersteins Give $25 Million for Academic Center
5/1/07	Harvard Law Today	Kathryn Spier to Join HLS Faculty
4/26/07	Harvard Law Record	Legal Services Center Budget Cut by $200K
4/1/07	Harvard Law Bulletin	Diversified Portfolio
3/23/07	Harvard Crimson	Alum Gives $25M to Build Law Center
2/23/07	Harvard Crimson	Law, Politics, and Debate Merge in HLS Journal
2/15/07	Harvard Law Record	HLS Students Apply Their Skills in New Orleans
2/14/07	Harvard Crimson	With Kagan at Helm, Law School Celebrates
2/12/07	Harvard Crimson	Across Campus, Profs Praise Faust
2/1/07	Harvard Law Today	Noah Feldman Joins the Harvard Law Faculty
1/17/07	Harvard Crimson	Kagan Joins Critics of Boycott Proposal
1/1/07	Harvard Magazine	A New Script for One L
12/1/06	Harvard Law Today	Rethinking Langdell
10/12/06	Harvard Law Record	Faculty Unanimously Overhauls First-Year Curriculum
10/10/06	Harvard Crimson	Another Feather in Kagan's Cap
10/1/06	Harvard Law Bulletin	Traffic on the Off-Ramp

9/1/06	Harvard Law Today	Strict Construction
9/1/06	Harvard Law Today	Fallon Joins American Academy of Arts and Sciences
9/1/06	Harvard Law Today	Seven New Profs Join HLS Faculty Ranks
6/5/06	Harvard Crimson	Law Review Debates Affirmative Action Policy
6/1/06	Harvard Law Bulletin	Asia 2006
5/24/06	Harvard Crimson	Behind the Scenes, Bok Readies for His Role as Interim President
4/1/06	Harvard Law Bulletin	David Westfall, 1927-2005
4/1/06	Harvard Law Bulletin	Arthur T. von Mehren, 1922-2006
4/1/06	Harvard Law Today	Spring Ahead
4/1/06	Harvard Law Today	Accepting Their Chairs
4/1/06	Harvard Law Today	Show Me the Money!
3/9/06	Harvard Law Record	Harvard Law Reacts Strongly to Summers Departure
3/6/06	Harvard Crimson	HLS Dean Scott Nichols To Resign After 20 Years
2/22/06	Harvard Crimson	Outside FAS, Support Was Strong for Summers
2/21/06	Harvard Crimson	Report: Summers Set To Resign
1/1/06	Harvard Law Today	New Center to Explore Intersections of Health, Technology, and Law
1/1/06	Harvard Law Today	HLS Students and Alumni Win Record Number of Public Service Fellowships
12/9/05	Harvard Crimson	Law Students Snag Fellowships
11/1/05	Harvard Law Today	A Summer Workout
9/16/05	Harvard Crimson	Law School Adds Five Professors
9/15/05	Harvard Gazette	HLS Adds Five New Professors to its Ranks
9/1/05	Harvard Law Today	Five New Professors Join HLS Faculty
9/1/05	Harvard Law Today	Packing the Court
8/25/05	Harvard Gazette	McCrossan Appointed Dean for Administration at HLS
4/29/05	Harvard Crimson	Academy Honors 13 Harvard Faculty
4/1/05	Harvard Law Bulletin	Can Reporters Refuse to Testify?
4/1/05	Harvard Law Bulletin	Sowing the Seeds of Public Service at HLS
2/17/05	Harvard Gazette	FAS, HLS to Renovate Hemenway Gymnasium
2/10/05	Harvard Law Record	Fallon Appointed to Ralph S. Tyler, Jr. Professorship of Constitutional Law
1/24/05	Harvard Crimson	Joint Law and FAS Degree Program Satisfies Students of Two Minds
1/1/05	Harvard Law Today	Subramanian Joins Tenured Faculty

1/1/05	Harvard Law Today	Cox Family Establishes Fund to Assist Students Pursuing Careers in Public Service
12/8/04	Harvard Crimson	Law School Looks for New Blood
12/1/04	Harvard Crimson	HLS Bans Military
12/1/04	Harvard Law Today	Editors of Indian Law Handbook Convene
12/1/04	Harvard Law Today	Election Round-Up
12/1/04	Harvard Law Today	Big Plans Highlight Dean Elena Kagan's 2L Year
11/10/04	Harvard Crimson	Ice Skating Rink to Open in the Square
11/2/04	Harvard Crimson	Kerry May Tap Kagan for Court
9/30/04	Harvard Crimson	Military Recruits at HLS
9/22/04	Harvard Crimson	Harkness, Law School's Loker, Gets Facelift
9/21/04	Harvard Crimson	Professors Trade Pads
9/16/04	Harvard Gazette	Big Plans Highlight Dean Elena Kagan's 2L Year
9/15/04	Harvard Crimson	Law School Announces New Hires
9/13/04	Harvard Crimson	Ogletree Faces Discipline for Copying Text
9/1/04	Harvard Law Today	Students and Faculty Connect in First-Year Reading Groups
9/1/04	Harvard Law Today	From an Old Building, New Spaces
9/1/04	Harvard Law Today	Three Professors Added to Tenured Faculty Ranks
8/13/04	Harvard Crimson	HLS Undergoes Renovations
7/30/04	Harvard Crimson	Obama Stars at Convention
4/1/04	Harvard Law Bulletin	Why Harvard Law School Needs Your Money
4/1/04	Harvard Law Bulletin	A New Ballgame
3/11/04	Harvard Law Record	HLS Goes for the Gold
3/1/04	Harvard Magazine	An Icy Amenity
2/19/04	Harvard Law Record	Dean Richardson Steps Down
2/5/04	Harvard Law Record	Great Skate!
2/5/04	Harvard Law Record	Civil Rights Project Loses Edley, Marches On
2/5/04	Harvard Law Record	Harvard Increases Joint Degree Programs
1/22/04	Harvard Gazette	Lawyers on Ice
1/16/04	Harvard Crimson	Law Students Lace Up Their Skates
1/14/04	Harvard Crimson	Faculty File Brief Against Pentagon
1/1/04	Harvard Law Today	School Wins Record Number of Skadden Fellowships
11/10/03	Harvard Crimson	Law Review Draws Fire for Gender Gap
11/6/03	Harvard Law Record	Internal Law Review Report Leaked
9/11/03	Harvard Law Record	Renovations Greet Returning Students
9/1/03	Harvard Law	Ogletree Chosen to Head Brown v. Board Commission

	Today	
7/17/03	Harvard Gazette	HLS Launches Campaign to Raise $400 Million
7/1/03	Harvard Magazine	At the HLS Helm
6/27/03	Harvard Crimson	Law School Launches $400M Campaign
6/5/03	Harvard Crimson	People in the News: Elena Kagan
5/1/03	Harvard Law Today	Elena Kagan Named the Next Dean of Harvard Law School
4/10/03	Harvard Law Record	Kagan Promises More Faculty, Reevaluation of "Essential Structure"
4/3/03	Harvard Gazette	Elena Kagan Named the Next Dean of Harvard Law School
11/29/01	Harvard Law Record	HLS Zeros in on Allston
10/4/01	Harvard Law Record	Coates, Kagan Reap Benefits of Experience

While Deputy Assistant to the President for Domestic Policy, on March 2, 1999, I participated in an on-line interview on a variety of subjects conducted by MS-NBC. I am providing a transcript of this interview.

While a professor at the University of Chicago, I appeared at least twice on the Mara Tapp show on WBEZ. On February 4, 1993, I discussed Thurgood Marshall, and on December 15, 1994, I participated in a roundtable on the Bill of Rights. I also may have participated in a discussion of the Supreme Court on WGN in Chicago on October 25, 1994. (My calendar contains such an entry, but I do not recall it.) I have been unable to locate transcripts or tapes of these appearances.

14. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

U.S. Court of Appeals for the D.C. Circuit, nominated in 1999 by President William Clinton; nomination never acted upon.

Deputy Assistant to the President for Domestic Policy, 1997-99, appointed by President William Clinton

Associate Counsel to the President, 1995-96, appointed by President William Clinton

Special Counsel, U.S. Senate Judiciary Committee, summer 1993, appointed by Senator Joseph Biden

I have never been a candidate for elective public office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Between July and November 1988, I worked as a researcher for the Dukakis for President campaign. I was a junior staffer and do not believe I had an official title. I mostly worked on "defense research" – i.e., preparing responses to attacks on Governor Dukakis's record.

In the fall of 1996, I played a small role in debate preparation for President Clinton during his re-election campaign. I did this work (mostly preparing mock questions and answers) in accordance with the law addressing political activity of White House employees.

15. **Legal Career:** Please answer each part separately.

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

i. 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;

Hon. Thurgood Marshall, U.S. Supreme Court, 1987-88

Hon. Abner Mikva, U.S. Court of Appeals for the D.C. Circuit, 1986-87

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

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Professor and Dean, Harvard Law School, Cambridge, MA 02138, 1999-present (2003-present as dean, 2001-present as professor, 1999-2001 as visiting professor)

Deputy Assistant to the President for Domestic Policy, Executive Office of the President, Washington, D.C. 20502, 1997-99

Associate Counsel to the President, Executive Office of the President, Washington, D.C. 20502, 1995-96

Professor, University of Chicago Law School, 1111 E. 60th St., Chicago, IL 60637, 1991-97 (1991-94 as assistant professor)

Special Counsel, Senate Judiciary Committee, Summer 1993

Associate, Williams & Connolly, 725 12th St., Washington, DC 20005, 1989-91

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My legal career (following two years of clerking) has had a number of distinct stages. From 1989 to 1991, I served as an associate at Williams & Connolly, a Washington, D.C. law firm. I handled a mix of commercial litigation, First Amendment litigation, and criminal matters at the firm. From 1991 to 1995, I was a professor at the University of Chicago; my principal scholarship during that time was in the field of constitutional law. I took one summer off during that period to serve as special counsel to the Senate Judiciary Committee, working on the nomination of Ruth Bader Ginsburg to the U.S. Supreme Court. From 1995 to 1999, I worked at the White House, first in the Counsel's Office and then in the Domestic Policy Council (DPC). In the Counsel's Office, I primarily acted as a lawyer for the White House policy councils and legislative office. In the DPC, I played a role in the formulation, advocacy, and implementation of law and policy in areas ranging from education to crime to public health. Between1999 and 2003, I again served as a professor, but at Harvard Law School; my scholarship and teaching during these years focused on constitutional and administrative law. Starting in 2003, I have served as the dean of Harvard Law School. In this capacity, I oversee every aspect of the institution, academic and non-academic alike.

ii. your typical clients and the areas, if any, in which you have specialized.

I have had private clients only during the time I was an associate at Williams & Connolly. Those clients included business entities in civil litigation, press organizations defending themselves in libel and related actions, and white-collar criminal defendants.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

The only part of my practice that involved litigation was my work as an associate at Williams & Connolly between 1989 and 1991. I appeared in court occasionally during that time.

i. Indicate the percentage of your practice in:
   1. federal courts;
   2. state courts of record;
   3. other courts.

   The litigation practice noted above occurred primarily in federal court.

ii. Indicate the percentage of your practice in:
   1. civil proceedings;
   2. criminal proceedings.

   The litigation practice noted above was approximately two-thirds civil and one-third criminal.

d. 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.

   I have never tried a case to verdict or judgment.

   i. What percentage of these trials were:
      1. jury;
      2. non-jury.

      Not applicable; see above.

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

   I have not practiced before the Supreme Court as counsel.

   With many of my faculty colleagues, I joined an amicus brief in the Supreme Court (as well as in the Third Circuit) in support of FAIR in its suit against Secretary Rumsfeld challenging the Solomon Amendment, which governs universities' treatment of military recruiters. I did not participate in the drafting of this brief. Whereas the main argument in the case was constitutional, the amicus brief presented a statutory argument – that the Amendment did not require universities to make special exemptions for the military to neutral and generally

applicable recruiting rules. The Supreme Court unanimously rejected all claims, constitutional and statutory alike.

16. **Litigation**: Describe the ten (10) 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.

As noted above, most of my legal career has not involved litigation. The following ten cases are representative of my litigation experience as an associate at Williams & Connolly between 1989 and 1991. Please note that these matters occurred almost two decades ago. I have tried to update addresses and telephone numbers to the extent possible.

(a) Federal Realty Investment Trust v. Pacific Insurance Co., No. R-88-3658. We represented a real estate investment trust in an action against an insurer for the costs of defense associated with a prior litigation. I began work on the case in the middle of the litigation; I did some late discovery and drafted most of the pre-trial motions. On the eve of trial, Judge Norman Ramsey of the U.S. District Court for the District of Maryland ruled in favor of our position on the appropriate standard for allocating defense costs between covered and uncovered parties and claims (760 F. Supp. 533 (1991)). This ruling immediately produced a settlement favorable to our client.

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(b) In re Seatrain Lines, Inc., Nos. 81 B 10311, 81 B 10916, 81 B 11059, 81 B 12345, 81 B 12525, 81 B 11845, 81 B 11004, 81 B 11512. We represented Seatrain Lines, Inc., a debtor in bankruptcy, in U.S. Bankruptcy Court in the Southern District of New York (Judge Burton Lifland presiding) in connection with an application by Chase Manhattan Bank and Milbank, Tweed, Hadley & McCloy for legal fees associated with the bankruptcy case. In response to the filing of the fee application, our client counterclaimed against Chase for the recovery of the costs of preserving and disposing of certain properties subject to Chase's security interest. I handled some of the discovery and drafted most of the pleadings. When the court denied Chase's motion to strike our counterclaim (and a subsequent motion for reconsideration), the parties settled on terms favorable to our client.

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(c) Toyota of Florence, Inc. v. Lynch, Nos. 4-89-594-15, 4-89-595-15. We represented Southeast Toyota Distributors, Inc. in a suit brought by one of its franchisees alleging fraud, intentional interference with contract, violations of RICO, and a host of other claims. I drafted numerous pleadings in the case, including an opposition to the plaintiff's motion to remand (granted by Judge Hamilton of the U.S. District Court for South Carolina at 713 F. Supp. 898 (1989)), as well as motions to dismiss and discovery motions (ruled on by Judge Edwin Cottingham of the Court of Common Pleas for Darlington County). I also handled some of the discovery. I left the firm prior to trial. Ultimately, a verdict for the plaintiff was dismissed on appeal.

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(d) Byrd v. Randi, No. MJG-89-636. We represented defendant Montcalm Publishing Corp. in a libel action arising from an allegation that the plaintiff was in prison for child molestation. The case presented issues relating to the "libel-proof plaintiff" doctrine, the definition of a "limited purpose public figure," and the actual malice standard. I did most of the discovery, drafted our summary judgment motion and other pleadings, and argued the summary judgment motion before the district court. After initially denying the motion, Judge Marvin Garbis of the U.S. District Court for the District of Maryland dismissed the case a few months later on a motion for reconsideration.

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(e) In Re Application of News World Communications, Inc., Nos. 89-3160, 89-212. We represented the Washington Post and WRC-TV in this effort to compel release to the

public of unredacted transcripts of audiotapes to be received in evidence at a criminal trial. I argued motions before Judge Charles Richey of the U.S. District Court for the District of Columbia to compel release of the transcripts and to prevent redaction. Judge Richey granted both motions, with the latter reported at 17 Media L. Rep. 1001 (1989). The Court of Appeals for the D. C. Circuit, with Judges Wald, Silberman, and Sentelle hearing argument, denied a motion to stay this order (17 Media L. Rep. 1004 (1989)).

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(f) J. Odell Anders v. Newsweek, Inc., No. 90-715. We represented Newsweek, Inc. on appeal from a jury verdict in its favor in a libel action filed in the Southern District of Mississippi. The case raised questions about the actual malice standard, as well as numerous evidentiary issues. I drafted the appellate brief urging affirmance. The U.S. Court of Appeals for the Fifth Circuit held in our favor by unpublished opinion (judgment reported at 949 F.2d 1159 (1991)).

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(g) Luke Records, Inc. v. Nick Navarro, No. 90-5508. We filed an amicus brief in the U.S. Court of Appeals for the Eleventh Circuit on behalf of the Recording Industry Association of America and numerous record companies, challenging the decision of the district court that a musical recording was obscene under the standard set forth by the Supreme Court in Miller v. California. I drafted the brief in the case, which stressed the difficulty of holding music obscene under prevailing constitutional law. Judge Lively, joined by Judges Anderson and Roney, reversed the district court's decision (960 F.2d 134 (1992)).

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(h) Bagbey v. National Enquirer, No. CV 89-2177. We represented the National Enquirer in this libel action brought by a person mistakenly identified in the publication as being Jimmy Swaggert's father. I drafted all pleadings and did all discovery in the case, which began in Louisiana state court but which we removed to the U.S. District Court for the Western District of Louisiana (Judge F.A. Little, Jr.). We eventually settled the case on terms favorable to our client.

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(i) Chuang v. United States, No. 89-1309. We represented Joseph Chuang, a former bank president, on his appeal from a criminal conviction for numerous counts of bank fraud. The principle issues in the case concerned the propriety of two warrantless searches of the bank, one by the Office of the Comptroller of the Currency and one by the FDIC. I drafted most sections of the brief, which argued among other matters (1) that the statute authorizing the OCC's search failed to provide a constitutionally adequate substitute for a warrant, as required by the Supreme Court, and (2) that the FDIC's search was invalid because it went beyond the bank premises into Chuang's law firm offices. The Second Circuit affirmed the conviction, with Judge Timbers writing and Judges Newman and Altimari joining (897 F.2d 646 (1990)).

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(j) United States v. Jarrett Woods, We represented the former head of the Western Savings Association, a failed savings and loan, in both a grand jury investigation and a number of civil suits brought against him. The Federal Home Loan Bank Board had declared the S&L insolvent and placed it in receivership after discovering various suspect real estate loans. In addition to trying to keep the civil suits at bay, we tracked the grand jury investigation of Woods closely for more than a year – interviewing each of the many people brought before the grand jury – before Woods became unable to afford the representation. Woods was subsequently indicted and convicted of numerous counts of bank fraud.

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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 fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protecting attorney-client privilege.)

For almost six years, I have headed the largest and most significant law school in the nation. This job has a very significant managerial component: Harvard Law School has a $180 million operating budget, over 500 employees, and almost 1 million square feet of physical space. The job also has a very significant academic component: as dean, I led efforts to expand and enhance the faculty and to reform and modernize the curriculum. Finally, the job includes significant outreach to and interaction with key parts of the profession, including judges, government officials, private attorneys, and public interest lawyers.

Significant parts of my career have been devoted to scholarship and teaching. Between 1999 and 2003, I principally focused on administrative and associated constitutional law questions. My major work during this period concerned the relationship between the President and the administrative agencies. Between 1991 and 1995, I wrote primarily about issues of free expression. My major work at this time proposed a theory of the First Amendment focused on the nature of governmental motives underlying speech restrictions.

My work in the White House, both in the Counsel's Office and the Domestic Policy Council, centered on the development and implementation of law and policy in areas ranging from education to crime to welfare to public health. Among other matters, I led the Clinton Administration's inter-agency effort to analyze all legal and regulatory aspects of the Attorney Generals' tobacco settlement and then participated actively in the development and legislative consideration of tobacco legislation. I also worked extensively on legislative or executive action involving constitutional issues, including the separation of powers, governmental privileges, freedom of expression, and church-state relations.

I have never performed lobbying activities for any client or organization.

18. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

Administrative Law – numerous times at Harvard; most recent syllabus attached.

Constitutional Law – numerous times at Harvard and University of Chicago; most recent syllabus attached

Civil Procedure – numerous times at Harvard and University of Chicago; most recent syllabus attached

Labor Law – three times at University of Chicago; most recent syllabus attached

Presidential Lawmaking (seminar) – once at Harvard; syllabus attached

The President and the Law (seminar) – once at Harvard; syllabus attached

Law of Political Process (seminar) – once at University of Chicago; no syllabus found; dealt with issues of election law such as districting and campaign finance.

19. **Deferred Income/ Future Benefits**: List the 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.

    If I am confirmed, I expect to take a two-year leave of absence from, but remain on the faculty of, Harvard Law School. As an employee benefit, I receive from Harvard an applicable federal rate second mortgage and a cash subsidy for the interest payments on the loan. During the period I remain on approved unpaid leave from Harvard, I will continue to hold the mortgage, but will not receive the interest payment subsidy. I will also retain my interest in Harvard University's Retirement Plans, with no further contributions made by me or Harvard during my unpaid leave.

20. **Outside Commitments During Service**: 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 other than that described in question 19.

21. **Sources of Income**: 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.)

    See financial disclosure report.

22. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

23. **Potential Conflicts of Interest**:

    a. Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

24. **Pro Bono Work**: 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. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

As noted in my answer to question 7, I serve on the boards of numerous non-profit organizations, including several devoted to ensuring the availability of legal services for the disadvantaged. As dean of Harvard Law School, I do not engage in any individual representation of clients, but I have promoted public service and pro bono work among our students in a variety of ways. Last year, the School instituted an unprecedented program to make the third year of law school tuition-free for any student who commits to doing five years of public service work after graduation. At the same time, the School has enhanced its loan forgiveness program and its summer public interest funding program to increase the number of our students engaged in public interest work, especially on behalf of disadvantaged persons, during law school and after graduation.

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	$135,045	Notes payable to banks-secured	
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule	$162,652 *(Schedule A)*	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 income and interest	
Doubtful		Real estate mortgages payable-add schedule	$1,215,000 *(Schedule C)*
Real estate owned-add schedule	$1,400,000 *(Schedule B)*	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	$25,000		
Cash value-life insurance			
Other assets itemize:			
Retirement Savings Plans	$504,021		
		Total liabilities	$1,215,000
		Net Worth	$1,011,718
Total Assets	$2,226,718	Total liabilities and net worth	$2,226,718
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			

Other special debt			

Schedule A: Securities are money market fund held at Vanguard ($39,812) and mutual funds held at Vanguard ($88,435) and Franklin Templeton Investments ($34,404).

Schedule B: Real estate owned is residence; value is original purchase price (2004).

Schedule C: First mortgage of $715,000 held by Countrywide; second mortgage of $500,000 held by Harvard University.

AFFIDAVIT

I, ELENA KAGAN, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Jan 15, 2009
(DATE)

Elena Kagan
(NAME)

Virginia L Fort
(NOTARY)
VIRGINIA L. FORT
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires November 14, 2010

Senator CARDIN. Thank you. We thank both of you for your opening statements.

We are going to have 7-minute rounds, and let me start, and I am going to try to stick to that time limit for myself.

Mr. Perrelli, let me start, if I might, with the tradition of the Department of Justice over many, many years of being the premier agency for the people of this country in protecting the rule of law, representing the people of this Nation, and holding anyone who violates our laws accountable, even if it is the President of the United States.

In the last few years, there have been serious problems of partisan politics played within the Department of Justice as it relates to the retirement and promotion of career attorneys, as it has been in selecting what type of cases to be pursued, overriding the advice of career attorneys in many cases for partisan reasons.

I want to get your assessment, if confirmed to be the number three person in the Department of Justice, as to how you will approach the appointment, retention, recruitment of career attorneys, their assignments, and what impact partisan politics will play in regards to those decisions.

Mr. PERRELLI. Well, Senator, with respect, I think the answer to the last part of your question is none. You have identified an area where the Justice Department has come under criticism, including from its own Inspector General, over the last several years and concerns about partisanship in hiring. That is something that under the laws enacted by Congress is simply inappropriate, and I think Attorney General Mukasey and Deputy Attorney General Filip have taken important strides to ensuring that problems of the past are not current problems of the Justice Department. But I think it will be incumbent on the Attorney General and others, as they are nominated and confirmed, to take a serious look at the policies governing the Department, to take whatever additional steps are necessary to ensure that there is no partisanship in hiring or assignment of attorneys. And I would say that my experience in working with the career professionals at the Department is that they are an extraordinary group, and that management in the Department would be wise to listen to their recommendations, and I hope to have the opportunity to do so.

Senator CARDIN. That is the answer I expected to hear from you, but let me just caution you. You are responsible for the people that you supervise within the Department of Justice. So we expect that message to be very clear to all the people in the Department of Justice as to restoring the confidence that partisan politics will not play a role in the deployment of career personnel. And I am pleased to hear you say that, but I just want to make sure that becomes a priority and a message that is clearly understood at all levels within the Department of Justice.

The second point I want to raise is the Civil Rights Division. We have been extremely concerned about what has happened in the Civil Rights Division. In the last 8 years, the number of significant cases brought has been diminished greatly. The resources made available to that office has been reduced. I want to know what priority you intend to place on the Civil Rights Division within the Department of Justice.

Mr. PERRELLI. Well, Senator, the Attorney General has already made clear that that would be a significant priority of his, and as the Associate with management responsibility over, among other things, the Civil Rights Division, it will be a significant priority of mine.

I think you identified both the set of concerns about partisanship that have been the subject of a recent Inspector General report that was quite disturbing, as well as the reality that of all of the civil litigating components in the Department, the Civil Rights Division is the one that has actually declined in terms of its resources, even though the number of statutes that it enforced and the job that it has to do is, I suspect, greater not less than it was in 2001.

So I think it is a very high priority to focus on the Division to make certain that it is engaged in its mission. It certainly will have in the coming years very, very significant responsibilities following the 2010 census, and the management of the Department has to give it a special focus to make sure that it is ready.

Senator CARDIN. Thank you.

Dean Kagan, I very much support your statement of aggressively enforcing the laws of our country regardless of your personal views. That is your responsibility, if confirmed to be Solicitor General. I want to talk, though, about the potential conflict between the laws that Congress passes and the claim of the President to his inherent power. This has been an issue that has come up in regards to the FISA statute. It has come up in regards to detainee rights. It has come up in regards to the use of enhanced techniques for interrogation.

I want to know how you will approach the issues when we are talking about fundamental rights and protection of the separation of branches of Government. Speaking as a Member of the U.S. Senate, I want to make sure the Solicitor General is going to be sensitive to the role that you can play in making sure that the appropriate protections are maintained within our Constitution.

Ms. KAGAN. Thank you, Senator Cardin. That is an extremely important question. Every Solicitor General nominee who has sat at this table for the past many years has always said that there are two very rare exceptions where a Solicitor General will not defend a statute of the United States. And one exceedingly rare exception is when there is simply no reasonable basis to do so; and second is where that statute infringes directly on the powers of the President.

And I would say the same thing to you. I think that there is a category of cases in which statutory defense might be inappropriate because it violates separation of powers concerns. But I think that that is an exceedingly narrow category of cases, and here in thinking about executive power, I would go back to the Youngstown framework that I know so many of you, all of you are familiar with. Of course, that framework says that when Congress authorizes Presidential power, Presidential power is at its highest. When Congress is silent, we are in a kind of middle ground. And where Congress says no to Presidential power, denies Presidential power, Presidential power is at its lowest ebb.

There are occasional times where Presidential power still exists even if Congress says otherwise. Think about if Congress were to deny any power of pardons on the President. That would be a time where you would say no, there is a constitutional commitment here. But that category of cases, Senator, I think is exceedingly narrow, and that is how I would approach the problem that you raise.

Senator CARDIN. I thank you for that response. I would also hope that there would be some transparency in making those judgments so that there is an opportunity for input and challenge if it is a fundamental issue.

With that, let me recognize Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Perrelli, I sent you a letter on the issue of congressional oversight and told you I would be asking you about it at the hearing today. And my question to you is whether you agree with what the Congressional Research concluded was the scope of congressional oversight when they say, "DOJ has been consistently obliged to submit to congressional oversight regardless of whether litigation is pending. Investigating committees were provided with documents respecting open or closed cases that included prosecutorial memoranda, FBI investigative reports * * * prepared during the pendency of cases."

Do you agree with the Congressional Research statement as to the congressional authority on oversight?

Mr. PERRELLI. Senator, that passage that you provided, I agree with respect to the description of the scope of the permissible oversight by Congress that reaches all aspects on which it could legislate. I think that passage does not discuss the countervailing interests of the executive branch in certain circumstances, and the process of accommodation that goes back and forth and has historically between the executive branch and the——

Senator SPECTER. Well, would you supplement your answer by specifying what kind of extenuating circumstances you see to deviate from that standard?

Mr. PERRELLI. Well, I think that certainly you have the situation of executive privilege and——

Senator SPECTER. I want you to supplement your answer in writing, because I have only got 7 minutes.

Mr. PERRELLI. I will do so.

Senator SPECTER. But you said you would adopt those as a generalization, but there might be some extenuating circumstance which would limit it. Please provide that to me in writing.

Mr. PERRELLI. Thank you, Senator.

Senator SPECTER. The Washington Post has an account today from the State Secrets Doctrine. The Obama administration invoked the State secrets privilege as its predecessor in Federal court in opposing the reinstatement of the lawsuit that alleges that Boeing flew people to countries where they were tortured as part of the CIA's extraordinarily rendition program. I know that in your background you dealt with the State Secrets Doctrine. Do you think that this is a wise use of the State Secrets Doctrine, as reported in the Post today?

Mr. PERRELLI. Senator, I think with respect to the question about any particular case, I think it would require me to have more knowledge about particular classified information that might be at issue. I will say——

Senator SPECTER. Would you take a look at the case and the statute which Senator Kennedy and I have pending and give us your judgment on that?

Mr. PERRELLI. I will, Senator.

Senator SPECTER. There have been a large number of cases by the Department of Justice in taking monetary fines in the face of gigantic malfeasance. The malfeasance in one case, a company that did about $80 billion a year, and they got a $1.7 billion fine. I would appreciate it if you would take a look at those cases with a view to jail sentences for white-collar crime as opposed to fines. Those cases look as if the fines are really license to violate the law as opposed to a criminal sanction which has some real teeth.

One more question before moving over to Dean Kagan, and that is, you participated in the Schiavo case, and you said that the congressional action in giving jurisdiction to the Federal court—the matter had been in the State court, and you were an attorney in the case. But you said that when Congress legislated to give jurisdiction to the Federal court, the enactment of the Federal statute in this case "is not an exercise of legislative power, but trial by legislature, something that exceeds Congress' Article I power."

I believe that the law is that Congress has the authority to establish the jurisdiction. Do you stand by the assertion which you made in that brief?

Mr. PERRELLI. Senator, with respect to that assertion, I think the argument was that Congress cannot through any vehicle overturn a prior final court judgment, which I think has—those arguments and those concerns were raised going back to the Founding Fathers. That was an issue that no court ever ruled on, so I do not think we know the outcome at this point.

Senator SPECTER. Well, there is concurrent jurisdiction between the State courts and the Federal courts. Double jeopardy, a State prosecution does not bar the Federal Government from initiating a prosecution on the same facts. This is an exercise in congressional authority to establish jurisdiction. Why not?

Mr. PERRELLI. I think the argument that we made in that case was that what the impact—the effect of Congress' enactment was essentially to attempt to relitigate issues that had been in State court.

Senator SPECTER. Well, that may be the impact, but would you supplement your answer with why you think Congress does not have the authority to determine Federal jurisdiction?

Mr. PERRELLI. I will do that, Senator.

Senator SPECTER. Dean Kagan, coming to the citation that I had mentioned earlier about how strongly you felt on the Solomon case, you wrote a memo for Justice Marshall in *Bowen* v. *Kendrick*, which involved the Adolescent Family Life Act which authorized Federal funds for religious organizations designed to discourage teen pregnancy and provide care to pregnant teens. The Supreme Court upheld the statute, and your memo said, "It would be dif-

ficult for any religious organization to participate in such projects without injecting some kind of religious teaching."

Now, I asked you about the Solomon military issue where you had very, very strong moral objections, but you assert that you can function in an advocacy role notwithstanding your own personal views.

How would you distinguish your confidence that you can do that in light of what you say here? And I understand why you say it, that religious organizations might be inclined to project some of their religious doctrine. But isn't that an inevitable consequence even for a skilled advocate who feels very strongly about a matter with respect to the capability to clearly do the right job in advocacy?

Ms. KAGAN. Senator, thank you for raising that memo. I first looked at that memo, thought about that memo, for the first time in 20 years, I suppose, just a couple of days ago when it was included on a blog post. And I looked at it and I thought, "That is the dumbest thing I have ever heard."

[Laughter.]

Ms. KAGAN. So I looked at it and I said——

Senator SPECTER. You do not have to go any further.

[Laughter.]

Senator SPECTER. Are you telling us you will not make that same mistake again?

Ms. KAGAN. You should never make the same mistake twice.

Senator SPECTER. I wish I could follow that advice.

[Laughter.]

Senator SPECTER. One final question, Mr. Chairman.

In a whole series of memos which you sent to Justice Marshall—and let me join you in extolling the virtues of Justice Marshall. There was a case called *Bowles* v. *Fultz*, and this followed a pattern that you had in five other memos where you express concern over what a majority of the Court might do as a reason for denying cert. And this involved an admission, and your memo said, "I think the admission of this statement is outrageous." And then you expressed "worry that the Court might reach the opposite result so that all ambiguous statements in the future will be construed in favor of the police." You expressed similar sentiment in five cases, which has all the appearance of an overarching philosophy here in deciding what cases to decide.

Isn't it really the function to decide whether an injustice has been done when you say it is outrageous and not to look to a broader public policy concern as to what the Court might do as it affects other cases? When you have a defendant, his constitutional rights are involved, isn't that defendant entitled to have a decision on the merits of his case without having a decision as to whether the court takes jurisdiction decided on some broad philosophical grounds?

Ms. KAGAN. That is a very interesting question, Senator. You know, the Supreme Court's jurisdiction is, of course, discretionary, and the Supreme Court does not take every case in which an injustice has been done, even if an injustice had been done in that case, which I am not sure of. I do not have any recollection of that case and, again, have not thought about it for 20 years.

But let me step back a little, if I may, Senator, and talk about my role as a clerk in Justice Marshall's chambers. We produced an enormous amount of paper for Justice Marshall. He was not in what is called the "cert. pool," so we wrote memos on literally every single case where there was a petition, and that is hundreds and hundreds, probably thousands. And I am sure that there were hundreds of criminal cases of which, again, there was a blog post about five of them.

I do not want to say that there was nothing of me in these memos. You first asked about *Bowen* v. *Kendrick*, and I think it is actually fair, when you look at the memo, to think that I was stating an opinion, however wrong it may have been. But I think in large measure, these memos were written in a context of you are an assistant for a Justice; you are trying to facilitate his work and to enable him to advance his goals and purposes as a Justice. And I think most of what we wrote was in that context. You know, I was a 27-year-old pipsqueak, and I was working for an 80-year-old giant in the law and a person who, let us be frank, had very strong jurisprudential and legal views. He knew what he thought about most issues. And for better or for worse, he was not really interested in engaging with his clerks on first principles. And he was asking us in the context of those cert. petitions to think and to channel him and to think about what cases he would want the Court to decide. And in that context, I think all of us were right to say here are the case which the Court is likely to do good things with from your perspective, and here are the ones where they are not. And I think that that is what those five that you mention were doing.

Senator SPECTER. Thank you, Dean Kagan.

Thank you, Mr. Chairman.

Senator CARDIN. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Dean Kagan, congratulations on your nomination. I was personally delighted when you were appointed, having followed your career and having really enjoyed working with you on a number of issues. Although women have made great strides in the legal profession in recent decades, I think the nomination of the first woman Solicitor General is obviously a historic moment for our country and for the profession. It is no small thing, and I think President Obama should be congratulated for making this nomination as well.

You touched on an issue in your opening statement that I would like to underline. It is important. I think it answers whatever concerns some in the center and the outside might have about your personal views or positions you have taken in your career. So I would like to ask you a question that I asked Ted Olson when he was nominated to be Solicitor General at the time. The Senate had just passed the McCain-Feingold bill, and there was great debate about the bill's constitutionality.

Mr. Olson had written the following about 20 years earlier in the Harvard Journal of Law and Public Policy: "The laws that we disagree with, the policies that we do not like, once they are implemented in the law must be enforced by the President and the Justice Department, notwithstanding our antipathy toward them. We

in the Justice Department must also defend the constitutionality of congressional enactments, whether we like them or not, in almost all cases. We are the Government's lawyers, so even if we disagree with the policies of a law and even if we feel that it is of questionable constitutionality, we must enforce it and we must defend it."

Do you agree with what Ted Olson wrote?

Ms. KAGAN. Absolutely. There is simply no question that when one assumes the Solicitor General's role, one is assuming a set of responsibilities, a set of obligations of which the defense of statutes is one of the most critically important. And you defend those statutes whether you would have voted for those statutes or not. And I know that Ted Olson would not have voted for the McCain-Feingold bill, but he and Paul Clement did an extraordinary job of defending that piece of legislation, which I think you will agree. And that is what a Solicitor General does.

Senator FEINGOLD. I agree with that. He did do a superb job, and I could have sworn he almost was believing what he was saying.

[Laughter.]

Senator FEINGOLD. That he actually was persuaded, because he did a superb job.

Ms. KAGAN. For that day he was persuaded, and that is all you need.

Senator FEINGOLD. Let me ask you now about the conflict of interest restrictions on those who serve in the Solicitor General's Office. It is somewhat ironic. As I mentioned, I was pleased with how the Justice Department, and Mr. Olson in particular, handled the responsibility to defend the McCain-Feingold bill. But since Mr. Olson left the Department, he has been involved in two cases challenging the statute's constitutionality. I guess he determined that the Code of Professional Responsibility allows him to do that, but I am somewhat troubled by it. It seems like he has switched sides and is now representing the clients challenging the very statute that he defended ably as Solicitor General.

President Obama has put in place very tough ethical restrictions concerning the post-Government service of people who work for his administration, going well beyond the revolving-door limitations that would otherwise apply.

Will you please review the ethical rules and whatever guidance currently exists at the Solicitor General's Office and determine whether more restrictive rules ought to be put in place so that you and the lawyers who work for you do not end up on the other side of issues you directly participated in while in Government service?

Ms. KAGAN. I will, Senator Feingold. To be truthful, this is not a question that I have thought anything about or know anything about, and in my own case, when I leave the Solicitor General's Office, I am sure I will go back to academia where I will not be arguing against—where I will not be litigating against anything that I have defended. But it is an interesting and important question, and I will look into it.

Senator FEINGOLD. Thank you so much.

Mr. Perrelli, I congratulate you as well. You have a truly stellar reputation, and I am pleased that you have agreed to return to the Department of Justice. I want to follow up on the state secrets doctrine issue that Senator Specter mentioned. I have been concerned

that the state secrets privilege has been invoked by the previous administration to avoid accountability for potentially unlawful activities. And courts, of course, tend to be very deferential to these privilege claims, so there is a real opportunity for abuse.

As was mentioned, just yesterday there was a press report that the Department of Justice has told the U.S. Court of Appeals for the Ninth Circuit that it will continue to assert the state secrets privilege in a case brought by five men who claim to have been the victims of extraordinary rendition. The assertion of the privilege will likely cause the case to be dismissed.

In response to press inquiries, a DOJ spokesperson said a review of all the cases where the state secrets privilege has been invoked is underway and "the Justice Department will ensure the privilege is not invoked to hide from the American people information about their Government's action that they have a right to know. This administration will be transparent and open, consistent with our national security obligations."

So I am glad to hear that this review, which I asked Attorney General Holder to do, is underway. I will follow the issue very closely, and I am not going to ask you about the Ninth Circuit case here. But will you commit to me that, if you are confirmed, you will arrange for a classified briefing on this case so I can understand the decision you have made?

Mr. PERRELLI. Senator, with respect to the particular case, I think I would need to consult with others at the Department about what information is most appropriate to be shared. I will say that my background and experience in this area has let me see these issues from all sides. As a law clerk, I worked on Iran-contra and the difficult issues of how you move forward in a criminal case where classified information is throughout the matter.

At the Department of Justice, as the head of the Federal Programs Branch, it was my job to invoke the state secrets privilege working with others in the intelligence agencies in court. And so I spent a significant amount of time working through when it is appropriate and not to assert the state secrets privilege.

And in the private sector, I represented a company whose claim of more than $1 billion was held not to be triable because of the state secrets privilege.

So I have seen this from all angles, and I look forward to being part of that review.

Senator FEINGOLD. But you will, if confirmed, give me an answer about whether I will get a classified briefing on this?

Mr. PERRELLI. I will give you an answer if confirmed, Senator.

Senator FEINGOLD. And I just want to confirm. One thing: I believe you indicated to Senator Specter that you would take a close look at the legislation that he and Senator Kennedy introduced in the last Congress, which was approved by this Committee, to give better guidance to the courts on how these claims of state secret privilege should be handled. Is that right?

Mr. PERRELLI. I will, Senator, and I look forward to speaking with the Committee about that if I am confirmed.

Senator FEINGOLD. There is a lot of suspicion of the Government out there, and this is important legislation that the Department should get behind. I think it is very important.

Finally, as I understand it, the Associate Attorney General is responsible primarily for Divisions of the Justice Department that deal with civil cases—the Civil Rights Division, the Tax Division, Antitrust Division, and others. But each of these Divisions has a criminal enforcement section which you would also supervise. What in your background gives you the experience and knowledge needed to take on these criminal responsibilities?

Mr. PERRELLI. Senator, I appreciate the question. In my prior service at the Department of Justice, I served as counsel to the Attorney General with a portfolio that essentially followed that of the Associate Attorney General so that I had on her immediate staff the direct supervisory role with respect to those same civil litigating components as well as the criminal aspects of those components—hate crimes, for example, in the Civil Rights Division, environmental crimes. So my experience I think dovetails particularly well with those aspects of criminal jurisdiction that fall within the Associate's role.

Senator FEINGOLD. Thank you.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator Feingold.

Senator Coburn.

Senator COBURN. Thank you. Welcome to you both.

Ms. Kagan, one of the things that you said earlier was explaining your role in terms of all three branches of the Federal Government, and I just kind of have a "what if." What if we have a statute that has been previously signed by the executive branch, passed by Congress, and we have an executive order that undermines the statute? In that case, you would have to figure out whether you support the executive order or you support the statute? How would you go about determining that?

Ms. KAGAN. That is a very interesting hypothetical question, Senator. I will say a little bit about a process first, because the first thing that I would do is really to reach out to people within the Government—and that means both within in the administration but also to Congress—to try to figure out what is going on and who requires representation and so forth. So there would be a lot of work to be done to talk to people, both the people responsible for the EO and the people responsible for the statute.

But I will give you just a gut instinct, which is that in a case like that, the defense, the obligation to defend statutes continues on, and the same narrow two exceptions are the only reasons in which you would not defend a statute: either if there is no reasonable basis in law, and it would not appear to me that an EO which call into question the legal basis for a statute; or if the statute impinged on a core element of executive power. And those would be the only two exceptions, both extremely narrow, and my guess is that your hypothetical would not fall within either.

Senator COBURN. OK. Thank you very much.

Of all I have read, the only real criticism that you have had is that you have not been a litigant in the past. As a physician, you know, I do not send patients to the professors at the university unless they are the expert in the field who have actually practiced rather than just taught. And I wonder how you respond to the criticism of this wonderful resume you have, but yet you have never

been a justice and you have never actually been a litigant. I have no doubt in hearing you that you are up to the task, but how are you going to handle that and how are you going to prepare yourself?

Ms. KAGAN. I think that is a very fair and important question. I am very confident that I am up to this part of the job, as I am to all the many other parts of the job.

Senator COBURN. I have no doubt.

Ms. KAGAN. And I will say a little bit about why. I think when you get up to that podium at the Supreme Court, the question is much less how many times have you been there before than what do you bring up with you. And I think I bring up some of the right things. I think I bring up a lifetime of learning and study of the law, and particularly of the constitutional and administrative law issues that form the core of the Court's docket. I think I bring up some of the communication skills that have made me—I am just going to say it—a famously excellent teacher.

[Laughter.]

Ms. KAGAN. I hope I bring up a set of—I hope I bring up strong legal analytic skills. This is for you to determine, of course, in the end, but I hope I bring up those kinds of skills. I hope I bring up excellent judgment. I hope I bring up what is maybe most important in addressing the Court, which is a kind of candid and direct way of speaking. So all of those things I think are important.

And I should say, Senator, that I will by no means be the first Solicitor General who has not had extensive or indeed any Supreme Court argument experience. So I will just give you a few names: Robert Bork, Ken Starr, Charles Fried, Wade McCree. None of those people had appeared before the Court prior to becoming Solicitor General.

Senator COBURN. And some of them, the record would show, had some difficulties in their presentations before the Court as well. So I am not accusing you of that.

[Laughter.]

Senator COBURN. Let me——

Ms. KAGAN. Now I want to know who you mean.

Senator COBURN. Well, my staff is going to invite you to come by and visit with me, so we will have a great conversation on that.

Mr. Perrelli, I have a few questions for you and, again, thank you, and I am here in case your wife needs me.

Mr. PERRELLI. Thank you, Senator. I have been heard to say that you are the most important member of this Committee to me—at least today.

[Laughter.]

Senator COBURN. Mr. Perrelli, the Department of Justice is responsible for enforcing our Nation's obscenity and child exploitation laws. The one thing that I think Attorney General Alberto Gonzales got right was establishing the Department's Project Safe Childhood Initiative to protect children from online exploitation and abuse.

Will you enforce the Child Protection Restoration and Penalties Enhancement Act of 1990 or will you seek to make changes the way the act is enforced?

Mr. PERRELLI. Senator, with respect to that act, I think that it is likely that the responsibility for that will not fall within the Associate Attorney General's purview, but I can assure you that both in terms of enforcement of the act as well as defense of the act, in the event that it is challenged, which may well come under the Associate Attorney General, I would seek to enforce the law in the first instance and defend the law if any reasonable argument could be made, as I have in the past when I was the head of the Federal Programs Branch, which defends most of these statutes. We defended the Child Online Protection Act, for example, against constitutional challenge.

Senator COBURN. The same would apply to the Children's Internet Protection Act and the Child Protection and Obscenity Enforcement Act of 1988? Same answer?

Mr. PERRELLI. To the best of my knowledge, those would be most likely to fall under the criminal jurisdiction for enforcement purposes, but defense of any act would likely fall under my jurisdiction.

Senator COBURN. Do you think any of your past experience in terms of those that you have defended or advocated for will affect your ability to enforce in a right manner, what we would consider a right manner, those appropriate laws?

Mr. PERRELLI. No, I do not, Senator.

Senator COBURN. Thank you.

Last year, I participated in legislation targeting combating child exploitation and enhancing the enforcement of the child exploitation law. The SAFE Act imposes enhanced criminal penalties for the use of the Internet to violate child pornography or sexual exploitation laws. It also expands the reporting requirements of electronic communication and remote computing services with respect to apparent violations of such abuse and pornography laws.

If confirmed, will you have any problem vigorously enforcing such laws as the SAFE Act?

Mr. PERRELLI. Senator, I think with respect to any enactment of Congress, my role will be to defend that statute if any reasonable argument can be made, and I would be happy certainly to work with the Committee on that.

Senator COBURN. One final question. Do you personally believe adult obscenity contributes to the sexual exploitation of children in any way?

Mr. PERRELLI. Senator, I cannot say that I have any recollection of looking at social science at all, but I would say that there is—we have to do everything we can to protect children from depictions that are going to be harmful to them. And I would certainly work with the Committee and take whatever steps are appropriate to do so.

Senator COBURN. But it is not your view that that in itself, adult obscenity, contributes to child exploitation?

Mr. PERRELLI. I have not looked—with respect to adult obscenity—and we are talking about unlawful materials. I think those are criminal and need to be prosecuted. With respect to the impact of them, to the extent that they are seen by children, I think it certainly would impact children. I have not looked at any—I do not have a view as to whether the existence of those materials viewed

only by adults and nothing more, but it obviously would concern me to the extent that the same adults who are viewing that material are also inclined toward viewing material related to children.

Senator COBURN. I will be happy to send you the literature on adult obscenity and child predators.

Thank you, Mr. Chairman. And I would ask unanimous consent—I am going to have to leave—to submit additional questions for the record.

Senator CARDIN. Without objection.

At this point, it might be appropriate, Senator Coburn, that I just put into the record the documentation we have in support of Mr. Perrelli from the National Center for Missing and Exploited Children, the Boys and Girls Clubs of America, the National Center for Victims of Crime, the Fraternal Order of Police, Federal Law Enforcement Officers Association, the National Association of Police Officers, and the Police Executive Research Forum. Without objection, they will be made part of the record. Thank you, Senator Coburn.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

Congratulations to both of you. Dean Kagan, I noted that when Senator Reed was introducing you, he did not emphasize enough your University of Chicago background. As an alumni, I know it is not always easy to survive there, so I congratulate you on that.

I was going to ask you—I was reading an article here—how you managed to get a standing ovation from the Federalist Society at Harvard. But after I listened to your exchange with Senator Coburn, I think I understand why.

As a general matter, I think it is very important that we restore a belief in the law over politics to the Justice Department, and I think your background, not just your legal experience, but clearly your background in reaching out to people of different views will be helpful to have that kind of credibility.

So I was just going to ask a more specific question. You have talked about how you respect so many of the other Solicitor Generals for their role in how they have upheld the law and argued for the law even when they did not personally believe it or in very narrow exceptions when it impinges of the President's executive power. But I was wondering if there is anything about the Solicitor General's role that you would change.

In particular, one of the things I have noticed as a lawyer is the fact that the Solicitor General's approval is always needed for the U.S. to take an appeal when the Government loses a case, but does not play a role in a decision when the Government wins a case. And I believe it has led to some inconsistency in how some of these appeals have been taken. So I wondered if that or some other issues you would consider of differentiating yourself in the role of a Solicitor General.

Ms. KAGAN. Well, thank you, Senator. It is an interesting question, and I think I am going to disappoint you on it a little bit, because my basic view of the Solicitor General's Office is, "If it ain't broke, don't fix it." And I do not think that this office is at all broke. It has been an extraordinary office for so many years with

such dedicated civil servants, incredible lawyers, and then I think that the leadership has been really quite excellent.

And I think that some of the practices that you were talking about have grown up because it is so important for the Solicitor General's Office to maintain the credibility, to maintain credibility with the Court and for the Court to feel as though the Solicitor General's Office really has an understanding of what its role is and of what it can do.

So, for example, you said the Solicitor General only decides which appeals to take, and there are many, many times when people in the Government do wish to take a case up to the Supreme Court where some part of the Government, some agency has lost a case, and the Solicitor General is very often in the position of saying, no, we are not going to do that, we are not going to take that case up. That is an extremely important thing for the Court to protect its jurisdiction and to make sure that it is not deluged, and for the Court really to act as—for the Solicitor General to act as the——

Senator KLOBUCHAR. And I do not question the Solicitor General's role with that at all. I was just wondering some of the decisions that are made not to become involved in other appeals when the Government wins the case.

Ms. KAGAN. Well, you can see why when the Government wins the case——

Senator KLOBUCHAR. No, I know. But, I mean, there has just been——

Ms. KAGAN. One would want to rest there.

[Laughter.]

Senator KLOBUCHAR. I understand that. I just meant becoming involved in those cases, because we have just seen some inconsistencies over time.

Ms. KAGAN. Yes. Well, it is very interesting, and I would love to talk to you about this further and to hear some examples of that.

Senator KLOBUCHAR. OK. Thank you.

Mr. Perrelli, I do note that your son seemed to quiet down when he was given a BlackBerry. Is that right? That is what Senator Feingold and I saw, and we were very interested in that. Just like the President, he cannot be without his BlackBerry?

Mr. PERRELLI. It is sad but true. I do believe that our children mimic what they see from their parents.

Senator KLOBUCHAR. All right, good. Well, I was a prosecutor for 8 years, ran an office of about 400 people, and one of the things that was most troubling to me in just the last few years was what happened to our U.S. Attorney'S Office in Minnesota. It was a gem of an office under Republican and Democratic Presidents. Someone was put in there without the experience to run it, a political appointment, and General Mukasey actually fixed it when he got in, and it is now back on track. But it was really shocking to me to see how quickly that office deteriorated and what went on there. And I wanted to say how much I appreciated the decision of the administration to keep on some of the appointees as we wait. I think it would have been a bad idea to suddenly throw out these U.S. Attorneys in there now as we try to chart a new course.

So my question is along that line. What would you do with Attorney General Holder to improve morale in the Department?

Mr. PERRELLI. Well, Senator, I think it is an important question, and the experience of having worked through the transition process I think demonstrated that the experience and talent of the Justice Department remains throughout. There are extraordinary public servants at every level. But there have been concerns, and obviously part of the Inspector General's reports about politicization, and those have affected morale. I think it starts from the top. I think the Attorney General and others, including myself, if confirmed, need to both speak actively and make clear from the top down about what the mission of the Department is, to re-energize that mission, and to assure career attorneys that kind of partisanship that may be of concern to them will not occur again.

And then I think it also is critically important to listen and hear from the Divisions and the U.S. Attorney's Offices what they feel like has been working and what has not been working, and do our best to improve those. And I think it will be a—it is a lengthy process, but there is such a reservoir of experience and talent there that I believe that we can accomplish this.

Senator KLOBUCHAR. One of the other things I think is so important is how the Department of Justice works with local county attorneys and local prosecutors across the country. I saw some breakdown of that, and it has always been my view that people do not care who prosecutes a case, whether it is the State's attorney or the U.S. Attorney's Office. Could you talk a little bit about how you would plan the Justice Department to reach out to local prosecutors?

Mr. PERRELLI. Certainly, Senator, and it is a critically important question, because I think we all have to be pulling the oars together in order to make our communities the most safe that we can. And I think that rebuilding the Federal, State, local, and tribal relationships is going to be critically important going forward. Certainly I have had law enforcement officials express concern about not having been consulted about issues.

With respect to the role of the Associate Attorney General, a primary area for the Associate is going to be in the grantmaking programs, technical assistance, and training for State and local authorities. And I hope to look forward to a robust and, frankly, daily dialog with State and local authorities about what is working for them, because my prior experience in the Government is that if you actually spend some time talking and working with them in individual communities, you can find the best solutions for the particular problems that they face.

Senator KLOBUCHAR. I am out of time here, but two areas that I hope you will consider in the future is the white-collar crime area, the fraud area, and how difficult it is for local prosecutors and local police to take on some of these cases. And I remember there were always promises of all these labs from the Federal Government, and it is very difficult for small police departments to take these on. So I think it is something that I hope that you will look at in the future.

Mr. PERRELLI. I will, Senator.

Senator KLOBUCHAR. Thank you.

Senator CARDIN. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Dean Kagan, I would like to ask a favor, if you would please read and, then when you are finished, give me your thoughts on a law review article written by Rex Lee, one of the preeminent Solicitor Generals, served under Ronald Reagan, Ohio State Law Journal, 1986, in which he describes from his perspective the unique and important role as steward of the Office of SG that the people who have held that position have, and I would like to get your take on it. I think it is a very good description of what a good SG should be.

Ms. KAGAN. Senator, if I may?

Senator KYL. Yes, surely.

Ms. KAGAN. I was told yesterday, I suppose one of your staff said that you had an interest in this article, and I did read that article yesterday.

Senator KYL. Oh, good. I did not want to catch you by surprise.

Ms. KAGAN. No, it was very fair. But I just want to say that I completely agree with you. I think it is a very thoughtful, powerful article about the SG's role. And I might have a quibble here or there, but I basically found myself agreeing with all the main points.

Senator KYL. For those who have not, it is a bit of a template for how an SG approaches decisionmaking about what cases to take and how to proceed, among other things. I would like to discuss it with you further. Thank you for that.

I do want to follow up, though, on the point that Senator Coburn was making about the matter of experience. I like to talk to my grandkids about, for example, the difference between intelligence and wisdom to encourage them—and from my perspective, wisdom is a combination of learning, knowledge, and experience, which also produces knowledge. And, obviously, I am encouraging them to get that learning and to get that experience.

And while it is true that you, because of your stellar academic background, bring a great deal to the Court as a litigant, it is also true that there is much to be gained by the experience of participating in a lot of oral arguments before appellate courts. You learn by doing, and you learn how to be better than your opponent. You are always facing- -by and large, you are facing, usually you are facing an experienced litigator who has practiced before the Court on the other side. And there is an advocacy ability that comes not just from academic knowledge, but by doing it. And you learn through trial and error what works and what does not work. I suggest that for the position of SG, you learn what arguments can be effective and which ones cannot, even what cases you might want to take and not take relative to the possibility of winning it.

What I am saying is that theoretical knowledge, the academic knowledge, while important, and good public speaking, while important, in my view are no substitute for having done litigation which causes you in that arena where you have got to think very quickly and where your past experience can guide you in how to proceed, that as compared to someone without the experience, someone with just the academic knowledge, is less suited to the position.

Now, I appreciate that you have great confidence in your abilities, but I think there—I would commend to you some degree of humility when you face some very experienced litigator who knows the ins and outs of the argument because he or she has done it a lot of times before.

I am not going to get into your background. The Committee is well aware of that background and you have conceded it does not consist of litigation experience. But respond to—and I am really concerned about this. I appreciate your academic learning. But, I mean, I think I am a fairly smart lawyer trained in the law, but I do not think I would be the best candidate for a top con. law position in a top law school in the country. That is an analogy I appreciate. But speak to the concern I have, please.

Ms. KAGAN. Well, I appreciate it. And, first, let me say I completely agree with you on the necessity of wisdom and judgment as opposed to just book learning. I think that this is true for many, many roles in life, the SG included. And I think one of the things I would hope to bring to the job is not just book learning, not just the study that I have made of constitutional and public law, but a kind of wisdom and judgment, a kind of understanding of how to separate the truly important from the spurious, or just a kind of situation sense, however you want to describe it. And, you know, I hope that you will look at some of the letters that people have written about me, because I think in my current job and other places, I hope that I have demonstrated that kind of judgment as opposed just to book learning.

And I will say to you, Senator, I am in complete sympathy with what you said about humility, and I like to think—I like to think—that one of the good things about me is that I know what I do not know and that I figure out how to learn it when I need to learn it. And this was one of those things where I am going to make a very intensive study of what I might be missing when I come to the job, if you see fit to confirm me, and to talk to a lot of people within the SG's Office and outside the SG's Office, and really to try to figure out how to fill any gaps that there are.

Now, when you think about a job like the SG, frankly, anybody has some gaps. You know, one person might not have the litigating experience; another person might not have the deep knowledge of constitutional or statutory law or so forth. But what you have to do is to try to figure out what you do not know.

Senator KYL. Sure. I appreciate that. The greatest knowledgeable surgeon, though, still has to get those fingers working to do the right kind of sewing, and there is a big difference between a 55-minute lecture and being constantly interrupted by the Court to where your wonderful presentation, you know, it gets sliced down into about five coherent things that you are able to say. And practice is what enables you to do that.

Let me just quickly ask you one matter, and this relates to the Solomon amendment that was also discussed earlier. The brief that you signed and that was submitted on behalf of the group of law schools the Court itself said represented a rather cramped interpretation of the law. It was not very kind to the interpretation in the brief that was submitted.

Do you think if you had been Solicitor General when *Rumsfeld* v. *FAIR* came to the Court, that you would have defended the statute, and that you would have interpreted it to bar universities from discriminating against military recruiters?

Ms. KAGAN. I absolutely would have, Senator, and I am glad you asked that question because the answer is clear. The Third Circuit, of course, held the statute unconstitutional. That was actually not the ground on which we argued, but the Third Circuit held it unconstitutional. There is a clear obligation on the part of the Solicitor General to defend the statute in that circumstance unless there is no reasonable basis to argue for the statute. And I feel comfortable in this case because it is a historic case, because I know the case—because I know the facts, because I know the litigating posture of the case, I feel comfortable saying, of course, there was a reasonable basis. I mean, my gosh, the Supreme Court rules 9–0.

So I absolutely would have defended that statute, and I would have defended it in exactly the way that Senator Feingold has noted Generals Olson and Clement defended the McCain-Feingold law.

Senator KYL. Again, thank you. And I would appreciate the chance just to visit privately for a little bit.

Senator CARDIN. Senator Kyl, thank you for your inquiry.

Let me just, if I might, put into the record—I think it is appropriate at this point—the letter of endorsement that received from the Solicitor Generals from 1985 to 2009 in support of Dean Kagan. The letter states that, "Dean Kagan will bring distinction to the office, continue its highest traditions, be a forceful advocate for the United States before the Supreme Court. Elena Kagan would bring to the position of Solicitor General a breadth of experience and a history of great accomplishment in the law. We believe that she will excel at the important job of melding the views of various agencies and departments into a coherent position that advances the best interests of the National Government. She will be a strong voice for the United States before the Supreme Court. Her brilliant intellect will be respected by the Justices, and her directness, candor, and frank analysis will make her an especially effective advocate."

That is from the former Solicitor Generals from 1985 to 2009.

Senator Feinstein

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and welcome to both of you and congratulations, and certainly, Ms. Kagan, as the first woman, it is a very special event, so double congratulations.

You mentioned in response to a prior question that if the Solicitor General's Office is not broke, your view is do not fix it. But I would like to give you one instance where I believe it was, and that was in the case of *Massachusetts* v. *the EPA*, where California and 11 States and a group of nonprofits sued the EPA for failing to regulate greenhouse gas emissions that cause global warming. The Solicitor General opposed the suit. He argued that the States could not sue because they could not prove that the EPA's decision affected them in any meaningful way.

The Supreme Court disagreed. It found that the emissions could cause sea level and water storage changes that would directly affect the States and their citizens. So this was one instance where I think a very bad decision was made.

Do you believe it was wrong? And how would you decide these issues of standing?

Ms. KAGAN. Well, Senator, you ask a question that I do think goes to the role of the Solicitor General's Office, because in that case the Solicitor General's Office was representing the position of the agencies involved. And if it was right or if it was wrong was more a matter of whether the agency had decided the right thing. But I think the Solicitor General's role, just as the Solicitor General defends statutes to the best of her ability, the Solicitor General has to defend executive actions to the best of her ability as well.

So if there is a regulation or if there is a policy or practice that the executive branch has set forward or that any particular agency in it has set forward, the usual thing for the Solicitor General to do is to vigorously defend that policy or practice in Court. And without knowing all the ins and outs of the communications between the Solicitor General and the EPA in that case, I suspect that that is the decision that the Solicitor General made.

Senator FEINSTEIN. Yes, well, of course, there are many of us—I happen to be one—that believe that the EPA was very politicized in the past administration, and this is just one example. But essentially what you are saying is whatever the agencies want, the agencies would get in terms of a determination of standing. Is that correct?

Ms. KAGAN. You know, I think that the presumption is—just like the presumption is that the Solicitor General's Office defends statutes, the presumption is that the Solicitor General's Office will defend agency actions and agency decisions to the best of its ability.

Senator FEINSTEIN. OK. Let me switch topics and ask: Are you both familiar with a bill that we spent a great deal of time on in the last session, and that is the Foreign Intelligence Surveillance Act?

Mr. PERRELLI. Senator, I am generally familiar with it.

Senator FEINSTEIN. How about you, Ms. Kagan?

Ms. KAGAN. Same.

Senator FEINSTEIN. Well, you mentioned the Jackson formula from *Youngstown*, and as you know, with the Terrorist Surveillance Program, the President sought to go outside the law and did, in fact, go outside the law. And that program now is totally under the Foreign Intelligence Surveillance Court. However, during this period of time, we were reviewing the Foreign Intelligence Surveillance Act, and we strengthened dramatically, I believe, the exclusivity sections of that act.

When President Carter signed the act following the Church Commission's revelations, he essentially called it the "exclusive tool of governance of the collection of foreign intelligence." Well, the Article II authority of the President was used essentially to go around this. We then strengthened it additionally in this latest amended act, which is now law.

Have you had an opportunity to review that? And do you believe that the exclusivity provisions are such that they are compelling

and, therefore, the President cannot go around this law and illegally then collect foreign intelligence?

Mr. PERRELLI. Senator, I have not looked at the exclusivity provisions for that precise purpose. Echoing Dean Kagan speaking before, certainly in a circumstance where Congress has spoken directly on a subject, whatever the authority President has is at its lowest ebb. So I think that statement by Congress will be an extremely powerful statement in terms of what the authority of the executive branch is.

Senator FEINSTEIN. Ms. Kagan.

Ms. KAGAN. I cannot say anything more than that.

Senator FEINSTEIN. OK. Have either of you had an opportunity to review the Geneva Conventions?

Ms. KAGAN. Again, generally, Senator.

Senator FEINSTEIN. With respect to the laws of war, which essentially cover the detention of an enemy combatant for the duration of a conflict?

Mr. PERRELLI. Senator, I have had occasion to review that in the context of reviewing the Supreme Court's decisions in that area to date.

Senator FEINSTEIN. Well, let me ask you this question then: Do you believe they are sufficient to detain an individual who is found to be an enemy combatant until the end of the conflict?

Mr. PERRELLI. Senator, I think I would want to consult further with experts in the field. The description from your question sounds similar to, at least in part, the Supreme Court's decision in the *Hamdi* case. But I am not certain of all the potential exceptions or nuances to that. But certainly that was in part what a majority of the Court held in that case. That is the best of my recollection.

Senator FEINSTEIN. The reason I raise this is because I think it is going to be a fundamental question as we consider the end planning for detainees as Guantanamo is closed, because the question arises: What do you do with people who might not be able to be tried but are adjudged, through a proper due process panel, to be a danger to the national security of this country and/or enemy combatants? Can they continue to be held without trial?

It is my understanding that the laws of war do permit this. Now, this is an asymmetric war, and it is apt to go on for a substantial period of time. But I was just curious whether you had a view on that. Clearly, you do not.

Mr. PERRELLI. Well, Senator, I think, as I indicated, my understanding is that that is indeed what the *Hamdi* case held, and certainly I think the President has made clear that, in considering the outcome of the Guantanamo review, keeping the country safe is his first priority.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you.

Senator Graham.

Senator GRAHAM. To pick up where Senator Feinstein left off—which is an excellent question, and this country needs to discuss this openly and, quite frankly, somewhat behind closed doors. But, Dean Kagan, do you agree with me that under normal criminal law

there is no process to hold someone indefinitely without trial under domestic criminal law?

Ms. KAGAN. Under normal criminal law? Yes, I do agree with you.

Senator GRAHAM. And if you had a criminal statute that would allow someone to be held forever without trial, that would no longer be criminal law, it would be something else.

Ms. KAGAN. That seems right, Senator.

Senator GRAHAM. OK. Now, if one is at war—let me ask this: Do you believe we are at war?

Ms. KAGAN. I do, Senator.

Senator GRAHAM. OK. Let me read from Mr. Holder here. Would you consider him your boss?

Ms. KAGAN. In a manner of speaking, Senator. I guess he can fire me, so that makes him my boss.

Senator GRAHAM. That would make him your boss. But he seems to be—I think he would be a good boss.

Ms. KAGAN. I think so, too.

Senator GRAHAM. And I think you would be very qualified for your job. I asked him, "Do you think we are at war?" And he says, "I don't think there's any question but that we're at war. I think to be honest, I think our Nation didn't realize that we're at war when, in fact, we were. When I look back at the 1990's and Tanzania, the embassy bombings, the bombings of the Cole, I think we as a Nation should have realized that at that point we were at war. We should not have waited until September 11, 2001, to make that determination."

Do you agree with that?

Ms. KAGAN. It is easy to agree with my boss in that circumstance.

Senator GRAHAM. OK. I asked him where the battlefield might be. If we are at war, I asked him, "Where would the battlefield be?" And he gave what I thought was a—I said, "If you are trying to explain to a civics class, a 9th grade civics class about the battlefield in this war, what would it be?" And he said, "The battlefield—there are physical battlefields, certainly, in Afghanistan, but there are battlefields, potentially, you know, in our Nation. There are cyber battlefields that we're going to have to—where we're going to have to engage. But there's also—and this sounds a little trite but I think it's real—there's a battlefield, if you want to call it that, with regard to the hearts and minds of the people in the Islamic world. We have to do things in a way, conduct ourselves in a way, that we win that battle as well, so that people there who might otherwise be well intentioned do not end up on the wrong side and against us."

Do you agree with that? Well, I certainly do, too. And I told him I felt what he was speaking of was the moral high ground. There is a physical high ground in traditional war, but in this war there is the moral high ground, and we have to maintain that moral high ground. I think at times we have lost it. But we also have to remember we are at war.

Now, I asked him this question: "Now, when you talk about the physical battlefield, if our intelligence agencies should capture someone in the Philippines that is suspected of financing al Qaeda

worldwide, would you consider that person part of the battlefield, even though we're in the Philippines, if they were involved in al Qaeda activity?" Holder said, the Attorney General said, "Yes, I would."

Do you agree with that?

Ms. KAGAN. I do.

Senator GRAHAM. So that gets us back to Senator Feinstein's question. Under law of armed conflict, as I understand it, and under the Geneva Convention, Article 5 says that if there is a dispute about status, what you are entitled to is an independent, neutral decisionmaker. And in most wars, that can be a battlefield determination by a single officer. But because this is a war without end, that will not end with a ceremony in the USS Missouri, there will be no defined end, I am all for giving more due process.

But the point she is making, I think is an important point. You cannot detain someone indefinitely under criminal law. They have to have a trial. But under military law, if you are part of the enemy force, there is no requirement to let them go and go back to the war and kill your own troops. Do you agree that makes sense?

Ms. KAGAN. I think it makes sense, and I think you are correct that that is the law.

Senator GRAHAM. So America needs to get ready for this proposition that some people are going to be detained as enemy combatants, not criminals, and there will be a process to determine whether or not they should be let go based on the view that we are at war, and it would be foolish to release somebody from captivity that is a committed warrior to our Nation's destruction.

Now, the point we have to make with the world, would you agree, Dean Kagan, is that the determination that led to the fact that you are an enemy combatant has to be transparent?

Ms. KAGAN. It does indeed.

Senator GRAHAM. It has to have substantial due process.

Ms. KAGAN. It does indeed.

Senator GRAHAM. And it should have an independent judiciary involved in making that decision beyond the executive branch. Do you agree with that?

Ms. KAGAN. Absolutely.

Senator GRAHAM. So we can go tell the world that this person is being held off the battlefield not because one person says so, but because there is a process that led to that determination where you had an independent judiciary involved. Do you think that is important for the Nation to make sure we have that kind of process?

Ms. KAGAN. I do, Senator.

Senator GRAHAM. I will look forward to working with you and this new administration on how to come up with a process that will make that statement, to let the world know that no one is being arbitrarily held based on just suspicion or emotion but based on evidence and a legal process. And some of these people are going to be held maybe for the rest of their life, but it will be based on our values, not theirs. And my message to those who are on the fence: Don't join al Qaeda. Not only does it corrupt your own life and your own religion—if you happen to be a Muslim—you can wind up getting killed or dying in jail.

Now, Mr. Perrelli, one of the things that I have been working on in the past administration, with not a whole lot of success, is trying to protect our intellectual property. I come from a manufacturing State. There are some people on this Committee who come from manufacturing States, and one of the edges that America has is the ability to innovate, but that innovation is routinely stolen in places like China and Russia and other places.

Do you believe we have sufficient laws on the book to protect intellectual property in the global economy from regimes like China and other places in the world that are less than respectful? And if not, what could we do better?

Mr. PERRELLI. Well, I think, Senator, simply by identifying the problem, whatever mechanisms and laws we have in place currently do not seem to be addressing the problem because, as you indicate, there are significant concerns and problems in a number of foreign countries with respect to the theft of intellectual property.

I think through the transition process, I heard from members of both chambers about the need to ensure that there is an intellectual property task force that is focused on these issues, or at least appoint people who are focused on this. I know that this Committee was one of the sources of the bill that created a broader intellectual property position throughout the administration, and we hopefully will be able to focus on these issues.

Senator GRAHAM. Well, thank you both. I think you are excellent choices and you will do a good job for the country, and I look forward to supporting you.

Ms. KAGAN. Thank you, Senator.

Mr. PERRELLI. Thank you, Senator.

Senator CARDIN. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you.

Just to follow up on Senator Graham's question, we passed legislation very recently that would set up an intellectual property czar in the White House that would empower the Department to put together task forces on this. And, obviously, implementation is yet to be accomplished, but we very much hope that that will be a priority for you, because I could not agree more with Senator Graham's concern about that.

I want to first recognize and appreciate Solicitor General Fried is here, who has done such great service to Harvard, the Commonwealth of Massachusetts, and the country. And I am delighted to see the former OLC chief Jack Goldsmith also here, who shared such an important window into a truly extraordinary moment in the Department of Justice's history.

My question for both of you has to do with the Department itself as an institution. It has probably had its bleakest period. You will be the first new administration to inherit that and try to rebuild it. I understand from your prepared testimony that you understand that and are well positioned for that.

And, Mr. Perrelli, you talked about your father's long and distinguished work for the Department of Justice and described your "reverence"—was the word you used—for the Department.

Dean Kagan, you talked about your clerkship for Justice Marshall and his pride in having served as Solicitor General and what you called the thrilling and humbling words, "I represent the United States of America."

I think those pieces of testimony put you in exactly the right place, but I want to hear each of your assurances that in all of your tasks, your first priority will be to defend the Department of Justice as an institution upon which Americans can rely for competence, for honesty, and for integrity.

Mr. PERRELLI. I certainly can make that assurance, Senator.

Ms. KAGAN. Senator, I can as well, and one of the glories of the Solicitor General's Office is that even in some very difficult times for the Justice Department, it has maintained its professionalism and its integrity and its refusal to be politicized.

Senator WHITEHOUSE. It has distinguished itself in that regard.

We have heard disturbing testimony about the disassembly of traditional civil service safeguards that for a long time have protected the Department and its career staff from political influence. We have heard of applicants being asked, as a measure of their qualification, why they want to serve George Bush. We have had them asked about the political background. We have had people who had associations that were deemed consistent with democratic or progressive or liberal views knocked out of consideration for career positions. And the danger of all of that is that as a result people whose first priority is to a party and to an ideology have been allowed to infiltrate the Department and they will not—did not intend to and now will not follow the traditions of independence, competence, and integrity that the Department has long stood for. But they are in now. And although in many respects they do not deserve it because they did not come in through a civil service proper process, they now enjoy the benefits of that civil service process.

Now, some people who came in I am sure are as qualified as anybody else and as excited about being in the Department as anybody else and as keen to do the right thing as anybody else, just the way that I think pretty much everybody who comes to the Department of Justice for the first time has that feeling. But to the extent that there are people who have essentially infiltrated themselves to be moles for a particular party or advocates for a political ideology, what mechanisms do you have in place to protect the Department and people who count on their judgment in particular cases to be protected against that?

Mr. PERRELLI. Well, Senator, I think it is an important question, and I think there is no question on a forward-looking basis that we have to do everything possible to ensure that never again are partisan criteria used in the selection of career attorneys or staff in any way, and that includes promotion decisions as well as decisions about hiring. And I think that, you know, having served in the Department, you understand the tremendous—the incredible power of standing up and saying you represent the United States and the extraordinarily high standards to which we need to measure attorneys at the Department of Justice.

My view is that we need to make sure that everyone who is working at the Department is one with the mission, and that to the

extent that there are those whose first priority may be to something other than the mission of t he Department of Justice, we will learn about that because their performance will demonstrate to us that they are working on something else or are focused on something else rather than the needs and interests of the United States.

Senator WHITEHOUSE. So you are completely confident that the existing performance evaluation and review process of the Department is adequate to the task of defending it against people who may have infiltrated it for partisan purposes?

Mr. PERRELLI. I cannot say that I am completely confident. It is something I would want to look at, if I am confirmed, with the Attorney General and others. But I think my view is that, going forward, we need to evaluate people based on their performance, and their performance with respect to the mission of the Department, because in the past, to the extent that other criteria have crept in, that is why we have a problem.

Senator WHITEHOUSE. Well, I certainly hope that that is the case, and I am prepared to accept that it may be the case. But I am not convinced yet, and from my point of view, I just want to register that as a remaining open question. But I am delighted that you both are candidates for these offices. I look forward to working with you, and I appreciate very much that you have taken this step to serve in these positions. The hassle and the criticism and the hours and the pay are all somewhat different than what you have experienced at different times in your pasts, but there is nothing quite like the responsibility and the honor. So I wish you well.

Ms. KAGAN. Thank you, Senator.

Mr. PERRELLI. Thank you, Senator.

Senator CARDIN. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. I welcome both of you to the Committee. I have great respect for both of you, and I appreciate the fact that you are willing to give your time to public service. It means a lot to me.

You both have excellent academic credentials. Dean, you have done a terrific job up there at Harvard.

Ms. KAGAN. Thank you.

Senator HATCH. No question about it. And I think it is evidence by the number of professors who are here today, a number of whom I consider close friends and who have weighed in in your favor from time to time with me. And I really appreciate you are both excellent lawyers, you are both excellent scholars.

Let me just raise a case with you, Dean Kagan, that I raised with David Ogden last week, and that is the child pornography case titled *Knox* v. *United States*. Now, this is important not only because protecting children is one of the highest matters of importance, but because of the attempt to weaken enforcement of the child pornography statute. That was first made by the Solicitor General in his brief to the Supreme Court awhile back. Suddenly, the Solicitor General asked that a different definition of child pornography be used and the conviction in that case be reconsidered.

You said in your opening statement that the Solicitor General must defend "any Federal statute in whose support any reasonable argument can be made." In my opinion, the Solicitor General at that time failed in this duty in the *Knox* case where something as

important at the protection of children was involved. And that is what the new Solicitor General in the last incoming Democratic administration did.

Now, I do not want a Solicitor General who will use that office to change the law through the courts. Neither the Solicitor General nor the courts make the law. Congress does. And I know you write in the area of First Amendment law and about legislative efforts to restrict obscenity and pornography.

Now, do you have any comment on the *Knox* case? And how will you keep that sort of thing from happening on your watch?

Ms. KAGAN. Senator, I do not know the case, and I am not sure I understand which Solicitor General did what when.

Senator HATCH. Well, it was the first Solicitor General in President Clinton's tenure.

Ms. KAGAN. I see. But then it was defended later?

Senator HATCH. Yes, it was—well, actually, it turned out, I think, all right in the end. But that was the argument.

Ms. KAGAN. Well, either way, Senator, I would have no difficulty in this area whatsoever. I mean, I would have no difficulty in any area defending a statute. And I cannot imagine why one would have any in this area.

Senator HATCH. Well, in your review of Professor Stephen Carter's book on the confirmation process, you wrote that the Senate should ask judicial nominees about their views on constitutional issues, the direction they would take the Court, and even about votes that they would cast. Now, I would like——

Ms. KAGAN. The——

Senator HATCH. Even about votes they would cast. How do you square this with the principle that judges must be impartial and with the oath they take to provide justice without respect to persons?

Ms. KAGAN. It is a great question, Senator, and I am not sure that sitting here today I would agree with that statement. I wrote that piece—after I had worked on this Committee, I had the privilege——

Senator HATCH. If you want to know the truth, I remember when Judge Bork was here. He had written some outlandish things from time to time, but he was absolutely brilliant. And he did it more as an academic, as a teacher, and some on this Committee held that against him very badly. But the fact of the matter is that I think it is good for teachers to raise all kinds of issues on all sides of cases.

Ms. KAGAN. Right, right.

Senator HATCH. And you are good at that.

Ms. KAGAN. Well, thank you, Senator. I was just going to say, you know, I wrote that when I was in the position of sitting where the staff is now sitting and feeling a little bit frustrated that I really was not understanding completely what the judicial nominee in front of me meant and what she thought. But I think that you are exactly right, of course, that there are other—that this has to be a balance. The Senate has to get the information that it needs, but as well, the nominee for any particular position, whether it is judicial or otherwise, has to be protective of certain kinds of interests. And you named the countervailing ones.

Senator HATCH. Let me just say that I may not agree that Thurgood Marshall was the greatest attorney of the last century, but I agree with you he is one of the greatest. And I have nothing but respect for what he did for the civil rights community and the courage that he had in doing that. And so I think I would just commend you for having had the privilege of working with him and others on the Supreme Court who were giants at that time when you were there. I think you have had some tremendous experiences in your life, and, naturally, I respect that.

Now, Mr. Perrelli, I do not want to ignore you.

[Laughter.]

Senator HATCH. If you are confirmed to be Associate Attorney General, you will oversee the Justice Department's Civil Rights Division. In the last several years, the Division has launched some important initiatives which reflect a more comprehensive vision of civil rights, and I want to know if you intend to continue these programs and priorities. Let me give you an illustration.

One of these is the protection of religious liberty. Now, I take a tremendous interest in that. Naturally, as a member of the Church of Jesus Christ of Latter Day Saints, the only church against whom an extermination order was issued by a Governor of a State, I naturally have a great deal of concern, and not just for my faith but for people of all faiths. You know, it is the first liberty mentioned in the First Amendment to the Constitution.

Now, the Division right now has a Special Counsel for Religious Discrimination to handle these cases. It has also developed a strong program for enforcing the Religious Land Use and Institutionalized Persons Act, which I introduced and which was passed unanimously by the Senate and the House. I think it is a very important bill.

Now, what priority will the Civil Rights Division under your leadership give to the protection of religious liberty? Will you maintain the position of Special Counsel? And I would like your views on how this will fit into your approach to civil rights?

Mr. PERRELLI. Well, Senator, it is an important question, and I agree with you that we need to continue the efforts of the Civil Rights Division in protecting religious freedom. As I indicated previously, one of my concerns is that the number of statutes that the Civil Rights Division is enforcing has only increased while its staffing has actually been declining over time.

With respect to the particular position that you reference, I think I would want to talk to the incoming Assistant Attorney General for Civil Rights at such time when he or she is nominated and confirmed about the right approach here. But I agree fundamentally that work on the RLUIPA, which I worked on when I was at the Department of Justice in the drafting phases, in cooperation with this Committee, is an extremely important statute, and we need to continue significant enforcement efforts with respect to it.

Senator HATCH. Well, thank you. I want to express my regard for both of you, and I have really enjoyed listening to your comments here today. I think you both are very, very top-flight people with top-flight abilities. And I appreciate your willingness to serve here in Washington. It is not as much fun as Harvard, I have got to tell you. In fact, it gets pretty miserable at times.

[Laughter.]

Senator HATCH. But I am glad to have you here and glad that you are willing to serve.

Ms. KAGAN. Thank you, Senator.

Mr. PERRELLI. Thank you, Senator.

Senator CARDIN. Thank you, Senator Hatch.

Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman. I want to welcome both of our witnesses as well. I know we have votes, and both Senator Kaufman and I are going to try and get our 5 minutes in, and we will try and do it quickly.

Mr. Perrelli, let me start with you on the white-collar crime issue. I think we all understand that hundreds of billions of dollars is going out to the financial sector at this time, and we have seen this enormous spree of rip-offs, investment schemes, and frauds and the like. You have looked at what your predecessors in the Bush administration have done in the financial fraud area. What will you do specifically to change the Bush policy and beef up the fight against white-collar crime?

Mr. PERRELLI. Well, Senator, I appreciate the question, and I agree that, particularly in the current phase of the economy that we are in, we need to be extraordinarily vigilant both on the civil and criminal side in enforcing the law against those who would defraud consumers as well as defraud the Government.

As the Associate Attorney General, most of the jurisdiction of the components that I would supervise, if confirmed, is focused on the civil side, civil enforcement. But there is criminal jurisdiction, for example, over scammers that come out of the FTC, and those are enforced by the Civil Rights Division.

Through the transition process, I think we talked a lot about the need for enhanced FBI—additional FBI agents to focus on white-collar crime, because over the last several years the FBI has really had to transform itself into a national security agency. We have also talked about the need for additional U.S. Attorneys and working with Assistant United States Attorneys in the field, figuring out whether a centralized task force or a more dispersed approach is appropriate.

But I certainly think that we will need to focus on fraud both against consumers, mortgage fraud, and fraud against the Government, particularly with large sums of money flowing to the private sector. Those are going to need to be extraordinarily important priorities for——

Senator WYDEN. You have told me that you would look at putting more agents on it and more U.S. Attorneys. I want to hold the record open on this point because I want to know specifically what you would do to beef up the fight against white-collar crime relative to what was done in the Bush administration. You can get back to us quickly on that?

Mr. PERRELLI. I can, Senator.

Senator WYDEN. Very good. Second point for you, you represented the Recording Industry Association, and there was an aggressive there to pursue individuals who share music files. Now, clearly, the Department of Justice has got to set some priorities, and given the need to set priorities, do you believe that Govern-

ment prosecutors ought to devote time to pursuing individuals accused of these illegal downloads if we are talking about, say, a small number of music files?

Mr. PERRELLI. Senator, with respect to the enforcement of the criminal copyright laws, that again would likely fall within the Criminal Division, so it would not necessarily fall under the purview of the Associate Attorney General.

I would say that, to date, I think the career prosecutors of the Criminal Division have never yet concluded that it was an appropriate use of their resources to pursue such action.

Senator WYDEN. And you would support that?

Mr. PERRELLI. I have no reason to disagree with it, Senator.

Senator WYDEN. OK. One question for you, Ms. Kagan, and I share Senator Hatch's views about your qualifications, and we are looking forward to your confirmation. I want to ask you about the unusual case of Ali al-Marri, the legal resident of the United States who has been held at the military brig in Charleston for the past several years. He is currently the only U.S. person being held in prison in the United States on the grounds that he was declared an enemy combatant. And I want to go at this issue in a careful way because it is certainly, you know, a possibility that you may have to argue the case.

So let us kind of set aside that, and what I would like is just a little bit of your thinking without it just being 35,000 feet about the kind of legal principles and the legal analysis that you might bring to cases like this without getting you into the area that you might 1 day have to argue.

So do not be so general that you just take me to 35,000 feet and I do not get a sense of your thinking, and at the same time, I want to be respectful of the fact that you may one day be arguing. I am just trying to get a sense of how you think about these kinds of cases.

Ms. KAGAN. Senator, I appreciate the question, but I have this urge actually to stay up at 50,000 feet.

Senator WYDEN. I got the drift.

Ms. KAGAN. For the reasons that you say. You know, the President has authorized a review of this case and all the various ways of dealing with it, and that review is ongoing. I do not know really anything because, you know, I am only a nominee and I have no sense of how it is proceeding or how this might get to the Court, whether it would get to the Court, if it got to the Court what the arguments would be. I just feel as though I do not want to step into that area. This is, you know, very much an ongoing case, and also an ongoing exploration in the Justice Department of how to deal with it.

Senator WYDEN. Well, tell me then about the balance, the constitutional balance as you would think about it. What our country has always been about is protecting the public good—in this case, fighting terrorism ferociously—and at the same time, being sensitive to individual liberty. Talk to me about how you approach the balance.

Ms. KAGAN. Fighting terrorism ferociously and also fighting terrorism within the rule of law. And those are the two things that you have to make sure happen at one and the same time.

Senator WYDEN. Thank you, Mr. Chairman.

Senator CARDIN. Senator Kaufman?

Senator KAUFMAN. Thank you, Mr. Chairman.

Dean Kagan, Mr. Perrelli, I am really pleased that you are taking on these new assignments, and although, Dean Kagan, what I find is that when we were working for Chairman Biden, we got to question a lot earlier. And, frankly, most of the questions that I had have already been asked, and I do not see any reason to repeat them.

I especially want to associate myself with Senator Whitehouse's remarks about the Justice Department and what has happened in recent years—not to look back. I agree with President Obama. We should be looking forward. But, clearly, there are some things that went on there that are disturbing in terms of keeping career people and in terms of the kind of people that are presently there and in terms of recruiting people. I think you are going to have some excellent recruits for the Justice Department, and it is a challenge you have to meet. And, Dean Kagan, I am glad to hear that you feel that the Solicitor General's Office is in good shape in this regard.

I want to just thank you for—we have a vote coming up. I just want to thank you for serving. I think you are, as Senator Whitehouse said, going to have an incredible experience in the Justice Department. I think that what we are going to be doing in the Justice Department, as Senator Wyden said, are extremely difficult questions. No one wants to make these questions any simpler, and I think, Dean Kagan, that the question he asked you and the fact that the Justice Department is looking into this and trying to determine is really one of the key things.

So I want to thank you very much for coming here today. Thank you for serving. I think you are excellent selections, and I wish you all good luck.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator Kaufman.

Let me just echo what Senator Kaufman has just said and thank both of you for being willing to serve our country. These are very important positions, and as Senator Whitehouse said, it is going to be long days. Your family are going to make continued sacrifices, and we thank them for being willing to share your talent with our country.

The hearing record will remain open for one week in order for members to submit questions in writing. I would urge you all to please respond to those questions as quickly as possible so that we can complete the process that we need to go through to make a recommendation to the floor in regards to confirmation.

Chairman Leahy apologizes for not personally being here today. Other business kept him away from the Committee. Without objection, his statement will be made part of the record, and once again, I thank you all for your courtesies today.

With that, the Committee will stand adjourned.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Responses to Follow-up Questions of Senator Tom Coburn, M.D.
"Nomination of Thomas Perrelli to be Associate Attorney General of the United States"
United States Senate Committee on the Judiciary
February 10, 2009

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1. Mr. Perrelli, you received a set of documents from me addressing pornography's effects on adults and children. Please review those documents and respond to them accordingly.

At my hearing you asked me whether I personally believe that adult obscenity contributes to the sexual exploitation of children in any way, and you offered to send me literature on the topic. I have reviewed the two summaries you forwarded, compiled by a social scientist at the University of Pennsylvania, which indicate her view that exposure to extreme forms of pornography can teach behaviors, including the sexual exploitation of children. It appears there is a great deal of literature on the subject, and without a comprehensive examination of the research, I am hesitant to come to any firm conclusions on the science.

I agree that dissemination of obscenity violates federal law and must be prosecuted, among other reasons, because of the potential effect such violations of law have on both parents and minor children. As a father now of two children, I believe strongly that our children ought to be protected from predators, and if confirmed as the Associate Attorney General would work to the extent possible to make sure the Department of Justice vigorously enforces the appropriate laws.

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RESPONSES TO WRITTEN QUESTIONS OF SENATOR CHUCK GRASSLEY TO THOMAS PERRELLI, TO BE ASSOCIATE ATTORNEY GENERAL FOR THE U.S. DEPARTMENT OF JUSTICE

DEFENDING/FOLLOWING ACTS OF CONGRESS

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

1. If you are confirmed, will you commit to enforce and defend the laws and the Constitution of the United States, regardless of your personal and philosophical views on a matter?

   Yes. If confirmed, my decisions as Associate Attorney General will be governed by my best legal judgments, not my personal or philosophical views.

OBSCENITY PROSECUTIONS

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

   Although the Justice Department's criminal prosecutions for obscenity fall outside the purview of the Associate Attorney General, if confirmed I would ensure that the Department vigorously defends the federal statutes, such as the Child Online Protection Act of 1998, the Communications Decency Act of 1996, and the PROTECT Act of 2003, that are important to those efforts in all cases where reasonable arguments can be made in support of those statutes. I would vigorously defend those statutes not only because they are the laws of the United States, but because it is important that the Department have all the tools it needs to protect children and their families from obscenity.

2. Will you commit to seeing that obscenity prosecutions remain a top priority at the Justice Department?

   Although the Justice Department's criminal prosecutions for obscenity fall outside of the purview of the Associate Attorney General, I would support the Attorney General's efforts to make protecting children and their families a high priority.

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3. Do you believe that the Justice Department has adequate tools to effectively combat obscenity and child exploitation? Do you believe that further legislation is necessary to protect our children?

   If confirmed as Associate Attorney General, I will consult with Department officials under my supervision to determine whether they have the tools they need to enforce the laws. If further civil legislation is needed, I will work with the Committee to resolve any issues.

SUPREME COURT DECISION IN *HELLER*

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

1. What is your personal opinion of the rights afforded by the Second Amendment?

   I believe that the rights afforded by the Second Amendment are laid out in *District of Columbia v. Heller*, 554 U.S. ___ (2008), which recognizes an individual right to bear arms and imposes limitations on the regulation of firearms.

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

   The *Heller* decision is the law of the land.

3. If you are confirmed, will you commit to protect an individual's right to possess a firearm? If so, how?

   If I am confirmed as Associate Attorney General, I will commit to defending and enforcing the laws of the United States as they have been interpreted by the courts, including by the Supreme Court in *Heller*.

BANKRUPTCY

Comprehensive bankruptcy reform was enacted a few years back, and because of it, I believe that the bankruptcy system has been made much better and fairer. Nevertheless, critics of this legislation want to weaken the statute.

1. Will you commit to actively support enforcement of the bankruptcy reform law, and make enforcement of the bankruptcy laws a priority for the U.S. Trustee's Office?

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Yes.

2. Will you support and encourage greater enforcement actions by the U.S. Trustee's Office to prevent abusive or fraudulent bankruptcy filings? How?

   Yes. If confirmed as Associate Attorney General, I will work with the U.S. Trustee's Office to determine how best to prevent abusive or fraudulent bankruptcy filings.

3. Will you assist in efforts to fight attempts to undermine the bankruptcy reform law?

   Yes.

4. There was a great deal of controversy about whether the Bush Administration sought to remove U.S. Attorneys and hire Justice Department personnel for political and ideological reasons. I'm concerned that a similar issue could arise under the new Administration with respect to the U.S. Trustee's Office, which governs the Justice Department's statutory responsibility for implementing our bankruptcy laws. It is my understanding that the Executive Office of the U.S. Trustee in Washington, DC is filled with non-political career attorneys, and it is currently headed up by a non-political career attorney, Clifford White. As the Associate Attorney General with direct supervision over the U.S. trustees, will you commit to keeping politics out of the U.S. Trustee Program?

   As Associate Attorney General I would be committed to ensuring that politics play no role in the hiring, promotion, or firing of any career civil servant, as well as to ensuring that politics never be permitted to interfere in the Department's work.

ANTITRUST

As you know, I have been extremely concerned about increased agribusiness concentration, reduced market opportunities, fewer competitors in the marketplace, and the inability of family farmers and producers to obtain fair prices for their products. I have also been concerned about the possibility of increased collusive and anti-competitive business practices in the agriculture sector.

I believe that the Justice Department's Antitrust Division needs to dedicate more time and resources to agriculture competition issues. The Justice Department must play a key role in limiting monopsonistic and monopolistic behavior in agriculture.

1. I would like to get a commitment from you that the Antitrust Division will pay heightened attention to agribusiness transactions. Can you assure me that agriculture antitrust issues will be a priority for DOJ if you are confirmed?

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If confirmed as Associate Attorney General, I will work to make enforcement of federal antitrust laws as they apply to the agricultural sector a priority. The Antitrust Division plays an important role in ensuring a competitive marketplace, and the laws must be enforced whenever the facts so warrant. Agriculture is an important industry, both for consumers and producers, and it is important to insure that the antitrust laws are fulfilling their purposes in that field.

2. Senator Kohl and I have introduced S. 364, the Agriculture Competition Enhancement Act. This legislation, among other things, would require the Justice Department to issue agriculture merger guidelines. Can I get your commitment that the Justice Department will work with us on moving this bill forward?

I look forward, should I be confirmed, to working with the Committee on these issues.

CONGRESSIONAL OVERSIGHT

1. If confirmed, will you pledge to be responsive to all Congressional requests for information in a timely manner? Including requests for documents and witnesses for interviews?

I commit to working with the Committee, should I be confirmed as Associate Attorney General, to ensure that its requests for information receive timely responses.

2. Will you work to ensure that responses are not held up due to lengthy "clearance" processes at subordinate agencies such as the FBI?

Although supervision of the FBI is generally outside the purview of the Associate Attorney General, I believe it is important that responses be provided timely. If I am confirmed, I will encourage subordinate agencies within the purview of my office to respond to the Committee's requests in a timely manner.

OLC OPINION ON RANKING MEMBER ACCESS TO DOCUMENTS AND INFORMATION

On December 5, 2001, the Office of Legal Counsel (OLC) issued a Letter Opinion to the General Counsel at the Department of the Treasury. The Opinion titled "Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members," concludes that the Privacy Act "prohibits the disclosure of Privacy Act-protected information to the ranking minority member" of a congressional committee of jurisdiction that requests information from a Federal agency. The Opinion reached this

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conclusion despite the fact that the Privacy Act allows disclosures, "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." Nowhere in the statute does it define "committee" to mean only the Chairman and not the Ranking Member. Despite the plain language and the court interpretations to the contrary, this Opinion is used as a shield to prevent disclosure of information to Ranking Members.

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

   I have not studied the Privacy Act or the OLC Opinion in question in sufficient detail to respond substantively to questions about these matters. That said, I believe it is important to cooperate with the Committee's efforts to fulfill its legitimate oversight functions.

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

   There are circumstances in which the executive branch is not in a position to disclose certain information, such as when disclosure would violate a statute or impair the executive branch's ability to fulfill its responsibilities, which include (but are not limited to) national security, law enforcement, or litigation interests.

   Subject to such limitations, I believe that the Department should cooperate with the Committee to ensure that the legislature can exercise its legitimate oversight functions.

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

   I have not studied this provision of the Privacy Act in sufficient detail to respond appropriately to the question of statutory interpretation that this question presents. That said, I recognize the importance of executive branch cooperation in facilitating the Committee's legitimate oversight functions.

4. Will you pledge to work with Ranking Minority Members of Committees on any oversight request, regardless of the OLC Letter Opinion?

   Although I have not studied the OLC Opinion in sufficient detail to comment substantively on its requirements, I recognize the important interests of individual members in oversight matters.

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FALSE CLAIMS ACT

1. If you are confirmed, will you vigorously enforce the False Claims Act?

   Yes. The Government has recovered over $22 billion through False Claims Act cases since 1986, and I will support the Attorney General's efforts to make sure that the Department vigorously enforces the False Claims Act.

2. Will you oppose efforts by industry groups, including the health care industry and the defense industry, to weaken the False Claims Act and the *qui tam* provisions of the Act?

   Yes.

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

   No.

4. Do you anticipate any decrease in the budget for the Justice Department's Commercial Litigation section which is responsible for false claims prosecutions? In previous years, the Justice Department has specifically requested litigation support funds, including funding for accounting experts, for pending false claims cases. Are you committed to securing the funding necessary to successfully litigate False Claims Act cases?

   The False Claims Act is a critical tool in protecting the Government and taxpayers against the misuse of taxpayer funds by private sector recipients. If confirmed, I will make every effort to ensure that the Department devotes sufficient resources to enforcing the FCA.

5. Will you support efforts to utilize the False Claims Act to recover government money lost to fraud or abuse of government bailout funds, including but not limited to funds expended under the Troubled Asset Relief Program and other direct infusions of Government money used to prop up the balance sheets of various financial institutions across the country? Why or why not?

   Yes. The False Claims Act should be used to address misuse of taxpayer funds whenever warranted by the evidence and the law.

6. Recently, a lawsuit was filed alleging that the seal provision of the False Claims Act, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed in camera and remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time

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to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I've been a critic of prolonged extensions of the seal. I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

As Associate Attorney General, I would defend the False Claims Act and Section 3730(b)(2)'s seal requirement against any such constitutional challenge, including the challenge raised in *ACLU v. Mukasey* (E.D. Va. filed Jan. 15, 2009), so long as there are reasonable arguments in its defense. The seal requirement serves very important governmental interests, and it does so without unduly restricting the free flow of information.

7. Will you work cooperatively with me—and other members of this Committee—to ensure that legislation I introduced restoring the original intent of the False Claims Act is reviewed by the Department in a timely manner with constructive input?

Yes.

WHISTLEBLOWERS

1. Will you provide Congress with accurate and timely information regarding any action taken, administrative or criminal, against individuals who retaliate against whistle blowers?

If confirmed as Associate Attorney General, I will make every effort to respond in a timely manner, consistent with law and Department policy, to Committee requests regarding actions taken against individuals who retaliate against whistle blowers.

2. I have closely monitored the treatment of whistleblowers by the FBI over the years. Could you please address what safeguards you will put in place to ensure that all FBI whistleblowers are not subject to retaliation, be if from the Office of Professional Responsibility or elsewhere within the FBI or DOJ?

As Associate Attorney General, I would not have direct responsibility over the FBI, but I believe that unlawful retaliation against any Department employee should not be tolerated. I will fully cooperate with other officials in the Department to determine whether current protections are adequate, both

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with respect to FBI employees and others in the Department, or whether other protections are necessary.

3. What actions will you personally take to abate any fears of retaliation against individuals who are critical of procedures, practices or policies that do not guarantee or execute the primary mission and goals of both the FBI and DOJ?

If confirmed as Associate Attorney General, I will remind my subordinate leadership that unlawful retaliation against legitimate whistleblowers will not be tolerated and will be subject to appropriate disciplinary measures. I will take any such violations, as well as any allegations of such violations, very seriously.

DOJ OAAM AUDIT OF JUVENILE JUSTICE GRANTS

Last year, the Judiciary Committee started reviewing legislation to reauthorize the Juvenile Justice Delinquency Prevention Act. As part of that discussion, I reviewed some of the past audits the Inspector General conducted of Juvenile Justice grant expenditures and I was quite shocked at the findings. These reports showed a series of problems with grant expenditures by OJJDP grantees. I believe a top to bottom review of OJJDP grant funding is necessary to ensure that taxpayer dollars are being spent appropriately.

I was encouraged to learn that the Office of Audit, Assessment, and Management at the Office of Justice Programs has planned a two-part assessment of OJJDP grants. This review is similar to an amendment I proposed in Committee. This assessment is planned to begin in the first quarter of this year and will review the effectiveness of OJJDP as well as general compliance of grantees receiving awards. I believe this assessment will be an important tool to assist Congress as we review the grant management of OJJDP.

1. Will you commit to ensuring that this audit is completed as envisioned and is not impeded by the change in administration?

   Yes.

2. Will you make a commitment to consider all the recommendations that are made by OAAM, including any necessary reforms to OJJDP?

   Yes. I look forward to the OAAM's recommendations and am committed to ensuring that OJJDP grants are spent effectively for the purposes they were intended.

BYRNE/JAG GRANTS

The Byrne/JAG program has been successful because it provides vital resources of both equipment and staff to state and local law enforcement when they assist in the prosecution of federal crimes, such as drug crimes. In my home state of Iowa, the

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Byrne/JAG funding is used to form multi-jurisdiction drug task forces. In Border States, Byrne/JAG funding is used to help shore up border security. It is this use of funds for truly federal purposes that makes the Byrne/JAG grants a worthwhile endeavor.

However, while the Byrne/JAG program has truly helped state and local law enforcement fight violent crimes that have a federal nexus, there are a number of other grant programs at DOJ that lack a similar corresponding federal nexus. I am concerned that as budgets tighten and deficit spending increases, funding must be given to programs that are truly federal in character and are not just spending money on purely state matters.

1. Will you ensure that the Byrne/JAG program remains the cornerstone of federal financial assistance to state and local law enforcement agencies?

   Yes. In overseeing the Office of Justice Programs, I would be committed to ensuring that the Byrne/JAG program is reinvigorated. As it has in the past, Byrne/JAG should play a paramount role in providing federal assistance to state and local law enforcement.

2. Will you review the various grant programs at DOJ to ensure federal dollars are spent on matters that are truly federal in nature and not merely slush funds for state expenditures?

   Yes. Federal grants should be used for the purposes for which they are intended, not for unrelated state purposes. The funds that Congress allocated to the Byrne/JAG program in the American Recovery and Reinvestment Act of 2009 will be of important assistance in fulfilling the program's purposes, and I am committed to ensuring that the funds are spent appropriately.

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Responses to Written Questions for Thomas Perrelli from Senator Specter

1. During our courtesy visit and at your confirmation hearing, I asked for your views on a Congressional Research Service (CRS) analysis regarding Congress' oversight authority with respect to the Department of Justice (DOJ). That statement is reproduced below:

   [A] review of congressional investigations that have implicated DOJ or DOJ investigations over the past 70 years from the Palmer Raids and Teapot Dome to Watergate and through Iran-Contra and Rocky Flats, demonstrates that DOJ has been consistently obliged to submit to congressional oversight, regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating misfeasance, malfeasance, or maladministration in DOJ or elsewhere. A number of these inquiries spawned seminal Supreme Court rulings that today provide the legal foundation for the broad congressional power of inquiry. All were contentious and involved Executive claims that committee demands for agency documents and testimony were precluded on the basis of constitutional or common law privilege or policy.

   In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or closed cases that included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrests of suspects, and documents presented to grand juries not protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, among other similar "sensitive" materials. Congressional Research Report, "Investigative Oversight: An Introduction to the Practice and Procedure of Congressional Inquiry", pp. 23-24 (April 7, 1995).

   You testified that you agreed with the statement with regard to the scope of permissible oversight but that the statement did not discuss the "countervailing interests of the executive branch" that in certain circumstance require deviation from the foregoing standard.

   a. Please explain in detail what you meant by the "countervailing interests of the executive branch."

   As I testified at my hearing, I agree with the statement's description of the scope of the permissible oversight by Congress that reaches all aspects on which it could legislate. I noted that the passage did not discuss the countervailing interests of the executive branch in certain circumstances. By that I meant the times when there is a tension between Congress's oversight interests and executive branch interests, such as where disclosure would impinge on the executive branch's ability to fulfill its responsibilities or would violate a federal statute. These circumstances include, for example, situations in which disclosure

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would impair the executive branch's ability to carry out its national security, law enforcement, litigation, and other responsibilities.

b. Please explain under what circumstances you think it is justified for the executive branch to deviate from the standard set forth in the CRS statement above.

I believe, for example, there can be instances where the Department of Justice is asked to discuss pending matters, Grand Jury testimony, or other information that could compromise an ongoing investigation or litigation. There could also be situations where Congress is asking for disclosure of advice given to the President or other senior officials, thus implicating significant confidentiality interests of the Executive Branch. I am, however, sensitive to the Committee's legitimate oversight interests, and I believe that in the ordinary course the Department and the Committee can reach an accommodation that will permit the Committee to conduct its necessary oversight, consistent with the Department's interests and responsibilities.

2. At your confirmation hearing, I asked you whether you thought the Obama Administration's invocation of the state secrets doctrine in *Mohamed et al. v Jeppesen Dataplan, Inc.*, currently before the U.S. Court of Appeals for the 9th Circuit, was an appropriate use of the doctrine. You responded that to answer the question you required more knowledge about the classified information at issue.

a. Please explain your views on the current Administration's assertion of the state secrets doctrine in *Mohamed et al. v. Jeppesen Dataplan, Inc.*

Without having reviewed all of the relevant information in question, including the classified materials, I am unable to provide fully informed views on the invocation of the state secrets privilege in that case. I understand that the Attorney General has announced a review of assertions of the privilege and, if confirmed, I will participate in that review if directed by the Attorney General.

b. In your view, what are the parameters of the state secrets doctrine?

Under *United States v. Reynolds*, 345 U.S. 1 (1953), the state secrets privilege can be invoked only following careful consideration by appropriate executive branch officials. Once the privilege is properly invoked, courts determining whether the privilege applies must then give deference to the Government's invocation of it; the privilege must be upheld if the Government demonstrates a "reasonable danger" that disclosure will harm the national security. *Reynolds*, 345 U.S. at 10. As courts have interpreted the doctrine, it covers information that, among other things, if disclosed, would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

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c. Please provide your opinion on S. 417, the "State Secrets Protection Act," which was introduced on February 11, 2009.

I have not yet reviewed the State Secrets Protection Act, but I would be glad to do so if I am confirmed and to consult with career Department of Justice officials concerning the legislation. I believe it is extraordinarily important, both to individual litigants and to the national interest, that the state secrets privilege not be abused.

3. At your confirmation hearing, I asked for your views on whether criminal sanctions for corporate malfeasance are more appropriate than monetary fines.

   a. Please explain your position and your reasoning

   The appropriate sanction for corporate malfeasance will depend a great deal upon the particular facts of any given case. I do support, however, the availability of criminal sanctions and believe that, in appropriate cases, prosecutors must seek such sanctions and/or seek sufficient monetary fines to both punish the corporate offender and deter other corporate entities from violating the law.

4. In your Supreme Court brief in the Schiavo case (in opposition to Mrs. Schiavo's parents' application for an injunction), you argued that Congress exceeded its authority in enacting the federal statute that gave Mrs. Schiavo's parents the opportunity to file suit in federal court. In my view, Congress has the authority to grant jurisdiction, which it did in the Schiavo matter. At your confirmation hearing, I asked you whether you stood by the assertions set forth in your brief. You answered that your argument before the Supreme Court was that "Congress cannot, through any vehicle, overturn a prior final court judgment."

   a. Please explain your views on when Congress has the authority to establish federal jurisdiction and why it did not in this case.

In the Schiavo litigation, I represented a client and sought to advance my client's interests as effectively as I could. As was argued in briefs on behalf of Michael Schiavo in his role as guardian of Theresa Schiavo, at the time Congress enacted its law, the issues related to Ms. Schiavo's medical condition, wishes, and her rights (under both state and federal law) had been fully litigated through the Florida state courts, including multiple appeals and petitions for certiorari to the U.S. Supreme Court. As was argued in those briefs, the Supreme Court has held that Congress may not enact legislation that has the effect of nullifying a decision in a particular case. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 219, 225 (1995); *see United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). As was argued in those briefs, if Congress would have been unable to enact such a law had the original litigation concerning Ms. Schiavo's medical condition and wishes been litigated in federal court, Congress could not have enacted such legislation to overthrow the final decision of a state court, which had adjudicated state and federal rights, given

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principles of federalism inherent in the Constitution. *See Alden v. Maine*, 527 U.S. 706, 752-53 (1999). One judge in the Eleventh Circuit did opine that the statute exceeded Congress' authority.

5. You have engaged in extensive redistricting litigation representing Democratic voters and legislators, including Democratic Speaker of the Oklahoma House of Representatives Larry E. Adair in *Alexander v. Taylor*, 51 P.3d 1204 (Sup. Ct. 2002) and Democratic voters in Pennsylvania in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Have you ever represented Republicans in a redistricting case? If confirmed, you will be at the Department of Justice after the 2010 Census when new redistricting plans will be submitted to the Department for approval under Section 5 of the Voting Rights Act. Do you believe that you should recuse yourself from consideration of any redistricting plans given your past representation of the Democratic Party in several redistricting cases? Why or why not?

I do not recall representing specific Republican voters or legislators in redistricting litigation. If I am confirmed as Associate Attorney General, I will consult with the Department's career ethics officials on any matter in which I believe there may be legitimate concern about my ability to fulfill my obligations to my client, the United States Government. I will not hesitate to recuse myself when ethical obligations require it.

   a. What steps will you take to ensure that you prior advocacy will not have any influence on decisions you make if confirmed as Associate Attorney General?

I will consult with the Department's career ethics officials on any matter in which I believe there may be legitimate concern about my ability to fulfill my obligations to my client, the United States Government. I will not hesitate to recuse myself when ethical obligations require it.

7. In *Vieth v. Jubelirer*, Democratic voters in Pennsylvania sued Republican state executive and legislative officers, alleging that the officers enacted legislation creating voting districts that favored Republicans in violation of the constitutional one-person, one-vote requirement. In a split decision with no majority opinion, the Court held that political gerrymandering claims were nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist. The Court stated that the appellants, whom you represented, took "a run at enunciating" a workable standard. According to the Court, the standard you enunciated "rests upon the principle that groups (or at least political-action groups) have a right to proportional representation," a principal not recognized by the Constitution. As you know, Section 2 of the Voting Rights Act, which prohibits abridgement of the right to vote on the basis of race or color, specifically states that Section 2 does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973.

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a. If confirmed, do you intend to use Section 2 to sue any states that do not have congressional representation in a ratio that is in strict accord with the racial and ethnic demographics of their state?

If confirmed as Associate Attorney General, I would seek to enforce the Voting Rights Act's Section 2 as the facts and law require. That law requires consideration of "the totality of the circumstances"; as the statute puts it, "nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

With respect, the briefs that I helped to prepare in *Vieth v. Jubelirer* expressly disclaimed the proposition that proportional representation is required. As those briefs stated, "Importantly, this test [i.e., the test that was proposed] does not compel proportional representation and is not satisfied by a mere demonstration that a political party has won fewer seats than its share of the electorate suggests." The briefs also stated that "[i]n America, no political, racial, or socioeconomic group has a constitutional right to proportional representation" (citations omitted).

b. In *Vieth*, Justice Scalia, for a four-member plurality, wrote that the Court should declare all claims related to political (but not racial) gerrymandering nonjusticiable. He stated that, because no court had been able to find an appropriate remedy to political gerrymandering claims in the 18 years since the Court decided *Davis v. Bandemer*, 478 U.S. 109 (1986) (which held that such a remedy had not been found yet, but might exist), it was time to recognize that the solution simply did not exist. Do you agree with Justice Scalia's conclusion on behalf of the four-member plurality that all claims related to political gerrymandering are nonjusticiable?

The Supreme Court has twice struggled with the issue of partisan gerrymandering, and twice, five justices have concluded that political gerrymandering claims are justiciable. *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986). Justice Scalia's view in *Vieth* did not command a majority of the Court.

c. Why or why not?

Five members of the Supreme Court in *Vieth* ruled that partisan gerrymandering claims are justiciable, but they did not agree on a precise standard for evaluating those claims.

8. Please explain your involvement, if any, in IMPAC 2000, the national organization responsible "for formulating, coordinating and implementing Democratic congressional redistricting efforts."

The law firm in which I am a partner, Jenner & Block LLP, was retained by IMPAC 2000 several years ago. I provided advice on one of IMPAC 2000's matters, but other lawyers at my law firm handled the bulk of the work.

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9. In the recent case of *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), which upheld Indiana's photo identification requirement, Justice Stevens stated "that flagrant examples of [in-person voter] fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election." Despite such extensive evidence, however, there are those who continue to deny that voter fraud exists or that steps need to be taken to remedy the problem. The Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III profoundly disagreed, finding that our "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

   a. Do you believe voter fraud, including votes cast by ineligible individuals, is a significant problem?

      I believe that any unlawful activities relating to the conduct of an election are significant problems.

   b. Do you agree with Justice Stevens' conclusion in the *Crawford* case that in-person voter fraud not only exists but "could affect the outcome of a close election"?

      I agree that depending on the closeness of the election and the level of "in-person voter fraud," such activity could affect the outcome of the election.

   c. Do you agree that the Justice Department should ensure that people who are ineligible to vote do not dilute the votes of eligible voters?

      I agree that both civil and criminal laws governing the conduct of elections should be enforced. Both the Department of Justice and state governments play a role in this effort.

   d. If confirmed, would you commit to enforcing laws that ensure those who are ineligible to vote do not cast illegal votes?

      If confirmed, I would certainly seek to enforce federal laws as the evidence and law warrant, to the extent such enforcement falls within the jurisdiction of the components that I would supervise.

10. For the first 10 years that the National Voter Registration Act of 1993 (NVRA) was in effect, the Justice Department never filed a single enforcement action against any state for failing to maintain its voter registration list and purge ineligible voters. In the previous administration, the Civil Rights Division of the Department of Justice, which you will oversee if confirmed, brought suit against jurisdictions that had failed to purge

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ineligible voters as required by the NVRA. Those enforcement actions have been sharply criticized as attempts to "disenfranchise" voters.

a. If confirmed, will you continue the practice of pursuing enforcement actions as required under the NVRA to ensure that states maintain accurate and up-to-date voter registration lists?

I agree that the maintenance of accurate and up-to-date voter registration lists is an important goal, and if confirmed, I would consult with the Department's career professionals to determine the best tools for helping states reach that goal. I would seek to take appropriate action when warranted by the facts and the law.

11. Absentee ballots are particularly vulnerable to vote fraud, and "no-fault" absentee ballot laws that allow any registered voter to use an absentee ballot for any or no reason and the growing movement toward all-mail elections further weaken the safeguards enacted to prevent voter fraud.

b. Do you agree that absentee ballots should be reserved for individuals who cannot vote in person at their assigned polling place on Election Day or at early voting sites prior to the election?

As a policy matter, issues regarding the availability of absentee ballots are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department officials if a particular state policy in this area is inconsistent with federal law.

c. Do you agree that to increase the difficulty of fraudulent voting with absentee ballots, individuals submitting absentee ballots should be required to provide a copy of an identification document containing a photograph with their absentee ballots?

As a policy matter, issues regarding the manner in which voters are to identify themselves are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department officials if a particular state policy in this area is inconsistent with federal law.

d. Do you agree that to deter the forgery of voter signatures, the signatures on absentee ballots should be either notarized or witnessed by at least two other individuals who provide their addresses and telephone numbers, and the number of voter signatures that any single individual is allowed to witness should be limited?

As a policy matter, issues regarding the signature requirements on absentee ballots are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department

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officials if a particular state policy in this area is inconsistent with federal law.

e. Do you agree that to prevent intimidation and fraud, unrelated third parties, including campaign workers and candidates, should be prohibited from delivering absentee ballots?

As a policy matter, issues regarding the handling of absentee ballots are typically handled by state law. To the extent there is a federal role in these issues, I would consult carefully with career Department officials if a particular state policy in this area is inconsistent with federal law.

12. In your brief before the Supreme Court in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, you argued, in the cable television context, that the federal government has an interest "of the highest order" in maintaining what you refer to as "broadcast diversity." Your brief emphasizes "Congress' interest in a multiplicity of diverse broadcast sources."

a. Do you believe that the federal government, rather than the free market, should determine the content of broadcasts, regardless of the medium?

As Associate Attorney General, my primary role in any such matters would be to enforce or defend the laws as Congress passes them and the regulations as agencies promulgate them. The must carry statute represented an effort by Congress to enact a narrowly tailored regulation to advance important state interests. That statute, which Congress itself intervened to defend at one point, was upheld by the U.S. Supreme Court as consistent with the First Amendment.

b. Do you agree that government regulation could have the effect of eliminating certain programming that is demanded by audiences through the free market?

Depending on the regulation in question, I agree that regulation can affect the programming that would otherwise be offered through an unregulated market.

c. Please set forth your position on so-called "Fairness Doctrine."

Whether a regulation or statute implementing the so-called "Fairness Doctrine" is good policy generally does not fall within the jurisdiction of the Department of Justice. I would support the Department's review of the constitutionality of any specific legislation or regulation under consideration.

d. Do you agree that if the Fairness Doctrine is implemented, it could force the elimination of some programming (e.g., conservative talk radio programming might be cancelled to make way for less commercially viable programs with contrasting viewpoints)?

I have not studied the potential effects that the Fairness Doctrine, if implemented, would have on talk radio programming. A statute or regulation implementing the so-called Fairness Doctrine would have to be analyzed closely

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under the First Amendment to determine if it could be justified under the relevant standards.

13. In your questionnaire, you state that as Counsel to the Attorney General and then as Deputy Assistant Attorney General in the Clinton Administration, you were "very involved in tobacco policy matters, including efforts to enact federal legislation concerning tobacco." What were your policy recommendations in this regard?

    a. Please explain what "efforts" you took to enact legislation concerning tobacco.

    As Counsel to the Attorney General, I worked with the Senate Commerce Committee, then chaired by Senator McCain, and others in the executive branch to draft comprehensive tobacco legislation in the first half of 1998. That effort was unsuccessful.

    b. Please explain your supervisory role over the Justice Department's Tobacco Litigation Team in *United States v. Philip Morris*.

    From 1999 to 2001, I was one of two Deputy Assistant Attorneys General who supervised the conduct of the Tobacco Litigation Team, which itself consisted entirely of career attorneys at the Department of Justice. In that context, I met with career attorneys to hear their recommendations on the Department's litigation strategy and reviewed work product, such as specific pleadings and briefs.

16. According to FBI statistics, in the U.S., all traditionally defined property crimes accounted for $16 billion in losses in 2005. The best estimates for losses from counterfeiting and piracy exceed that number by ten or fifteen times. Yet, the Justice Department spends a very small amount of resources combating intellectual property theft. In fact, in FY2007, the Department filed only 217 intellectual property cases, sentencing less than 300 defendants.

    d. If confirmed, what will you do to ensure that resources and responses are commensurate with the scale of the threat and the gravity of the injury to the economy, public health and safety?

    As I noted during my hearing, responsibility for the enforcement of the criminal copyright laws typically falls within the Criminal Division; accordingly, enforcement decisions and, in large part, budget decisions, related to those crimes would be outside of my purview if I am confirmed as Associate Attorney General. To the extent I am involved in the budget process or other matters related to enforcement of the laws governing intellectual property, I will work to ensure that resources are allocated properly.

17. In 2003, the Justice Department created an internal "IP Task Force" to raise the priority of intellectual property enforcement and to coordinate the efforts of the many components of the Department that play an important role in this area, including the Criminal Division, the U.S. Attorneys, the FBI, the Civil Division and the Antitrust

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Division. That Task Force remained in place throughout the Bush Administration and Deputy Attorney General Mark Filip last served as its head.

a. Do you intend to continue the IP Task Force as an integral part of the Department's strategy to protect intellectual property?

If confirmed as Associate Attorney General, I would seek the advice of the career professionals who work in the area, as well as participants on the IP Task Force, and work with others involved in the process to help determine the most effective approach to enforcing federal law in this area. Given the Task Force's structure, I do not anticipate that the Associate Attorney General would have the final decision on that issue.

b. Given your background, do you expect to head this Task Force, rather than the Deputy Attorney General?

I have no current expectation to head the IP Task Force, assuming that it continues. If I am confirmed, I will work with the Attorney General and the Deputy Attorney General to ensure that the Task Force is appropriately staffed.

18. In 2007, the FBI and the People's Republic of China Ministry of Public Security conducted the largest ever joint counterfeiting and piracy investigation, "Operation Summer Solstice." Throughout the course of this investigation, agents arrested 25 individuals in China and seized more than a half billion dollars worth of counterfeit software (worth more than all the counterfeit and pirated goods seized by Customs and Boarder Protection in FY2007).

a. If confirmed, what will you do to build on the success of operations like this that involve cooperation with foreign counterparts (especially China) and to address the problem of counterfeiting and piracy at its source?

If confirmed as Associate Attorney General, the work of the FBI would not be under my responsibility. That said, to the extent that issues related to foreign theft of intellectual property fall within the purview of the Associate Attorney General's responsibilities, I will work with other components of the Department as appropriate to find effective means to enforce U.S. law.

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Responses to Senator Ron Wyden

Questions for the Record for Thomas Perrelli

My state, Oregon, has twice voted on ballot measures on physician aid in dying. I opposed these measures as a private citizen and Oregon voter. However, my Senate seat does not give me the authority or the right to substitute my personal beliefs for judgments made twice by the people of Oregon, and as a Senator, I have fought to protect the decision of Oregonians on their right to make decisions around the end of life.

You represented Michael Schiavo, the husband of Terri Schiavo, in a case that also dealt with the government's role in end-of-life decisions. I objected to efforts by Congress to intervene in that case and to give the federal judiciary jurisdiction over a decision that traditionally has been reserved to the states. I have deep concerns regarding the potential authority of courts, legislative bodies, or government agencies to dictate such personal, moral questions.

If you are confirmed as Associate Attorney General, what principles would you use in deciding whether the Department of Justice should get involved in litigation over end-of-life decisions?

If confirmed as Associate Attorney General, I would apply the same principles in that context as I would in any other. The obligation of the Department of Justice is to represent the interests of the United States, and its powers should be invoked only when an interest of the United States is at stake.

Do you believe that current laws on end-of life decision-making give courts an appropriate authority over end-of-life issues, or do you believe there should be certain limitations on the availability of litigation in such matters?

It is my understanding that when a competent adult's wishes regarding end-of-life issues are unknown, most states provide some type of judicial process that attempts to ensure that the individual's wishes are determined and carried out in a manner consistent with state law. I am unaware of any reason to believe that such state processes are inadequate.

Would you advocate any changes in Federal law that would impact end-of-life decision-making?

In general, this has been an area governed by state law. I have no plans to advocate for changes to federal law that would override state efforts in this area.

Would you advocate any changes in Federal law that would preempt, restrict, or in any way interfere with Oregon's Death with Dignity law?

I have no plans to advocate for such changes, unless there was a law, regulation, or Executive Order of the President or Attorney General proposed for which I believed there were reasonable arguments in support of its constitutionality.

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Follow-up Questions of Senator Tom Coburn, M.D.
Hearing: "*Nomination of Elena Kagan to be Solicitor General of the United States*"
United States Senate Committee on the Judiciary
February 10, 2009

Solomon Amendment
President Obama has said, "the notion that young people…anywhere, in any university, aren't offered the choice, the option of participating in military service, I think is a mistake." As solicitor general, you are tasked with deciding whether and when to appeal if a lower court rules against the government in any case.

- If a lower court strikes down the Solomon Amendment, which it appears this Administration supports, will you recommend intervening on behalf of the government to defend the policy, even though you once described its defeat as "gratifying?" (Reported in the Harvard Law news on 11/30/04 after the Third Circuit struck down the Solomon Amendment)
- Would you recuse yourself from personally arguing a case involving the Solomon Amendment?
- Will you commit to ensuring a vigorous defense of the Solomon Amendment, providing the resources and expertise necessary to vehemently defend the policy?
- Do you believe that you would enjoy a job that requires you to advance a policy that you have described as "discriminatory," "deeply wrong," "unwise," "unjust," "abhor[rent]," a "profound wrong," and a "moral injustice of the first order?"

Answer: As I stated at my confirmation hearing, I know well the facts and issues involved in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and I feel confident in saying that had I been Solicitor General at the time that the 3rd Circuit held the Solomon Amendment unconstitutional, I would have sought certiorari in the Supreme Court, exactly as then-Solicitor General Paul Clement did. *A fortiori*, now that the Supreme Court has upheld the Solomon Amendment, if confirmed I would vigorously defend it against constitutional challenge. I would not recuse myself from participating in or personally arguing such a case because I would feel confident in my ability to supply such a defense given the responsibilities and role of the Solicitor General. I understand that role as representing the interests of the United States, not my personal views. I indeed think that I would enjoy, as well as be deeply honored by, the Solicitor General's position if I am fortunate enough to be confirmed. The advocate's role is frequently to put aside any interests or positions other than those of her clients. And as I hope I expressed at my confirmation hearing, I would take enormous pride in representing and advancing the interests of the United States as a client – even if I would not myself have voted for every one of its statutes.

Solomon Amendment — Amelioration
The Association of American Law Schools (AALS) requires that law schools "ameliorate" the "presence of the military on campus." This guide, produced by the Association of Legal Career

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Professionals, was produced after the Supreme Court upheld the validity of the Solomon Amendment.

- Are you familiar with the "Amelioration Best Practices Guide," published by the Association of Legal Career Professionals in August 2007?
- As dean of Harvard Law School, did you ever consult the Guide or adopt any of its recommendations? If so, which ones?
- The only ameliorative step that is "absolutely mandated" by the AALS is that a notice be posted stating that the military's so-called discriminatory practices are inconsistent with the schools nondiscrimination policy. Also required, however, is an additional "amelioration" step. Do you believe that an additional step is necessary? If so, why is notice insufficient to educate law students of the difference in policy?
- Do you believe that law schools should not only ameliorate any perceived ills that stem from military activities or presence on campus, but that they should also protest either the military's presence or policies? (The Guide refers to a "commitment to acts of protest and amelioration.")
- The Guide describes "[p]rotesting or picketing military recruiters when they come to campus" as an "ameliorative step."
    - Do you think the Guide's characterization of protesting or picketing as "amelioration" is accurate?
    - Do you believe such conduct is appropriate?
    - As dean, do you ever encourage or participate any such protests or pickets of the military?

Answer: I am not familiar with the 2007 Guide to which this question refers, and I never consulted it. I do have some knowledge of earlier AALS guidance on the same issue, which suggested that law schools engage in "amelioration practices." My general approach to this guidance was to interpret it as urging law schools to create a respectful and welcoming environment for gay and lesbian students, which as the dean of Harvard Law School, I would have tried to do regardless. I have never specifically thought about the questions whether the AALS should require "amelioration steps" beyond notice or what the AALS counts as "amelioration." Again, because I understood the concept of "amelioration" as doing the kinds of things that make a community of students feel welcome and respected on campus (which I do for many communities of students), I never experienced this guidance as particularly intrusive. I certainly do not think law schools should feel any obligation to protest the military's restrictive employment policies; at the same time, I believe in principles of free expression that permit members of a law school community to engage in peaceful and non-disruptive protests of all kinds, including to express opposition to governmental policies. The freedom to engage in such expressive activity indeed was relevant to the Court's decision in *Rumsfeld v. FAIR*: in holding that the Solomon Amendment does not violate the First Amendment, the Court noted that "law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy," *id.*, at 60, and "students and faculty are free to associate to voice their disapproval of the military's message." *Id.*, at 69-70. During my tenure as Dean, Harvard Law School itself never sponsored or organized protests of the military's employment policy, but students sometimes did so. I made remarks at one assembly organized for this purpose by

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Lambda, our gay and lesbian student organization, in October 2004; I have provided press coverage of this event to the Judiciary Committee. I believe I also may have attended but not spoken at one other event of this kind.

ROTC:

- As dean of Harvard Law School, your decision to restrict military recruiters' access to students was limited to career services. Does your personal opposition to the Solomon Amendment mean that you also support barring the ROTC from college campuses?
- As dean of the law school, did you ever express objection to the exclusion of the ROTC from Harvard?

Answer: As dean of Harvard Law School, I felt a responsibility to apply and defend the School's longstanding nondiscrimination policy, which prohibits our Office of Career Services from assisting *any* organization (not just the military) that discriminates in employment. At the same time, I worked to ensure that military recruiters in fact had available an alternative and effective method of access to our students. My statements and actions defending the Law School's general nondiscrimination policy did not sweep more broadly. The position I took does not entail a view on the exclusion of ROTC from college campuses, and I never expressed a position on the exclusion of ROTC from Harvard.

Other:

- Please discuss your view of the Second Amendment, in light of the recent *Heller* decision. I would like to better understand the lens through which you view this right, as you will surely be faced with related legislation as Solicitor General.

Answer: The Supreme Court held in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), that the Second Amendment guarantees an individual right to keep and bear arms. In light of this right, the Court invalidated a ban on handgun possession in the home. At the same time, the Court stated that "some measures regulating" firearms would comport with this constitutional right. Essentially, the Court made clear that the Second Amendment right to bear arms should be treated like any other constitutional right – the Court, for example, offered an analogy to the First Amendment – providing strong but not unlimited protection. As I indicated at my confirmation hearing, my concept of the Solicitor General's role includes respect for Supreme Court precedents such as *Heller* and for the principle of *stare decisis* generally.

- In the 109th Congress, both the Senate and the House passed legislation making it a federal crime to transport a minor across state lines to obtain an abortion. Despite bipartisan support in both bodies, such legislation never became law. Should we be so fortunate as to enact this legislation during President Obama's term, will you commit to supporting and defending it to the best of your ability?
    - Do you believe the Constitution protects a woman's right to obtain an abortion?

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- If you do believe the Constitution protects a women's right to obtain an abortion, do you believe limitations such as the one described above would pass constitutional muster?

Answer: If I am confirmed as Solicitor General, I would commit to defending this statute, as I would defend any other, so long as there is any reasonable basis for doing so. I am not familiar with this statute's terms or the constitutional arguments that were made for or against it. The Court has held that the Due Process Clause protects a woman's right to terminate a pregnancy, subject to various permissible forms of state regulation. In most cases, the critical inquiry is whether a regulation imposes an "undue burden" on the exercise of the right – or otherwise stated, places a "substantial obstacle" in the path of a woman seeking an abortion. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As Solicitor General, I owe respect to this body of law and to the principle of *stare decisis*. If there were a reasonable basis for arguing that the statute comported with this body of law, I would defend the statute.

- President Obama has nominated Dawn Johnsen as Assistant Attorney General for the Office of Legal Counsel. As Solicitor General, you will most likely work closely with Ms. Johnsen. Ms. Johnsen is a prolific writer. I would like to ask you about some of the positions that she has taken on issues that may come before you if you are confirmed.
  - In a law review article in the *Yale Law Journal*, Ms. Johnsen wrote, "In recent years, however, courts and state legislatures have increasingly granted fetuses rights traditionally enjoyed by persons. Some of these recent 'fetal rights' differ radically from the initial legal recognition of the fetus in that they view the fetus as an entity independent from the pregnant woman with interests that are potentially hostile to hers."[1] Do agree with this statement?
  - In another *Yale Law Journal* article she wrote, "Granting rights to fetuses in a manner that conflicts with women's autonomy reinforces the tradition of disadvantaging women on the basis of their reproductive capability. By subjecting women's decisions and actions during pregnancy to judicial review, the state simultaneously questions women's abilities and seizes women's rights to make decisions essential to their very personhood. The rationale behind using fetal rights laws to control the actions of women during pregnancy is strikingly similar to that used in the past to exclude women from the paid labor force and to confine them to the "private" sphere."[2] Do you agree with this statement?

Answer: I have not read either of these articles, and I do not know what kind of legislation Professor Johnsen was discussing. For these reasons, I do not think I can sensibly comment on Professor Johnsen's observations or conclusions.

[1] D. Johnsen, "The Creation of Fetal Rights:…", 95 YALE L.J. 599 (1986).
[2] D. Johnsen, "The Creation of Fetal Rights:…", 95 YALE L.J. at 624-25.

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Questions from Senator Cornyn

1. As Solicitor General, you would be charged with defending the Defense of Marriage Act. That law, as you may know, was enacted by overwhelming majorities of both houses of Congress (85-14 in the Senate and 342-67 in the House) in 1996 and signed into law by President Clinton.

   a. Given your rhetoric about the Don't Ask, Don't Tell policy—you called it "a profound wrong—a moral injustice of the first order"—let me ask this basic question: Do you believe that there is a federal constitutional right to same-sex marriage?

   Answer: There is no federal constitutional right to same-sex marriage.

   b. Have you ever expressed your opinion whether the federal Constitution should be read to confer a right to same-sex marriage? If so, please provide details.

   Answer: I do not recall ever expressing an opinion on this question.

2. In 2003, the Massachusetts supreme court ruled that there is a constitutional right to same-sex marriage under the Massachusetts constitution. Do you agree with that ruling? Have you ever discussed it with anyone? What did you say?

   Answer: I have never studied the Massachusetts Constitution, judicial interpretations of that document, or the SJC's decision, so I do not have an informed view. I moderated a panel on the SJC's decision at Harvard Law School on February 5, 2004, but do not recall stating any views of my own at this event. (I have provided a tape of this event to the Judiciary Committee.) I suspect I participated in informal conversation about the decision when it came out, but I cannot remember anything that I said.

3. Do you believe that the Supreme Court's decision in *Boumediene v. Bush*, which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?

   Answer: The Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. I do not think it would comport with this responsibility to state my own views of whether particular Supreme Court decisions were correctly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. In the position of Solicitor General, I would not frequently or lightly ask the Court to reverse one of its precedents, and I certainly would not do so just because I thought the case wrongly decided.

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4. Do you believe that the Supreme Court's decision in *Lee v. Weisman*, which held that a nonsectarian invocation at a public school graduation violated the Establishment Clause, was correctly decided?

   Answer: My answer to this question is the same as my answer to question #3.

5. Do you believe that the Supreme Court's decision in *Zelman v. Simmons-Harris*, which ruled that school-choice programs that include religious schools don't violate the Establishment Clause, was correctly decided?

   Answer: My answer to this question is the same as my answer to question #3.

6. In *Kennedy v. Louisiana*, a case in which the Supreme Court ultimately struck down a Louisiana statute that allowed the death penalty for the aggravated rape of a child, a group of former law lords of the United Kingdom submitted an amicus brief. This brief cited the American Convention on Human Rights and statements of the United Nations Commission on Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights to argue that international law required that nations that retain the death penalty may not extend the death penalty to crimes to which it does not presently apply.

   a. Do you believe that international law forbids federal and state governments from broadening the application of the death penalty? Please explain your answer.

   Answer: I do not believe that international law (assuming it has not been incorporated into domestic federal law) can prevent federal and state governments from broadening the application of the death penalty should they wish to do so. In a case like *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the appropriate question is whether the Eighth Amendment of the U.S. Constitution forbids the application of the death penalty to a particular kind of crime, not whether international law does so.

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WRITTEN QUESTIONS OF SENATOR CHUCK GRASSLEY TO ELENA KAGAN TO BE SOLICITOR GENERAL, U.S. DEPARTMENT OF JUSTICE

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

> **Answer:** Yes, absolutely – in each and every case that comes before me.

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

> **Answer:** I agree that protecting children and families from obscenity is an important objective and that the Justice Department must continue to pursue individuals who violate federal obscenity laws. I understand the Attorney General and the nominee for Deputy Attorney General to agree with this policy as well. If I am confirmed as Solicitor General, I will have significant responsibility for the handling of obscenity cases in the appellate courts. I believe that obscenity causes significant harm in our society, especially to children and women, and I will pursue these cases with all the seriousness and determination they deserve.

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

> **Answer:** The Supreme Court held in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), that the Second Amendment guarantees an individual right to keep and bear arms. The Court granted this right the same status as other individual rights guaranteed by the Constitution, such as those protected in the First Amendment. Like other nominees to the Solicitor General position, I have refrained from providing my personal opinions of constitutional law (except in areas where I previously have stated opinions), both because those opinions will play no part in my official decisions and because such statements of opinion might be used to undermine the interests of the United States in litigation. I can say, however, that I understand the Solicitor General's obligations to include deep respect for Supreme Court precedents like *Heller* and for the principle of *stare decisis* generally. There is no question, after *Heller*, that the Second Amendment

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guarantees Americans "the individual right to possess and carry weapons in case of confrontation."

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

Answer: Please see my answer to question #3 above.

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

Answer: If I am confirmed, I will commit to show *Heller* and the principles articulated in it the full measure of respect that is due to all constitutional decisions of the Court. Only highly unusual circumstances can justify the Solicitor General's office in asking the Court to reconsider a decision, especially one as thoroughly considered as *Heller*. Once again, there is no question, after *Heller*, that the Second Amendment guarantees individuals the right to keep and bear arms and that this right, like others in the Constitution, provides strong although not unlimited protection against governmental regulation.

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

Answer: I have not studied the False Claims Act and its *qui tam* provisions, but I know that the Solicitor General's office often has defended the constitutionality of these provisions in the past. This longstanding practice of defense of *qui tam* supports and reinforces the usual strong presumption of constitutionality that the Solicitor General's office gives to all statutes. If confirmed as Solicitor General, I would apply this presumption to the False Claims Act's *qui tam* provisions as well as give appropriate deference to the Solicitor General office's prior practice regarding these provisions.

7. Recently, a lawsuit was filed alleging that the seal provision of the False Claims Act, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed in camera and remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I've been a critic of prolonged extensions of the seal. I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?

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Answer: Please see my answer to question # 7 directly above. I have not studied the seal provision of the False Claims Act and therefore cannot offer a firm opinion as to its constitutionality. If I am confirmed as Solicitor General, I would defend the seal provision of the False Claims Act, as I would defend any other provision of federal law, so long as there is any reasonable basis for doing so.

8. In 2007, the U.S. Supreme Court in *Gonzales v. Carhart*, by a vote of 5 to 4, rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act's application. Your role as Solicitor General would require you to defend the Act against such challenges. Do you believe that *Gonzales v. Carhart* was correctly decided? Why or why not?

Answer: *Gonzales v. Carhart* is settled law, entitled to deep respect from the Solicitor General under principles of *stare decisis*. In addition, as you note, the Solicitor General has the responsibility of defending federal statutes in this area whenever there is a reasonable ground to do so. If I am confirmed, I would apply these principles in a case involving the Federal Partial-Birth Abortion Act exactly as I would in a case involving any other statute. As Solicitor General, my role would be to represent the interests of the United States, not any personal views I might have (see my answer to question #3 above). In that capacity, I would provide *Gonzales v. Carhart* with all due respect and defend with any reasonable arguments the Partial-Birth Abortion Act against constitutional challenges.

9. Is it your belief that the U.S. Constitution confers a right to abortion? Why or why not?

Answer: Under prevailing law, the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy, subject to various permissible forms of state regulation. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.

10. Is it your belief that the U.S. Constitution compels taxpayer funding of abortion? Why or why not?

Answer: Under prevailing law, the U.S. Constitution does not compel taxpayer funding of abortion. The Court said in *Harris v. McRae*, 448 U.S. 297, 316 (1980), that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.

11. Is it your belief that the U.S. Constitution prohibits informed-consent and parental-involvement provisions for abortion? Why or why not?

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Answer: Under prevailing law, a particular informed-consent or parental-involvement law will meet constitutional standards if it does not impose an "undue burden" on a woman's right to terminate a pregnancy. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), upheld informed-consent and parental-consent provisions under this standard. As Solicitor General, I would owe respect to this law, as I would to general principles of *stare decisis*.

12. You have been a staunch opponent of the Solomon Amendment, a law that requires colleges and universities to provide students access to military recruiters or lose federal funding. For example, you have characterized the Solomon Amendment as "immoral." You also filed an *amicus* brief with the U.S. Supreme Court opposing the Solomon Amendment in the case *Rumsfeld v. FAIR*. Given your strong opposition to the Solomon Amendment, how can you reassure me that you will vigorously defend this law?

Answer: I would defend this law as vigorously as any other in the United States statute books. I deeply believe that different roles carry with them different responsibilities and demand different actions. My role and responsibilities as Solicitor General, should I be confirmed, would be utterly unlike my role and responsibilities as the dean of Harvard Law School to support the school's longstanding nondiscrimination policy. As Solicitor General, my function would be to advance the interests of the United States, and the interests of the United States call for the defense of federal statutes against constitutional challenge whenever there is a reasonable basis for doing so. As I stated at my confirmation hearing, I know well the facts and issues involved in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and I feel confident in saying that had I been Solicitor General at the time that the 3rd Circuit held the Solomon Amendment unconstitutional, I would have sought certiorari in the Supreme Court, exactly as the then-Solicitor General did. And now that the Supreme Court has upheld the statute, I would treat that decision with full respect and rely on it to defend the Solomon Amendment against any constitutional challenge.

13. Congress enacted PL 109-8, the bankruptcy reform law, in 2005. One of the provisions of this law forbids bankruptcy attorneys from counseling debtors from incurring debt in contemplation of filing for bankruptcy. Debtor attorneys have challenged this provision, arguing that it violates the First Amendment. The Fifth and Sixth Circuits have split on this question. So far, the Justice Department has defended the constitutionality of the law. If you are confirmed as the next Solicitor General, will you commit to continue to defend the constitutionality of this law?

Answer: As noted previously, the Solicitor General's Office applies a strong presumption of constitutionality to all statutes. If I am confirmed, I will continue this practice of defending federal statutes (outside of a small category of cases involving impermissible infringement on the President's Article II powers) whenever there is a reasonable basis for doing so. In addition, I recognize a significant interest in continuity in the Solicitor General's positions. I am not

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currently familiar with this provision of the bankruptcy reform law or the judicial decisions regarding it, but the presumption of the statute's constitutionality, the Solicitor General's prior decision to defend the statute, and the existence of a circuit court decision upholding the statute all would favor continued defense of the statute against constitutional challenge.

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Questions from Senator Orrin Hatch

1. At your hearing, I asked you about the case of *Knox v. United States*, in which the Bush Justice Department had obtained a conviction of Stephen Knox for receiving and possessing child pornography. The videotapes he possessed depicted young girls who were minimally clothed. On October 15, 1992, the U.S. Court of Appeals for the Third Circuit affirmed the conviction, holding that a "lascivious exhibition of the genitals or pubic area" in the definition of child pornography does not require nudity. On September 17, 1993, the Clinton Justice Department told the Supreme Court that the conviction should be reconsidered under a new construction of the statute that would require "substantial…genital or pubic visibility." The Supreme Court remanded the case and the Third Circuit again held that "the federal child pornography statute, on its face, contains no nudity or discernibility requirement." Along the way, the Senate voted 100-0 and the House voted 425-3 to reject the new construction of the statute and President Clinton wrote the Attorney General, stating that "I fully agree with the Senate about what the proper scope of the child pornography law should be."

At your hearing, you properly affirmed that the Solicitor General must make every reasonable argument defending the constitutionality of federal statutes. In this case, the Solicitor General, on his own initiative, argued on appeal for a different construction of the statute than the one under which the conviction was obtained.

- Is this ever appropriate for the Solicitor General to do?
- Do you believe the Third Circuit's construction of the child pornography definition in *Knox* was correct?

  Answer: As I noted at my confirmation hearing, I am not familiar with the *Knox* case or the positions taken by the Solicitor General at its various stages. In general, the Solicitor General should argue on appeal for the construction of the statute under which a conviction is obtained. An exception might be if that construction of the statute were clearly unconstitutional; but as I have said on a number of occasions, the Solicitor General's office should apply a presumption of constitutionality when dealing with federal statutes. I have not read the statutory provision at issue in *Knox* or the Third Circuit's opinion interpreting that provision, so I do not have an independent view of the correctness of the Third Circuit's construction. But I will say that however suspicious a court generally should be about subsequent legislative history, the subsequent votes of Congress in this case surely suggest that the Third Circuit, rather than the Solicitor General's office, got the matter right.

2. At your hearing, I asked you about your review of Professor Stephen Carter's book, *The Confirmation Mess*. Writing in the *University of Chicago Law Review*, you distinguished between a judicial nominee's "judicial philosophy" and "her views on particular constitutional issues" and argued that Senators should ask about both. You wrote that the "critical inquiry as to any individual…concerns the votes she would cast…and the direction in which she would move the institution." You suggested that failing to focus on such views and votes gives the confirmation process "an air of vacuity and farce" and renders the Senate "incapable of either properly evaluating nominees or appropriately educating the public."

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- How do you reconcile this view with Canon 5A of the Model Code of Judicial Conduct or the judicial oath of office which require judicial impartiality?
- At your hearing, you said: "I'm not sure that, sitting here today, I would agree with that statement." Do you?
- Do you still believe that Senators who do not ask about particular issues, votes, and directions are contributing to a vacuous or farcical confirmation process?
- If you have changed your views on these questions, please explain why.

Answer: The review clearly stated, in accord with Canon 5A and the judicial oath of office, that judicial nominees cannot make pledges, promises, or commitments (whether explicit or implicit) as to a very wide range of matters; it argued, however, that some kinds of statements – "comment[s] on judicial methodology, on prior caselaw, on hypothetical cases, on general issues" – often do not fall within this prohibition (pp. 939-40). (In keeping with this distinction, I want to emphasize, because this question may appear to suggest otherwise, that I never suggested Senators should ask about particular "votes.") I have not reviewed the caselaw or commentary on the Model Code of Judicial Conduct for many years and do not know whether my understanding of it was correct when I wrote this review in 1995 or, perhaps more importantly, is so today. I do think now, more than I did then, that significant considerations (even apart from specific rules of judicial conduct) support some real reticence from judicial nominees on these matters; I am also less convinced than I was in 1995 that substantive discussions of legal issues and views, in the context of nomination hearings, provide the great public benefits I suggested. Yet that leaves the question just what these hearings should be about – what matters Senators should explore with the nominee and how the nominee should be evaluated. I confess to finding these questions very difficult.

3. At your hearing, you said the view you expressed in your review of Professor Carter's book resulted from your experience working on the Judiciary Committee staff and "feeling a little bit frustrated that I really wasn't understanding completely what the judicial nominee in front of me meant and what she thought." As Senator Cardin explained at the hearing, you were special counsel to then-Chairman Biden in the summer of 1993, working on the confirmation of Supreme Court Justice Ruth Bader Ginsburg. At her hearing, Justice Ginsburg said that "I must avoid giving any forecast or hint about how I might decide a question I have not yet addressed." She also said: "A judge sworn to decide cases impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process."

- Were these examples of the response that you found frustrating?
- Was Justice Ginsburg correct in adopting that standard?
- Given your frustration at the time and the standards you wrote about in your review of Professor Carter's book, what approach would you have taken instead had you been the nominee?

Answer: In the review, I wrote that I was frustrated by what I called Justice Ginsburg's "pincer movement" – the tendency to say that questions were either too specific or too general to be able to answer, with little ground in between. Even at the time I wrote the review, I agreed with Justice Ginsburg that a judicial nominee should not forecast how she would decide a particular case; the question that seemed different to me, as noted above, was whether a nominee could answer

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questions about "judicial methodology," "prior caselaw," "hypothetical cases," and "general issues." I think I made clear in the review that I would have done the same thing as Justice Ginsburg given prevailing conventions and standards. (I asked in the review, "Who would have done anything different?".) The question I raised in the review was whether those conventions and standards were correct. As noted in my answer above, my views on this question have evolved in some ways, but I continue to think the question well worth exploring.

4. Do you believe that the Supreme Court's decisions that material meeting the definition of obscenity in *Miller v. California* and its progeny lack any First Amendment protection were correctly decided? Do you believe that this definition, which relies on community standard, properly applies to the Internet? Or do you believe there should be a definition of obscenity based on a national standard applied to the Internet?

Answer: The Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. As I have noted in responding to several Senators' questions, I do not think it would comport with this responsibility to state my own views of whether particular Supreme Court decisions are correctly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. The cases this question references are particularly well-settled. *Miller v. California*, 413 U.S. 15 (1973), established more than 35 years ago the definition of obscenity that continues in use today. And the Supreme Court has *always* understood obscenity to be entirely outside the scope of First Amendment protection. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957) (cataloguing speech restrictions at the time the Constitution was ratified and concluding that obscenity was "outside the protection intended for speech and press"). I have not thoroughly studied the questions whether and how the *Miller* standard, with its reliance on community standards, applies to the internet. The Court considered this question in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), holding that a federal statute (the Child Online Protection Act) regulating obscene material on the internet was not invalid on its face because it applies local community standards in determining whether particular material is obscene, but leaving unsettled whether certain as-applied challenges might be successful. I view the holding in this case as settled law, to which the Solicitor General owes respect. I do not know whether any as-applied challenges have been made to this statute since the decision in *Ashcroft v. ACLU*, so I cannot say anything further about the viability of these challenges. Of course, to the extent that a federal statute, whether the Child Online Protection Act or any other, provokes such challenges, I would apply the usual strong presumption of the Solicitor General's office that the statute meets constitutional standards.

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Written Questions of Chairman Patrick Leahy
For Elena Kagan
Nominee to be Solicitor General of the United States
Submitted February 10, 2009

In a civil case before the 9th Circuit Court of Appeals yesterday, *Mohamed et al v. Jeppesen Dataplan, Inc.*, the Department of Justice adhered to its claim that the "state secrets" privilege required the dismissal of a lawsuit claiming that a unit of Boeing Company provided aircraft to fly people to foreign countries where they were tortured. Last year I chaired a hearing where we explored how the "state secrets" privilege had been greatly expanded and abused by the Bush administration. The privilege should be limited to protecting our national security and not used to avoid accountability.

1. If confirmed, will you review the invocation of the privilege in this case and consider whether through use of CIPA or other procedures there is a way to allow this case to proceed on the merits?

   Answer: My understanding is that the Attorney General has directed a review of all litigation in which the United States Government has asserted the state secrets privilege, including the case you cite. If I am fortunate enough to be confirmed, I will work with the Attorney General and others at the Department of Justice and across the agencies to ensure that the United States invokes the state secrets privilege only in legally appropriate situations.

2. Will you provide the Judiciary Committee with briefings on the basis for the invocation of the privilege in this and other cases?

   Answer: Although I have a good deal to learn about the Solicitor General's responsibilities, my current understanding is that the Solicitor General is not the primary person responsible for invoking the state secrets doctrine in litigation. I certainly will work with the Attorney General to ensure that the most appropriate official in the Justice Department provides such a briefing.

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QUESTIONS FOR THE RECORD FOR ELENA KAGAN
SUBMITTED BY SENATOR JEFF SESSIONS

1. Do you believe moral and ethical principles can provide a rational basis to support a law?

   Answer: Yes. I believe that many laws are grounded in moral and ethical principles and that those principles can provide a rational basis to support such laws.

2. In his famous *Lochner* dissent, Justice Holmes wrote:

   > It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.
   >
   > . . .
   >
   > **I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.**[1]

   A. Do you agree or disagree with Justice Holmes's view of judicial restraint when it comes to second-guessing the legislature on morally inspired legislation, as articulated in *Lochner?* How would you articulate your own view in this area, especially as it relates to your likely future role as the chief federal advocate before the Court?

   Answer: I agree generally with Justice Holmes's observation that courts should be restrained in second-guessing legislative action, including all the kinds of legislation that Justice Holmes cites. As the chief advocate for the United States before the Supreme Court, I will frequently be in the position

[1] *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

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of defending federal statutes and therefore expect often to urge this restraint on the Court.

B. Do you believe the federal government has a rational basis for the military's recruiting policy – whether embodied in "Don't Ask/Don't Tell" or the statute that policy supplements – 10 U.S.C. § 654? How would you analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?

Answer: I have never stated a position on the constitutionality of 10 U.S.C. § 654, and I am mindful of the established practice of the Solicitor General's office not to express views or take positions in advance of the presentation of a concrete case. I can, however, say the following. If I am confirmed as Solicitor General, I would apply the same strong presumption of constitutionality to 10 U.S.C. § 654 as I would to every other statute, irrespective of my personal views of the policy articulated in that statute. I know that courts have upheld this statute against constitutional attack under the rational basis standard, *see, e.g. Able v. U.S.*, 155 F.3d 628 (2nd Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), that the rational basis standard is generally easy to satisfy, and that courts frequently grant Congress special deference in military matters, *see, e.g., Rostker v. Godberg*, 453 U.S. 57 (1981). All of these precedents and principles would support, in a suit challenging 10 U.S.C. § 654, the usual strong presumption of constitutionality that the Solicitor General's office applies to all federal statutes.

C. Do you believe 10 U.S.C. § 654 violates the Equal Protection Clause of the Fourteenth Amendment, as incorporated by the Fifth Amendment? Please explain your views.

Answer: Please see my answer directly above. If I am confirmed as Solicitor General, one of my principal responsibilities would be to defend statutes as long as there is any reasonable basis to do so. In the context of the usual process that the Solicitor General's office follows when considering the positions it will adopt in litigation, I would take into account as I carried out this responsibility the various precedents and principles noted above, all of which support the constitutionality of 10 USC § 654.

3. In a *Kentucky Law Journal* article, Clinton-era Solicitor General Drew Days wrote "the Solicitor General has the power to decide whether to defend the constitutionality of the acts of Congress or even to affirmatively challenge them." What federal statutes now on the books do you believe are unconstitutional?

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Answer: If I am confirmed as Solicitor General, I would follow the traditions of the office and defend the constitutionality of each and every statute except when there is no reasonable basis to do so or the statute impermissibly curtails Article II powers. I do not now know of any federal statute that could not be defended under this standard (although I am of course not fully knowledgeable about the great mass of federal statutes).

4. In your 1996 law review article, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," you take to task what you call "[l]aws 'equalizing' the speech market."[2] You question whether a politician or policy-maker could check his or her views in deciding whether speech needed to be balanced by another viewpoint. You write:

> **It is the rare person who can determine whether there is 'too much' of some speech (or speakers), 'too little' of other speech (or speakers), without regard to whether she agrees or disagrees with – or whether her position is helped or hurt by – the speech (or speakers) in question."**[3] You further wrote that "the goal of equalization often and well conceals what does conflict with the First Amendment: the passage of laws tainted with ideological, and especially with self-interested, motivations.[4]

Do you still believe that "[i]t is the rare person who can determine whether there is 'too much' of some speech (or speakers), 'too little' of other speech (or speakers), without regard to whether she agrees or disagrees with – or whether her position is helped or hurt by – the speech (or speakers) in question[?]"

Answer: In this part of my article, "Private Speech, Public Purpose," I ask what accounts for the Supreme Court's frequent (though not universal) suspicion of laws designed to "equalize" the speech market – otherwise put, to promote balance or diversity of opinion. The question I set out to answer, after establishing that the Court indeed tends to be suspicious of such laws, is: "what view of the First Amendment accounts for the Court's refusal to allow, by means of

[2] Elena Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 U. Chi. L. Rev. 413, 464 (1996).
[3] *Id.* at 469-70.
[4] *Id.* at 471.

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restrictions, the redistribution of expression?" (p. 466). I explain the Court's doctrine in part by noting that views on laws designed to promote balance in the "speech market" often (though again not always) are influenced by views on the content of the speech that such laws predictably tend to favor (or disfavor). I continue to find this account of the Court's doctrine generally persuasive, although I should note that I have not fully explored whether the Court's doctrine today is as it was in 1996, when I wrote this article.

5. The section of your article addressing "laws equalizing the speech market" states in its conclusion: "Laws directed at equalizing speech thus join the list of laws that, although facially content neutral, demand strict scrutiny because of the heightened concerns relating to improper purpose."[5] Do you believe the "Fairness Doctrine," if revived, should be subject to strict scrutiny under the First Amendment?

   Answer: The sentence quoted above is what I might call a sympathetic description of the Court's general approach to laws attempting to promote balance in the expressive arena. (Another sentence in the same paragraph echoes: "The Court thus treats these laws in a strict manner – presuming improper taint though giving the government a chance to rebut this presumption." (p. 472)). Earlier in the same section, I note that the Court departed from this general approach in approving the FCC's then-existing fairness doctrine (p.465). The article does not state any view, nor do I recall having one at the time, of whether the Court was right to craft this exception, and I have not considered the matter any further in the years since.

6. During your confirmation hearing, you were asked about a memorandum you wrote in 1987 as law clerk to Justice Thurgood Marshall in *Bowen v. Kendrick*. In *Bowen,* the Supreme Court reversed a lower court's ruling that federal grants to religious and other organizations under the Adolescent Family Life Act (AFLA) violated the Establishment Clause of the First Amendment. The Supreme Court, in a 5-4 opinion written by Chief Justice Rehnquist, declared that AFLA's funding mechanism did <u>not</u> violate the Establishment Clause. The Court noted "[t]here is no requirement in the Act that grantees be affiliated with any religious denominations, although the Act clearly does not rule out grants to religious organizations." *Id.* at 604. Although the Court remanded for consideration of whether the Act had been applied correctly in individual grants, the Court made clear: "The facially

[5] *Id.* at 472

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neutral projects authorized by the AFLA-including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc., are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." *Id.* at 613.

Your memo suggested a different approach and made clear your view – at the time – that AFLA violated the Establishment Clause:

> "I think the [district court] got the case right. The funding here is to be used to support projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. It would be difficult for <u>any</u> religious organization to participate in such projects without injecting some kind of religious teaching. The government is of course right that religious organizations are different and that these differences are sometimes relevant for the purposes of government funding. The government, for example, may give educational subsidies to religious universities, but not to parochial schools. But when the government funding is to be used for projects so close to the central concerns of religion, <u>all</u> religious organizations should be off limits."

Kagan Bowen Mem. at 3 (emphasis in original).

When asked about your memo during your hearing, you described it as "the dumbest thing I've ever read." You appeared to want to explain further why your 22 year-old memorandum was "the dumbest thing," but time constraints and further questioning did not allow your explanation. I would like to give you the opportunity to provide your explanation and clarify your current position. Why do you believe the legal position described in your memorandum is so incorrect you now view it as "the dumbest thing[?]" Further, what is your current view of the constitutionality of faith-based funding under the Establishment Clause?

> **Answer:** I indeed believe that my 22-year-old analysis, written for Justice Marshall, was deeply mistaken. It seems now utterly wrong to me to say that religious organizations generally should be precluded from receiving funds for providing the kinds of services contemplated by the Adolescent Family Life Act. I instead agree with the *Bowen* Court's statement that "[t]he facially neutral projects authorized by the AFLA-including pregnancy testing, adoption counseling and

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referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.- are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations." As that Court recognized, the use of a grant in a particular way by a particular religious organization might constitute a violation of the Establishment Clause – for example, if the organization used the grant to fund what the Court called "specifically religious activity." But I think it incorrect (or, as I more colorfully said at the hearing, "the dumbest thing I ever heard") essentially to presume that a religious organization will use a grant of this kind in an impermissible manner.

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Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter

At your hearing, Senator Hatch asked you about a statement you made on senatorial inquiry into a nominee's judicial philosophy and views on specific issues in your review of Stephen Carter's book, *The Confirmation Mess*. You wrote: "The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues." In response to Senator Hatch's question, you stated, "I'm not sure that, sitting here today, I would agree with that statement;" however, you agreed that there "has to be a balance" and the "Senate has to get the information that it needs ... [from] the nominee, for any particular position -- whether it's judicial or otherwise." In light of your acknowledgement, I would like to have your views on the following constitutional issues.

Answer: I appreciate this comment and stand by what I said at my hearing. I would note only that the information the Senate needs is related to the position that the nominee hopes to perform. So, for example, information that is relevant to one executive branch position may not be relevant to another, and information that is relevant to a judicial position may not be relevant to either (or vice versa).

The Death Penalty

1. Justice Marshall, the justice for whom you clerked, maintained that the death penalty was always unconstitutional. Do you think that Justice Marshall had it right?

    a. Do you support the death penalty?

    b. Do you believe it is constitutional as applied in the United States?

    c. If your answer is no, are you prepared to argue in favor of the constitutionality of the death penalty before the Supreme Court?

Answer: I am fully prepared to argue, consistent with Supreme Court precedents, that the death penalty is constitutional. As Solicitor General, I would represent the interests of the United States, as expressed in legislation and executive policy. Like other nominees to the Solicitor General position, I have refrained from providing my personal opinions (except where I previously have disclosed them), both because these opinions will play no part in my official decisions and because such statements of opinion might be used to undermine the interests of the United States in litigation. But I can say that nothing about my personal views regarding the death penalty (relating either to policy or law) would make it difficult for me to carry out the Solicitor General's responsibilities in this area.

2. Last year, in *Kennedy v. Louisiana*, the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Justice Kennedy based his opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of

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capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006, as reported first by Col. Dwight H. Sullivan in his blog and later by the *New York Times*.

a. Given the heinousness of the crime, as well as the new information on the federal government's codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?

b. Following the Supreme Court's decision, President Obama announced at a press conference: "I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime." Do you agree with that statement?

c. Would you, as Solicitor General, encourage the Court to reconsider its decision?

Answer: I do not think it comports with the responsibilities and role of the Solicitor General for me to say whether I view particular decisions as wrongly decided or whether I agree with criticisms of those decisions. The Solicitor General must show respect for the Court's precedents and for the general principle of *stare decisis*. If I am confirmed as Solicitor General, I could not frequently or lightly ask the Court to reverse one of its precedents, and I certainly could not do so because I thought the case wrongly decided. There are circumstances, however, in which the Solicitor General properly can petition the Court to reconsider a decision. Relevant to this inquiry are whether a rule of law has been found unworkable, whether subsequent legal developments have left the rule an anachronism, or whether premises of fact are so far different from those initially assumed as to render the rule irrelevant or unjustifiable. The last of these factors would seem the one most potentially relevant to the *Kennedy v. Louisiana* decision. But I currently do not know enough about this decision or the facts and circumstances surrounding it to say whether I would ask the Court to reconsider it if I were confirmed as Solicitor General; nor would I make this determination without going through the extensive process that the Solicitor General's office typically uses in such cases.

Constitutional and Statutory Interpretation

3. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution?

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

b. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

c. Would you ever give weight to other nations' restrictions on gun rights when interpreting the Second Amendment?

Answer: This set of questions appears different when viewed from the perspective of an advocate than when viewed from the perspective of a judge. At least some members of

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the Court find foreign law relevant in at least some contexts. When this is the case, I think the Solicitor General's office should offer reasonable foreign law arguments to attract these Justices' support for the positions that the office is taking. Even the Justices most sympathetic to the use of foreign law would agree that the degree of its relevance depends on the constitutional provision at issue. A number of the Justices have considered foreign law in the Eighth Amendment context, where the Court's inquiry often focuses on "evolving standards of decency" and then on the level of consensus favoring or disfavoring certain practices. By contrast, none of the Justices relied on other nations' restrictions on gun rights in their opinions in *District of Columbia v. Heller*, 554 U.S. ___ (2008), and the grounded historical approach adopted in that case (and echoed even in the dissents) would grant no relevance to arguments from comparative law in defining the scope of the Second Amendment right.

4. What are your views on judicial activism?

   a. Do you agree with the view that the courts, rather than the elected branches, should take the lead in creating a more just society?

Answer: I do not agree with this view. I think it is a great deal better for the elected branches to take the lead in creating a more just society than for courts to do so.

   b. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), in which the Supreme Court held that a right to assistance in committing suicide was not protected by the Due Process Clause, the Court reasoned: "we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."

      i. Do you agree with the Court's assessment of the importance of public debate and legislative action?

      ii. The *Glucksberg* decision has proven to be a case that stimulated healthy debate amongst the states. As Solicitor General, will you argue for more reserved rulings such as the *Glucksberg*, which support the states' efforts and legislative action as the proper way to effect change?

Answer: I do agree with the Court's assessment of the importance of public debate and legislative action. If I am confirmed as Solicitor General, I expect I would make this point to the Court with some frequency, because it is likely to be relevant in any case in which a congressional statute is subject to constitutional challenge. In cases involving state legislation, the Solicitor General's office of course has more discretion regarding the appropriate position (if any) to take. But in these cases as well, I think an important consideration for the office to take into account is the degree to which the courts, by

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staying their hand, can encourage experimentation and healthy debate among the states and their citizens.

5. What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?

   a. Is there any room in constitutional interpretation for the judge's own values or beliefs?

Answer: I think a judge should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs. In order to accomplish this result, the judge should look to constitutional text, history, structure, and precedent. Relating these views to the position for which I am nominated, I think these kinds of arguments also are most successful in advocacy before the courts in constitutional cases.

   b. Do you believe that the Constitution, properly interpreted, confers a right to a minimum level of welfare?

Answer: The Constitution has never been held to confer a right to a minimum level of welfare. For a very short period of time around 1970, some courts and commentators suggested that welfare counted as a fundamental interest for purposes of equal protection review. This period of constitutional thought, however, came to a close very quickly, as the courts determined that welfare policy was not best made by the judicial branch. This determination comported with this nation's traditional understanding that the Constitution generally imposes limitations on government rather than establishes affirmative rights and thus has what might be thought of as a libertarian slant. I fully accept this traditional understanding, and if I am confirmed as Solicitor General, I would expect to make arguments consistent with it.

   c. Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?

Answer: The Constitution has never been held to confer a right to engage in obscene speech. To the contrary, the Court long has considered obscenity a category of "low-value" speech that is unprotected by the First Amendment. *Miller v. California*, 43 U.S. 15 (1973), sets out the basic test for what material counts as obscene. I fully accept this longstanding body of law, and if I am confirmed as Solicitor General, I would expect to make arguments consistent with it.

6. Do you believe the President has the constitutional authority as commander-in-chief to override laws enacted by Congress and to immunize people under his command from prosecution if they violate these laws passed by Congress?

   a. Do you believe the President has the authority to circumvent the Foreign Intelligence Surveillance Act (FISA), and bypass the FISA court to conduct warrantless electronic surveillance that may include spying on Americans?

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Answer: The appropriate analysis in considering any question of this kind derives from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that opinion, Justice Jackson describes three situations: the first where executive power is exercised pursuant to a congressional authorization; the second where executive power is exercised in the absence of any congressional action; and the third "when the President takes measures incompatible with the expressed or implied will of Congress." In the last situation, Justice Jackson notes, presidential "power is at its lowest ebb" and "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." This does not mean the President *never* has power to act in such a situation, for on some occasions, as Justice Jackson recognizes, Congress is indeed "disabl[ed]" from acting upon a subject. But these occasions are rare and cannot be created or justified merely by a general invocation of the commander-in-chief power. These principles are the ones I would apply to the consideration of any executive action, including any action relating to FISA.

7. How would you determine Congressional intent in cases of statutory interpretation?

    a. Should presidential signing statements be considered by a court in construing Congressional intent?

    b. What weight would you give foreign law in statutory interpretation?

Answer: By far the best way of determining Congressional intent in cases of statutory interpretation is to look at what *Congress* intended – not what either the President or foreign law says about the language in dispute. There may be exceptional occasions when non-Congressional sources can provide clues to meaning – for example, when Congress itself has indicated that it is looking to foreign law or when a Presidential signing statement makes note of a particular piece of legislative history. In general, however, such sources have far less weight than the actual language of the statutory provision in question and the legislative history (if any) surrounding it.

8. In 1993, you worked on Justice Ginsburg's confirmation hearing. Prior to Justice Ginsburg's confirmation to the Supreme Court, she wrote on a number of women's issue. She had written that the age of consent for women should be 12, that prisons should house men and women together in order to have gender equality, that Mother's and Father's Day should be abolished because they stereotype men and women, and that there is a constitutional right to prostitution. In a 1995 book review, you called Justice Ginsburg a "moderate." Do you believe these are moderate positions?

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

    b. Justice Ginsburg said that there should be Federal funding for abortion. Do you believe that is a moderate position?

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c. Do you think Justice Ginsburg's record on the Supreme Court demonstrates that she is a "moderate?"

Answer: My statement in 1995 that Justice Ginsburg was a "moderate" (meaning something like "in the middle") was based on her record on the Court of Appeals for the D.C. Circuit, not on any of the positions you cite. I do not recall (or perhaps never knew) what Justice Ginsburg said about the women's issues you cite, but as these positions are presented here, I do not agree with them and would not characterize them as moderate. Similarly, on the assumption that Justice Ginsburg once advocated a constitutional right to funding for abortion, that position has been decisively rejected. The Supreme Court held several decades ago that such funding is not a matter of constitutional right, *see Harris v. McRae*, 448 U.S. 297 (1980), and that holding has not since been seriously challenged. Given that I hope to be arguing before her one day soon, I hope you will let me decline to characterize Justice Ginsberg's record on the Court; I am concerned that applying any label to her, or to any other Justice, would compromise my ability to be the best advocate possible for the interests of the United States.

9. In *Boumediene v. Bush*, the Supreme Court held that the detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, "are entitled to the privilege of habeas corpus to challenge the legality of their detention." Slip Op. at 42. The Court based its holding on Article I, Section 9, Clause 2, of the Constitution (the Suspension Clause), which allows for suspension of habeas corpus rights only in cases of rebellion or invasion. Currently, a federal judge is exploring whether *Boumediene*'s result reaches another military prison where the U.S. now holds perhaps three times the number of detainees still left at Guantanamo Bay — the "Bagram Theater Internment Facility" at an airfield some 40 miles outside of Kabul, Afghanistan.

   a. Do you believe that the detainees imprisoned at Bagram are entitled to the writ of habeas corpus?

   b. Since both prisons are under the total control of the U.S., and both prisons may be used to imprison these men for an unlimited duration (although the President has vowed to close Guantanamo), how do you distinguish them?

Answer: On February 20, the Department of Justice filed papers in a case in the U.S. District Court for the District of Columbia stating that "the Government adheres to its previously articulated position" that the court lacks jurisdiction "over habeas petitions filed by detainees held at the United States military base in Bagram, Afghanistan." I played no role in this decision, but if I am confirmed as Solicitor General, I might well be called on to represent the position of the United States in this matter. Accordingly, I think I should refrain from saying anything more than the government previously has argued on the questions you raise.

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Particular Cases

10. Do you believe that the Supreme Court's Second Amendment decision in *District of Columbia v. Heller* was rightly decided?

11. Do you believe that the Supreme Court's Takings Clause decision in *Kelo v. New London* was correctly decided?

12. Do you believe that the Supreme Court's decision in *Zelman v. Simmons-Harris*, which ruled that school-choice programs that include religious schools don't violate the Establishment Clause, was correctly decided?

13. Do you believe that the Supreme Court's decision in *Morrison v. Olson*, which ruled that the independent-counsel statute did not violate the constitutional separation of powers, was correctly decided?

    Answer: For questions 10 through 13, my answer is the same. As noted earlier, the Solicitor General owes important responsibilities to the Court, one of which is respect for its precedents and for the general principle of *stare decisis*. I do not think it would comport with this responsibility to state my own views of whether particular Supreme Court decisions were rightly decided. All of these cases are now settled law, and as such, are entitled to my respect as the nominee for Solicitor General. In that position, I would not frequently or lightly ask the Court to reverse one of its precedents, and I certainly would not do so because I thought the case wrongly decided.

Defense of Statutes and Regulations as Solicitor General

14. You have been outspoken in your opposition to the military's "Don't Ask, Don't Tell" policy and the Solomon Amendment, which requires college campuses to permit military recruiters or forgo government funding. In fact, you have called it "a profound wrong – a moral injustice of the first order." In our private meeting and at your hearing, you said that that you thought you could overlook your strongly held personal views with regard to the Solomon Amendment and "Don't Ask, Don't Tell" and defend these statutes if needed. While I respect your position, I think that such an action may not be quite so easy when it concerns a matter you believe is a "moral injustice of the first order."

    a. What other "moral injustices of the first order" do you see in our society?

    b. Would you be able to defend laws that arguably perpetuate such injustices with equal vigor?

    c. If not, what makes the "moral injustice" with regards to "Don't Ask, Don't Tell" different?

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d. According to a December 1, 2004, *Boston Globe* article, Harvard was the first major law school to reinstate its ban against military recruiters on campus following the Third Circuit's decision enjoining the enforcement of the Solomon Amendment. At the time, you wrote an email to students stating "This return to our prior policy will allow [the Office of Career Services] to enforce the law school's policy of nondiscrimination without exception, including to the military services. I am gratified by this result, and I look forward to the time when all law students will have the opportunity to pursue any legal career they desire." The article further notes that "Leaders at most of the law schools reached ... said they have no immediate plans to change their policies." Why didn't you wait to see what the Supreme Court decided before reinstating the ban?

e. Will you decline to seek appellate review for cases which depart from the principles the Supreme Court articulated in *Rumsfeld v. FAIR*?

f. Will you seek appellate review of cases that challenge the "Don't Ask, Don't Tell" policy?

Answer: I view as unjust the exclusion of individuals from basic economic, civic, and political opportunities of our society on the basis of race, nationality, sex, religion, and sexual orientation. My role as Solicitor General, however, would be to advance not my own views, but the interests of the United States, as principally expressed in legislative enactments and executive policy. I am fully convinced that I could represent all of these interests with vigor, even when they conflict with my own opinions. I believe deeply that specific roles carry with them specific responsibilities and that the ethical performance of a role demands carrying out these responsibilities as well and completely as possible. The Solicitor General's role is to defend and advance the interests of the United States, and I would carry out those responsibilities, and those responsibilities alone, if I am fortunate enough to be confirmed to the position.

The Solomon Amendment provides a good illustration of the point I am making. As the dean of a law school with a general nondiscrimination policy – meant to protect each of our students regardless of such factors as race, religion, sex, or sexual orientation – I thought the right thing to do was to defend that policy and to do so vigorously. For that reason, when the Third Circuit held the Solomon Amendment unconstitutional, I reinstated the school's policy pending the Supreme Court's decision in *Rumsfeld v. FAIR*. (Of course, Harvard Law School has been in full compliance with the Supreme Court's decision since the day it was issued.) As Solicitor General, I would have a wholly different role and set of responsibilities. As I said at my hearing, I know well the procedural posture, facts, and arguments in the case, and I am sure that had I been Solicitor General at the time the Third Circuit decision came down, I would have asked the Supreme Court to review the decision. (Similarly, I would have sought appellate review in the Third Circuit had the district court held the Solomon amendment unconstitutional.) Indeed, this would have struck me as an easy case: a federal statute had been invalidated on constitutional grounds and there were clearly reasonable arguments that could be made in its defense. Those arguments, of course, would only be stronger

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today, in any future challenge to the Solomon Amendment, given the Supreme Court's emphatic decision upholding that statute's constitutionality. My approach to cases involving challenges to 10 U.S.C. § 654, the statute involving the don't-ask-don't-tell policy, would be the same. In this context, unlike in *Rumsfeld v. FAIR*, I do not know and cannot discuss the facts, procedural posture, and arguments associated with any particular case. But I can say that in any case attacking the constitutionality of 10 U.S.C. § 654, I would apply the usual strong presumption of constitutionality and give full weight to the factors supporting this presumption, such as the prior appellate court decisions upholding the statute and the doctrine of judicial deference to legislation involving military matters.

15. In late 2008, the Department of Health and Human Services issued the "Conscience Rule" to end discrimination against health care providers who decline to participate in abortion because of their moral or religious beliefs. At your hearing, you pledged to defend any federal statute or regulation "in whose support any reasonable argument can be made." Do you believe a reasonable argument can be made to support the "Conscience Rule?"

a. Do you support a right of health care providers to decline to participate in abortions because of their moral or religious beliefs?

b. Will you defend federal laws and regulations protecting health care providers who decline to participate in abortions because of their moral or religious beliefs?

c. What is your definition of a "reasonable argument?"

d. Can you list any cases that a Solicitor General has defended with an unreasonable argument?

Answer: I have not read and do not know anything about the "Conscience Rule" so cannot hazard a view about it. But I think I can answer most of this question in the following way. If the "Conscience Rule" were instead a statute and if it were attacked on constitutional grounds, the question I would ask would be a simple one: is there a reasonable defense to be offered in support of the statute? If so, I would make that defense. This standard is a very low bar: it is and should be highly unusual for the Solicitor General to decline to defend a statute. (I do not know of any cases that the Solicitor General has defended with an unreasonable argument.) That the Conscience Rule is in fact not a statute but a regulation potentially adds an additional element to the analysis. Here, the Solicitor General's Office typically would consult with the relevant agency regarding the regulation. If the agency stands behind the regulation, the Solicitor General's course of action is clear: the Office will defend the regulation against legal challenge assuming there is a reasonable basis to do so. But if the agency wishes to repeal or modify the regulation, a different question would be presented. The Solicitor General, after all, defends existing executive policy; if and as executive policy changes, the Solicitor General's course of action likely will change as well.

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16. At your hearing, Senator Klobuchar asked what you would change in the Solicitor General's Office. You responded, "If it ain't broke, don't fix it." You called the office "extraordinary" and could not identify anything that you would change. The new administration, however, may have some changes it would like to make to the office or to positions the office took during the previous administration. On February 6, 2009, for example, Acting Solicitor General Edwin Kneedler filed a motion informing the Supreme Court that the government no longer wished to appeal the D.C. Circuit's ruling in *Environmental Protection Agency v. New Jersey*. The Bush Administration had filed a petition for a writ of certiorari with the Supreme Court in that case after the D.C. Circuit vacated the EPA's rules regarding mercury and other hazardous air pollutant emissions from power plants under the Clean Air Act.

a. What role if any did you play in the Acting Solicitor's General's decision to withdraw the appeal in *EPA v. New Jersey*?

b. Will you continue the position of Acting Solicitor General Kneedler and not appeal the ruling in *EPA v. New Jersey*?

Answer: I did not play any role in the Acting Solicitor's General's decision to withdraw the appeal in *EPA v. New Jersey*. I would expect to continue this position for two reasons. First, my general approach will be to defer to decisions made by the Acting Solicitor General in this period. Second, although I have not at all consulted with him on the case, my understanding is that he made the decision not to appeal because the agency involved (the EPA) materially changed its position regarding the regulation of mercury. This is an example of the kind of situation to which I referred in my answer to question #15: when executive policy itself changes, the Solicitor General's litigating decisions also may change. Said another way, if the agency repudiates the executive policy that the Solicitor General is defending, then the Solicitor General has nothing left to defend.

17. Under what circumstances would it be appropriate for the Solicitor General to change the position taken by the previous Administration on a case pending before a federal court or the Supreme Court?

a. Have you discussed with anyone in the current Administration any positions of previous Administrations that should be changed?

Answer: The clearest cases in which such changes are appropriate are the ones described in my answer to the last two questions: where executive policy itself changes, the Solicitor General's defense of the original policy likely will change as well. Another category of cases in which such change may occur relates to discretionary positions taken by the Solicitor General's office. For example, if the Solicitor General has filed an amicus brief in a case not involving the government as a party, and the views of the executive branch change with respect to that filing, a change in litigating position may be appropriate. Counting against any such change, however, are important interests in continuity and stability, as well as a certain kind of seemliness in presenting matters to

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the Supreme Court. In the end, a balance must be struck in such cases between these countervailing interests, and I would not expect many changes of this kind to occur. The cases in which a change between Administrations is least justified are those in which the Solicitor General is defending a federal statute. Here interests in continuity and stability combine with the usual strong presumption in favor of defending statutes to produce a situation in which a change should almost never be made.

I am not sure whether this matter falls within the scope of the question, but I have discussed very generally with a person in the current Administration the department's consideration of the al Marri case pursuant to President Obama's executive order. I have played no part in any decisionmaking in this review.

18. What will be your practice if you personally disagree with the President or the Attorney General on the position to take in a case for which you or your office is responsible?

a. What if the President or the Attorney General advocates for a position that you believe is unconstitutional?

b. President Obama, in an interview with *Christianity Today*, stated that he believed states could ban partial birth abortion. Would you, as Solicitor General, intervene in such a case?

c. President Obama has said that he does not support same sex marriage; however, on the White House website, the President has posted a civil rights agenda, which calls for the repeal of the Defense of Marriage Act. The Defense of Marriage Act defines marriage as between a man and a woman. It passed Congress overwhelmingly. Would you defend the constitutionality of the Defense of Marriage Act before the Supreme Court?

d. Last year in passing the FISA Amendments Act of 2008, Congress approved retroactive immunity for telephone companies that may have broken the law by assisting the government in warrantless surveillance. President Obama initially opposed retroactive immunity for telephone companies, although he ultimately voted in favor of the FISA Amendments Act. Plaintiffs have challenged the immunity provision. Will you defend the immunity provision?

Answer: If I am confirmed and I disagree with the President on the position to take in a case for which the Solicitor General's office is responsible, I would do my best to persuade him of the correctness of the office's views or the appropriateness of deferring to the office. (I believe that if the disagreement were with the Attorney General, a natural step would be to appeal to the President.) If the disagreement were to continue, I would consider the nature of the case, the nature of the disagreement, and the full range of ways to deal with the disagreement. I should clarify here that the critical question is not what would happen if I "personally" disagree with the President, because my personal views would be irrelevant; the critical question is what would happen if the President and I were to disagree on the position that will advance the long-term interests of the United States, which is the Solicitor General's client. That is the only basis on which I would act as

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Solicitor General, and so that is the only ground on which disagreement between myself and the President might present itself. If I believe this disagreement goes to a highly material matter – a matter, for example, that would involve me in failing to fulfill my essential obligations to the Court or Congress – I would have to resign my office. Needless to say, I do not foresee any significant likelihood that this will happen. But I believe the Solicitor General needs to be able to walk away from the job when her assessment of her role and the obligations attendant on that role differs significantly from those of the President.

I cannot say with so little in the way of information whether, if confirmed as Solicitor General, I would intervene in a case involving a state ban on partial birth abortion. I would need to know more about the legislation and the challenge to it. In addition, I would want to take full advantage of the processes of consultation and deliberation that the Solicitor General's office follows in such cases, involving interested parties, other components of the Department of Justice, and other agencies.

I would apply the same standard to defending the Defense of Marriage Act and the FISA Amendments Act as to any other legislation: I would defend the Acts if there is any reasonable basis to do so. As I noted above, this is a low bar for a statute to climb over. It is very unusual for a Solicitor General to decline to defend a statute. Indeed, I have no present belief that *any* federal statute now on the books is clearly unconstitutional (such that a reasonable defense of the statute could not be offered).

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 25, 2009

Dean Elena Kagan
Harvard Law School
Griswold 200
1525 Massachusetts Avenue
Cambridge, MA 02138

Dear Dean Kagan:

I write to express my dissatisfaction with many of the answers you provided to the Committee in response to my written questions following your confirmation hearing. I believe these answers are inadequate for confirmation purposes.

In a 1995 review of a book entitled *The Confirmation Mess*, you made a compelling case for senatorial inquiry into a nominee's judicial philosophy and her views on specific issues. You stated, "when the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public." You further asserted that the Senate's inquiry into the views of executive nominees, as compared to Supreme Court nominees, should be even more thorough, stating, "the Senate ought to inquire into the views and policies of nominees to the executive branch, for whom 'independence' is no virtue." I agree with the foregoing assessment, and, therefore, am puzzled by your responses, which do not provide clear answers concerning important constitutional and legal issues.

For example, in response to several questions related to the constitutionality of the imposition of the death penalty, you offer only the following: "I do not think it comports with the responsibilities and role of the Solicitor General for me to say whether I view particular decisions as wrongly decided or whether I agree with criticisms of those decisions. The Solicitor General must show respect for the Court's precedents and for the general principle of *stare decisis*. If I am confirmed as Solicitor General, I could not frequently or lightly ask the Court to reverse one of its precedents, and I certainly would not do so because I thought the case wrongly decided." You repeatedly provide this answer verbatim, or a similarly unresponsive answer, to numerous questions regarding the First and Second Amendments, property rights, executive power, *habeas corpus* rights of detainees, the use of foreign law in constitutional and statutory analysis, and the Independent Counsel statute, among others. I think you would agree that, given the gravity of these issues and the significance of the post for which you are nominated, this Committee is entitled to a full and detailed explanation of your views on these matters.

Please provide the Committee with adequate answers to these questions so that I may properly evaluate your nomination and determine whether any supplemental questions are necessary.

Sincerely,

Arlen Specter

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March 2, 2009

Senator Arlen Specter
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Specter:

I am writing in response to your letter of February 25. I am sorry that you believe some of my answers to written questions to be inadequate. I wish to respond to your request for additional information as fully as possible while still meeting the obligations attendant to a nominee for the Solicitor General's office.

Let me first say how much I respect the Senate and its institutional role in the nominations process. As the members of a co-equal branch of government charged with the "advice and consent" function, you and your colleagues have a right and, indeed, a duty to seek necessary information about how a nominee will perform in her office. By the same token, each nominee has a responsibility to address senatorial inquiries as fully and candidly as possible. But some questions – and these questions will be different for different positions – cannot be answered consistently with the responsible performance of the job the nominee hopes to undertake. For that reason, some balance is appropriate, as I remarked to Senator Hatch at my nomination hearing and as you quoted approvingly in the introduction to your written questions.

I endeavored to strike that proper balance in responding to your and other senators' written questions. I answered in full every question relating to the Solicitor General's role and responsibilities, including how I would approach specific statutes and areas of law. I also answered in detail every question relating to my own professional career, including my relatively extensive writings and speeches. Finally, I answered many questions relating to general legal issues. In short, I did my best to provide you and the rest of the Committee with a good sense of who I am and of how I would approach the role of Solicitor General. The only matters I did not address substantively were my personal views (if any) regarding specific Supreme Court cases and constitutional doctrines. These personal views would play no role in my performance of the job, which is to represent the interests of the United States; and expressing them (whether as a nominee or, if I am confirmed, as Solicitor General) might undermine my and the Office's effectiveness in a variety of ways.

In answering these questions as I did, I was cognizant of the way other nominees to the position of Solicitor General have replied to inquiries from senators. For example, in answering a question about his views of the use of foreign law in legal analysis, Paul Clement wrote: "As Solicitor General, my role would be to advance the interests of the United States, 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." Similarly, Seth Waxman stressed in responding to questions about his understanding of a statute that "[i]t is the established practice of the Solicitor General not to express views or take positions in advance of presentation of a concrete case" and prior to engaging in extensive consultation within and outside the office. The advice I received from former Solicitors General of both parties prior to my nomination hearing was consistent with what the transcripts of their hearings reveal: all stressed the need to be honest and forthcoming, but also the responsibility to protect the interests of the office and of the United States. In my hearing and in my responses to written questions, I believe I have provided at least as much information to the Committee as any recent nominee.

As you noted to me when we met, I have lived my professional life largely in the public eye. I have written and spoken widely, so the Committee had the opportunity to review many pages of my law review articles and many hours of my remarks. I tried to answer every question put to me at my hearing completely and forthrightly. I met with every member of the Committee who wished to do so in order to give all of you a more personal sense of the kind of person and lawyer I am. I submitted letters from numerous lawyers, who themselves hold views traversing the political and legal spectrum, indicating how I approach legal issues. And as noted above, I answered many written questions from you and other members of the Committee.

In all, I did my best to provide you and the other members of the Committee with a complete picture of who I am and how I would approach the role of Solicitor General, consistently with the responsibilities of that office and the interests of the client it serves. But I am certainly willing to do anything else I can to satisfy your concerns, including meeting with you again.

Thank you for your consideration of this letter.

Sincerely,

Elena Kagan

Elena Kagan

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ational Chapters Director
RASHEED TAHIR
ational Awards Director
SHANON MAST-MCPHERSON
mmediate Past President
ART GORDON
egislative Counsel

January 26th, 2009

The Honorable Patrick J. Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Specter:

As the National President of the Federal Law Enforcement Officers Association (FLEOA), a 26,000 member nonprofit, nonpartisan organization representing federal law enforcement officers, I am writing to you in support of the appointment of Tom Perrelli for the position of Associate Attorney General.

FLEOA's membership includes criminal investigators and officers from the Bureau of Alcohol Tobacco and Firearms, Federal Bureau of Investigation, United States Marshals Service, Department of Justice, Office of the Inspector General and many others. All of our members serving in these agencies have sacrificed a great deal while supporting their agency's formidable mission. They are the frontline of our nation's defense, and we need to ensure that they are led by a qualified team of professionals who have consummate experience in law enforcement issues.

Mr. Perrelli served as Deputy Assistant Attorney General, supervising the Federal Programs Branch of the Civil Division, representing virtually every federal agency in complex civil litigation. In that role, Mr. Perrelli led a staff of 100 attorneys charged with defending the constitutionality of federal statutes, defending federal agency action and regulations, representing the diplomatic and national security interests of the United States in courts of law, and conducting significant Title VII, personnel and social security litigation.

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION

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I am optimistic that Tom Perrelli possesses the requisite knowledge, experience and and leadership ability that will serve as an asset to the Department of Justice and to the American people.

Please don't hesitate to call should you require any additional input from FLEOA regarding the qualifications of Tom Perrelli. We look forward to working with him and other senior members of the Department of Justice in the coming year.

Respectfully submitted,

for J. Adler
National President

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION

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January 22, 2009

The Honorable Patrick J. Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senator Leahy and Senator Specter:

I am writing to express support for the nomination of Thomas J. Perrelli to be Associate Attorney General. We had the opportunity to meet and work with Mr. Perrelli during his earlier public service as Counsel to Attorney General Janet Reno. We worked closely with Attorney General Reno and her staff on a wide range of issues relating to children and their protection. Attorney General Reno was a great friend and fierce advocate for our efforts to keep America's children safe. Mr. Perrelli was a key advisor and supporter of those efforts.

We are also enthusiastic about Mr. Perrelli's unique experience in his private law practice in connection with intellectual property and First Amendment issues. The National Center for Missing & Exploited Children (NCMEC) is exploring innovative, creative ways to work with the Internet industry to more effectively address the exploding problem of child pornography. In that regard we feel that there is much to learn from the experience of other industries.

We are exploring voluntary initiatives with Internet companies to attack child pornography without violating legitimate privacy and free speech protections. In exploring new approaches and innovations, we have looked closely at earlier efforts in attacking spam, phishing, copyright infringement, etc., and attempted to learn from those efforts.

Mr. Perrelli has been on the cutting edge in addressing intellectual property, technology and anti-piracy issues. His unique private sector experience coupled with his exemplary public service will make him a strong, effective Associate Attorney General.

Sincerely,

Ernie Allen
President & CEO

February 13, 2009

Senator Patrick Leahy
Chairman United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Senate Judiciary Committee Members:

The Alliance Defense Fund ("ADF") submits this letter in opposition to the Department of Justice nominees David Ogden, Elena Kagan, Dawn Johnsen, and Thomas Perrelli. ADF is a legal alliance, composed of more than 1,200 attorneys, that focuses its activities around three legal issues: (1) guarding the sanctity of life; (2) protecting marriage and the family; and (3) defending religious freedom. ADF regularly litigates difficult and contentious cases involving both novel and complex constitutional issues. In doing so, ADF consistently advocates for an originalist interpretation of the constitution, with the goal of fostering long-term legal stability and adherence to the "rule of law."

President Obama's most recent nominees for top-level positions in the Department of Justice ("DOJ")—David Ogden, Elena Kagan, Dawn Johnsen, and Thomas Perrelli—each subscribe to a results-oriented school of jurisprudence unmoored from a proper understanding of the constitution. Their legal philosophies depart from mainstream views, their professional careers reflect a far-left ideology, and their involvement in the DOJ will jeopardize the proper enforcement of federal law and development of constitutional doctrines. For the reasons expressed herein, ADF opposes each of their nominations and urges the Senate Judiciary Committee ("Committee") to do the same.

David Ogden

President Obama has nominated David Ogden to serve as Deputy Attorney General. Mr. Ogden's far-left jurisprudential background is truly astounding. He has repeatedly been an advocate of sexually oriented businesses, including distributors of hard-core pornography. He has represented a variety of clients seeking to strike down even slight restrictions on abortion, such as parental-consent laws, spousal-consent laws, and 24-hour waiting periods. And he has been a

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consistent advocate for the homosexual agenda. Perhaps most troubling of all, it appears that Mr. Ogden has been somewhat misleading in his testimony before this Committee. For these reasons, which will be more fully discussed herein, ADF urges this Committee to reject Mr. Ogden's nomination.

Throughout his career, Mr. Ogden has been a major defender of sexually oriented businesses and organizations. He has repeatedly represented major organizations within the pornography industry—including Playboy Enterprises, Playboy Programming Distribution Corporation, the Consenting Adults Telephone Rights Association, and PHE, Inc., which is the nation's largest distributor of hard-core pornography and other sexually oriented products. This industry is unique in its extreme degradation of women and disregard for human relationships.

In *United States v. American Library Association*, 539 U.S. 194 (2003), Mr. Ogden submitted an amicus brief on behalf of fifteen library directors, arguing that the federal constitution requires public libraries to remove internet pornography filters. In that brief, Mr. Ogden treated pornography like informative data, writing that "[i]mposition of mandatory filtering on public libraries impairs the ability of librarians to fulfill the purpose of public libraries—namely, assisting library patrons in their quest for information . . . ." In several other cases, including *American Library Association v. Reno*, 33 F.3d 78 (D.C. Cir. 1994), Mr. Ogden represented sexually orientated businesses and organizations in their quest to avoid any measure—however slight—of government regulation. His advocacy of expansive First Amendment rights for sexually oriented businesses rests on a revisionist understanding of the constitution.

Mr. Ogden has also been a staunch supporter of abortion, seeking to eradicate any state or federal law protecting unborn children or educating women about the harms of abortion. In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), Mr. Ogden argued, in a brief for the American Psychological Association, that a parental-consent law violated the constitutional "right" of a 14-year-old girl to kill her unborn child. In that brief, Mr. Ogden argued that 14-year-old girls are mature enough to decide whether to abort their child, stating that "the decision to abort is one that . . . a reasonable adolescent[] could make." He also asserted that 14-year-old girls are just as capable of making abortion decisions as adults are:

> [E]mpirical studies have found few differences between minors aged 14-18 and adults in their understanding of information and their ability to think of options and consequences when asked to consider treatment-related decision. These unvarying and highly significant findings indicate that with respect to the capacity to understand and reason logically, there is no qualitative or quantitative difference between minors in mid-adolescence, i.e., about 14-15 years of age, and adults.

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Mr. Ogden's efforts to invalidate parental-consent laws conflict with citizens' sentiment in this country; nearly 70% of Americans favor laws requiring women under 18 to get parental consent for any abortion. *See* Gallup's Pulse of Democracy: Abortion, *available at* http://www.gallup.com/poll/1576/Abortion.aspx.

In *Casey v. Planned Parenthood of S.E. Pennsylvania*, 505 U.S. 833 (1992), Mr. Ogden argued, in an *amicus* brief for Planned Parenthood and the American Psychological Association, that spousal notification and a mandatory 24-hour waiting period violate the federal constitution. He reasoned that "compelled spousal notification places a substantial burden on a married woman's right to terminate her pregnancy" and "cannot be justified [by] the [government's] interest in promoting the integrity of the marital relationship." By taking this position, Mr. Ogden's brief advocated the invalidation of a spousal-notification law supported by 64% of Americans. *See* Gallup's Pulse of Democracy: Abortion, *available at* http://www.gallup.com/poll/1576/Abortion.aspx. He also insisted that a minimal waiting period of 24 hours "severely burdens a woman's right to choose." These absolutist positions on abortion are based on a flawed understanding of the constitution, wholly disconnected from the federalist principles upon which our great nation was founded. Mr. Ogden's views leave no room whatsoever for the state to advance its compelling interest in its future citizens and taxpayers.

Mr. Ogden has also been an unwavering advocate for homosexual activists. In *Lawrence v. Texas*, 539 U.S. 558 (2003), he served as counsel for the American Psychological Association and argued that the criminalization of sodomy violates federal constitutional rights. In that brief, he asserted that "homosexuality is a normal form of human sexuality." He also argued, despite abundant evidence to the contrary, that "the children of [same-sex couples] . . . demonstrate no deficits in intellectual development, social adjustment, or psychological well-being as compared to children of [opposite-sex couples]." He submitted a brief advocating similar positions in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Mr. Ogden supports the use of "strict scrutiny" for equal-protection challenges brought by persons involved in same-sex relationships. He has asserted that "gay men and lesbians constitute a discrete and insular minority deserving strict equal protection scrutiny." Donald N. Bersoff and David W. Ogden, "APA Amicus Curiae Briefs: Furthering Lesbian and Gay Male Civil Rights," American Psychologist, Vol. 46, No. 9, p. 950-56 (Sept 1991). This radical legal theory has been rejected by nearly every court that has addressed the issue. *See, e.g.*, *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006); *Andersen v. King County*, 158 Wash.2d 1, 138 P.3d 963 (2006); *Conaway v. Deane*, 401 Md. 219, 932 A.3d 571 (2007). The only judicial opinion adopting that approach—the California Supreme Court's decision in *In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384 (2008)—has been resoundingly rejected by the people of California when they approved a

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constitutional amendment that effectively nullified the Court's decision. Mr. Ogden's advocacy of such radical constitutional jurisprudence lacks any basis in sound constitutional theory; instead, it is intended to further his favored political end, without regard for an originalist understanding of the document he purports to be interpreting.

And perhaps more troubling than Mr. Ogden's far-left jurisprudence is his lack of candor before this Committee. In a child pornography case, *United States v. Knox*, Mr. Ogden argued—on behalf of the ACLU, the American Library Association, and the American Booksellers Association—that the defendant had been improperly convicted under the federal child pornography statute. In that case, the Department of Justice adopted an "extreme" interpretation of the child pornography law, asserting that materials do not qualify as child pornography unless there is actual nudity, *i.e.*, the child's genitals or pubic area are fully or partially exposed. President Clinton publicly chastised the DOJ for its position, as did the Senate, by a vote of 100-0, and the House, by a vote of 425-3.

When questioned about this case during the Judiciary Committee's hearing, Mr. Ogden stated that he and his clients did not adopt what he characterized as the DOJ's "very extreme view . . . of the law." He stated: "The brief that I submitted . . . made a different point. . . . The court decided not to accept that view, but it wasn't the view—the extreme view that I myself rejected—that the Justice Department brief took." It appears, however, that Mr. Ogden's brief had in fact adopted the same "extreme" position put forth by the DOJ. The DOJ's brief asserted that "[d]epictions . . . come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their . . . genitals or pubic areas." Brief of Respondent United States at 13, *Knox v. United States*, No. 92-1183 (U.S.S.C. Sept 1993) (found at 1993 WL 723366). Similarly, Mr. Ogden's brief argued that "nudity was not only a requirement, but that nudity alone was insufficient. Something more, a 'lascivious exhibition of the genitals and public areas,' was required." Brief of *Amici* in support of Petitioner at 17, *Knox v. United States*, No. 92-1183 (U.S.S.C. Sept 1993) (found at 1992 U.S. Briefs 1183 (Lexis)). This lack of candor in Mr. Ogden's testimony further demonstrates that he is not fit to serve as a high-ranking DOJ official.

Elena Kagan

President Obama has nominated Elena Kagan to serve as Solicitor General. In her past, Ms. Kagan has shown open hostility towards the military's "Don't Ask, Don't Tell" policy, which is favored by a majority of Americans and, more importantly, by a majority of military servicemen and women. *See* Gallup's Pulse of Democracy: Homosexual Relations, *available at* http://www.gallup.com/poll/1651/Homosexual-Relations.aspx; Military Times Poll, *available at* http://www.militarycity.com/polls/2007activepoll_politics.php.

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While Dean of Harvard Law School, Ms. Kagan did not allow military recruiters on campus in protest to the military's "Don't Ask, Don't Tell" policy. In an email to the Harvard Law School community, she referred to this fifteen-year policy as "a profound wrong—a moral injustice of the first order." *See* Email from Elena Kagan, Dean Harvard Law School, to Harvard Law School Community (Oct 6, 2003, 9:04 EST), *available at* http://www.hlrecord.org/home/index.cfm?event=displayArticlePrinterFriendly&uStory_id=fb9b7e30-726c-45a1-ae9c-e74a7c5f655f.

Moreover, Ms. Kagan submitted an *amicus* brief challenging the Solomon Amendment, the federal law denying federal funding to an institution of higher education that has a policy or practice of prohibiting or preventing the military from gaining access to campuses for purposes of military recruiting. The *amicus* brief joined by Ms. Kagan and other law professors offered an implausible interpretation of the Solomon Amendment, which was rejected by a unanimous Supreme Court. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). In fact, the Court's opinion characterized Ms. Kagan's interpretation as one that would render the Solomon Amendment "largely meaningless." *Id.* at 57-58.

Ms. Kagan's proffering of an unsupportable interpretation of federal law to achieve her desired political result raises serious questions about her capacity to defend federal laws with which she personally disagrees. She appears driven by a results-oriented jurisprudence, unfitting for a high-ranking DOJ official who should not be tainted by an extremist ideology. Her outright hostility towards governing military policy and her inability to reconcile her personal views with her legal positions demonstrates that Ms. Kagan is ill qualified for the job of Solicitor General.

Dawn Johnsen

President Obama has nominated Dawn Johnsen to lead the Office of Legal Counsel within the DOJ. One need not explore far to see Ms. Johnsen's far-left legal background and jurisprudential theories. She was a staff counsel for the ACLU, and served as Legal Director for the National Abortion Rights Action League ("NARAL"). NARAL has adopted extreme, absolutist positions on abortion, opposing any attempt to restrict abortion on-demand. In line with its unwavering demands on abortion, NARAL has publicly condemned the federal law banning partial-birth abortions, *see* NARAL Pro-Choice American Press Release, "Senate Votes to Criminalize Safe, Legal Medical Procedures, Next Stop is President Bush" (Oct 21, 2003), *available at* http://www.commondreams.org/ news2003/1021-04.htm—a law supported by more than 72% of Americans. *See* Gallup's Pulse of Democracy: Abortion, *available at* http://www.gallup.com/poll/1576/Abortion.aspx.

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As a legal scholar, Ms. Johnsen has promoted radical legal positions concerning abortion. She has sharply criticized the creation of any legal rights for unborn children, asserting that this might have a deleterious effect on her desired end—a woman's unfettered access to abortion. *See* Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," 95 Yale L.J. 599 (Jan 1986). In addition, she has adopted far-left feminist positions, arguing that "[f]etal rights laws would not only infringe on constitutionally protected liberty and privacy rights of individual women, they would also serve to disadvantage women as women by further stigmatizing and penalizing them on the basis of the very characteristic that historically has been used to perpetuate a system of sex inequality." *Id.* at 620. These radical legal theories are far outside mainstream legal thought; they are grounded in achieving her desired end—the widespread availability of abortion—and not in a proper understanding of constitutional doctrine. And again, they run contrary to the government's profound interest in promoting life.

Thomas Perrelli

President Obama has nominated Thomas Perrelli as Associate Attorney General. While in private practice, Mr. Perrelli represented Terri Schiavo's husband and worked closely with the ACLU to deprive Ms. Schiavo of food and water. His intimate involvement in that case and tireless efforts to ensure Ms. Schiavo's death show a calloused disregard for the sanctity of all life, including the lives of disabled individuals.

In fostering Ms. Schiavo's death, Mr. Perrelli advanced a legal position rejected by 80% of Americans. A poll completed after Ms. Schiavo's controversial death found that 80% of likely voters said that a disabled person who is not terminally ill or in a coma should not, in the absence of a written directive to the contrary, be denied food and water. *See* Zogby International Poll, *available at* http://www.zogby.com/search/ ReadNews.cfm?ID=982. Moreover, by a three-to-one margin, likely voters said that, when there is conflicting evidence on the wishes of a patient, elected officials should order that a feeding tube remain in place. *See* Zogby International Poll, *available at* http://www.zogby.com/search/ReadNews.cfm?ID= 982. Mr. Perrelli's unwillingness to protect Ms. Schiavo's most important right—her inalienable right to life—raises serious questions about his ability to protect and defend the rights of other Americans.

Conclusion

ADF respectfully requests that the Committee reject the DOJ nominations of David Ogden, Elena Kagan, Dawn Johnsen, and Thomas Perrelli. Their far-left, results-oriented jurisprudence is wholly unmoored from the constitution as drafted

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and understood by our Founders. Confirming them to high-level DOJ positions will wreak havoc on the "rule of law" in our country.

Respectfully submitted,

The Alliance Defense Fund

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January 28, 2009

Honorable Patrick Leahy, Chairman
United States Senate Committee on the Judiciary
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Honorable Arlen Specter, Ranking Member
United States Senate Committee on the Judiciary
711 Hart Building
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

I am writing in support of the nomination of Elena Kagan to serve as Solicitor General of the United States. Although we belong to different political parties and undoubtedly have different political views, I believe strongly that she possesses the necessary skill, wisdom, and temperament to serve ably as Solicitor General of the United States.

I have come to know Dean Kagan in recent years in her capacity as Dean of my alma mater, the Harvard Law School. Dean Kagan came to that job from the Clinton Administration, where she had served in the White House Counsel's Office. Among the first things she did was to hire several prominent and outstanding young conservative scholars to join the HLS faculty. This sent a strong signal to conservative alumni that, despite her own party affiliation, she was committed to intellectual diversity and meritocracy at the Law School, and was determined to serve the long-term best interests of the institution rather than any narrow ideological agenda. This also sent a powerful message of inclusion to conservative alumni, many of whom had previously felt somewhat alienated from an institution they perceived as hostile to their points of view.

This open-minded approach to political and philosophical differences was also reflected in her treatment of students and student groups on campus. During her tenure, the Federalist Society became one of the largest and most active student groups on campus, and numerous leaders of the Harvard Federalist Society freely attest to the respectful, cooperative, and indeed supportive manner in which Dean Kagan and her office interacted with them. She encouraged the robust debate over jurisprudence and legal principles on campus of which the Federalist Society was a part. Dean Kagan also affirmatively reached out to alumni to generate ideas for how to improve the law school and its curriculum, which prompted a large number of previously passive alumni to re-connect to the school and to become more active in its affairs.

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Honorable Patrick Leahy, Chairman
Honorable Arlen Specter, Ranking Member
January 28, 2009
Page 2

The record of Dean Kagan's accomplishments in both public and private life provide considerable assurance that she will be a great success in the position to which President Obama has nominated her. Her skill as a leader and manager are unquestioned, as she has led Harvard Law School, an institution far harder to manage than the Solicitor General's Office, into a period of robust renaissance. Her previous government experience at the center of the Executive Branch equips her well to understand and respond in constructive ways to the needs and interests of the various federal agency and department clients she will serve as Solicitor General. Her legal acumen is more than equal to the task she faces, as reflected in her scholarship. The spirit of toleration and fair-minded consideration of competing views she brought to the Deanship reflect the sort of temperament and judgment that will inspire confidence in the Justices of the Supreme Court as well as the private parties with whom she will need to interact as SG. The same institutional loyalty that has enabled her to put Harvard Law School's interests ahead of her own will undoubtedly cause her to do likewise in service of the United States. And while her skill as an oral advocate has yet to be demonstrated to the same compelling degree as these other necessary and important qualities, the precedents provided by predecessors such as Erwin Griswold and Charles Fried, both Harvard Law School professors who assumed the position of Solicitor General without significant experience as advocates before the Supreme Court, provide strong reasons to feel confident that she will excel in that capacity as well.

In sum, I believe this is an outstanding nomination. Although there is little doubt that the United States will take positions in the Supreme Court in the Obama Administration with which I will disagree, if Dean Kagan is the Solicitor General, I know they will be arrived at honestly, reasoned soundly under the law, and presented responsibly and skillfully to the Supreme Court. I urge the Committee to promptly recommend her confirmation to the Senate.

Sincerely,

Bradford A. Berenson

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January 29, 2009

Honorable Patrick Leahy, Chairman
United States Senate Committee
on the Judiciary
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Honorable Arlen Specter, Ranking Member
United States Senate Committee
on the Judiciary
711 Hart Building
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to support the nomination of Tom Perrelli to be Associate Attorney General of the United States.

I have known Tom since 1990, when we both began serving as editors of the Harvard Law Review. During our two years on the Law Review, I had the opportunity to observe Tom's personal qualities and professional skills at close range. Along with our classmate (and now our President) Barack Obama, we worked together on the Review on an almost daily basis during two school years plus a number of the surrounding summer weeks. During the second year, when we were third-year students and Barack Obama was President of the Review, we both served on the masthead, with Tom serving as the Managing Editor.

Even in the highly charged political environment of the Harvard Law School of 1990-1991, Tom was unfailingly courteous, polite, and friendly to all of his fellow editors. He enjoyed the trust, respect, and affection of the members of the Review from right to left. On a personal level, Tom was among the most affable and easygoing members of the Review. He was one of the editors who never took political or philosophical differences personally and never allowed disagreements to become unpleasant. He fairly considered opposing viewpoints and treated everyone well. His management abilities were very strong, and he was respected for his dedication, hard work, and skills as a lawyer and legal writer. He consistently exercised sound judgment as Managing Editor, and in part due to his diligence and organization, the publication under his management was a great success.

The same complement of personal characteristics, managerial ability, and professional skill has been evident throughout his career since law school in both the public and private sectors. Based upon numerous conversations I have had with career attorneys at the Justice Department in past years, his reputation among the career professionals with whom he worked

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Honorable Patrick Leahy, Chairman
Honorable Arlen Specter, Ranking Member
January 29, 2009
Page 2

there during the Clinton Administration is stellar. And the similar esteem in which he is held by colleagues in the private sector, as well as his gift for managing lawyers, is also clearly reflected in his selection as Managing Partner of the Washington, D.C. office of his law firm, Jenner & Block.

Most importantly, Tom is the kind of lawyer who by temperament and training knows how to responsibly, ethically, and effectively serve the interests of his client. I was delighted to read of Tom's nomination, because I have such confidence in his judgment and ability. The interests of the United States in the many vital cases handled by the divisions supervised by the Associate Attorney General will be well protected with him in charge. I feel confident he will make decisions and set litigation strategy based on the institutional interests of our nation and its government, with due regard to the views and interests of the Department's client agencies, rather than any ephemeral political or policy considerations.

As a political appointee during the Bush Administration, as well as in the years since I left government service, I have had many occasions to work closely with lawyers from the Associate Attorney General's Office, and I am familiar with the important management and supervisory responsibilities vested in the Associate Attorney General. Tom Perrelli is an outstanding choice to fill that position, and I have no reservations whatsoever in recommending his confirmation to you.

Sincerely,

Bradford A. Berenson

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January 23, 2009

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510-4502

Senator Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Leahy and Ranking Member Specter:

We are writing to express our strong support for the nomination of Elena Kagan to become Solicitor General of the United States. We have worked with Elena from the time that she was on the faculty of the University of Chicago Law School to her service during the Clinton Administration as Associate Counsel to the President and then Deputy Assistant to the President and Deputy Director for the Domestic Policy Counsel. She has demonstrated an extraordinary intellect, legal analytic skills, an understanding of the real-world impact of the law, and an ability to hear and consider all sides.

During her career as an academic, in public service, and as Dean of Harvard Law School Elena has shown a commitment to improve the lives of women and their families, and we believe she will bring these concerns, as well as her legal talents and her deep respect for the law, to the position of Solicitor General.

We thank the Committee in advance for taking our views into account in considering Elena Kagan's qualifications for office.

Sincerely,

Nancy Duff Campbell
Co-President

Marcia D. Greenberger
Co-President

NDC/MDG:nb

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NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

February 6, 2009

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510-4502

Senator Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Leahy and Ranking Member Specter:

We are writing to express our strong support for the nomination of Tom Perrelli to become Associate Attorney General of the United States. He has had a distinguished legal career, including at the Justice Department where he played an oversight role for the Civil Rights Division. He has been widely acclaimed for his legal skills, integrity and commitment to enforcement of the law.

His work on a range of issues, including expansion of the federal hate crimes law to include gender, sexual orientation and disability, and the task force he led that created the CIRCLE Project, which included initiatives to address domestic violence and sexual assault, underscores why we believe he will bring a concern for the impact of the law on women and their families to the Justice Department.

We thank the Committee in advance for taking our views into account in considering Tom Perrelli's qualifications for office.

Sincerely,

Nancy Duff Campbell
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Co-President

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Paul T. Cappuccio
Executive Vice President
and General Counsel

January 22, 2009

The Honorable Patrick Leahy
United States Senate
433 Russell Senate Office Bldg
Washington, DC 20510

Dear Senator Leahy:

I am writing to endorse strongly the nomination of Elena Kagan to be Solicitor General of the United States. I have known Elena for over 25 years, since we were first classmates at the Harvard Law School and later served as law clerks at the Supreme Court during the same Term.

I am a registered Republican and consider myself a strict judicial conservative. Although Elena and I would probably disagree on many issues of politics and judicial theory, I believe very strongly that the President is entitled to pick accomplished people who share his political and judicial views. In my view, the President could not have picked a more highly-qualified, talented, and well-suited person than Elena to be Solicitor General. Elena's resume speaks for itself. But I also know from first-hand experience that Elena is brilliant, harder working than anyone I met in law school, and has the utmost integrity. She has a very even and judicious temperament, is a wonderful person with an open demeanor, and she listens with care and interest to the views of others.

I am proud to know Elena, and should you decide to confirm her nomination (as I strongly urge you to do), I will be proud for our country to have Elena serve as the Solicitor General.

Thank you very much for you consideration, and if I can be of any further assistance in your consideration of her nomination, please do not hesitate to contact me.

Sincerely,

Paul T. Cappuccio

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T [redacted] • F [redacted] • [redacted]

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United States Senate Committee on the Judiciary

< Return To Hearing

Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
February 10, 2009

OPENING STATEMENT OF

SENATOR BENJAMIN L. CARDIN

HEARING ON

NOMINATION OF THOMAS PERRELLI
ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

NOMINATION OF ELENA KAGAN
SOLICITOR GENERAL OF THE UNITED STATES

SENATE JUDICIARY COMMITTEE

February 10, 2009

The Committee will come to order. Let me thank Chairman Leahy for asking me to chair today's hearing.

Today we consider two important nominations for leadership positions in the Department of Justice. These are the nominations of Thomas Perrelli to be Associate Attorney General of the United States, and Elena Kagan to be Solicitor General of the United States.

I agree with Chairman Leahy that this Committee should move quickly to continue restoring the morale and integrity of the Department. I am pleased that this Committee recently reported Attorney General Eric Holder's nomination by a strong, bipartisan vote of 17 to 2, and that the full Senate overwhelmingly confirmed him shortly thereafter.

The Associate Attorney General is the number three position at the Department of Justice. This official oversees a wide range of offices at the Justice Department, including the Civil Rights, Civil, Antitrust, Environment, and Tax Divisions, as well as the Office of Justice Programs.

Thomas Perrelli comes to this Committee with an impressive range of experience in both the private and public sectors. He served as counsel to Attorney General Janet Reno from 1997 to 1999. For the final two years of the Clinton Administration, he served as Deputy Assistant Attorney General, where he supervised the Federal Programs Branch of the Civil Division, representing nearly every federal agency in complex civil litigation. In that role, Mr. Perrelli supervised a staff of 100 attorneys responsible for defending the constitutionality of federal statutes, defending federal agency action and regulations, representing both the diplomatic and national security interests of the U.S. in courts of law, and conducting a wide range of other litigation. He also supervised the Department's Tobacco Litigation Team's lawsuit against major tobacco companies.

In the private sector, Mr. Perrelli worked for many years at the Washington law firm of Jenner & Block, handling a caseload that includes constitutional, intellectual property, and appellate cases, as well as a wide

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range of complex civil litigation matters.

Most recently, he served on President Obama's Justice Department Transition Team. He is a graduate of Brown University and Harvard Law School.

I also want to note for the record that Mr. Perrelli has received the endorsement of several law enforcements organizations, such as the Federal Law Enforcement Officers Association and the National Fraternal Order of Police, as well as the National Center for Missing and Exploited Children. These letters will be entered into the record.

Elena Kagan also comes to this Committee wide a wide range of experience, having served as the dean of a law school, a law professor, a senior official at the White House, a lawyer in private practice, and a legal clerk for a Justice of the Supreme Court.

A graduate of Princeton University and Harvard Law School, Ms. Kagan clerked for Justice Thurgood Marshall on the Supreme Court, and then worked as an associate at the Washington law firm of Williams & Connolly. While teaching law at the University of Chicago, she took on another assignment as special counsel to Senator Joseph Biden, our distinguished former Chairman of this Committee. Ms. Kagan assisted in the confirmation hearings of Supreme Court Justice Ruth Bader Ginsburg.

In 1995, Ms. Kagan served as President Clinton's Associate White House Counsel, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council. In the White House Counsel's Office, she acted as a lawyer for the White House policy councils and legislative office, analyzing and drafting statutory language and executive actions, and offering policy advice. In the Domestic Policy council office, she played a role in the Executive Branch's formulation, advocacy, and implementation of law and policy in a wide variety of issue areas.

In 1999 Ms. Kagan left government and began serving as a professor at Harvard Law School, teaching administrative law, constitutional law, civil procedure, and a seminar on legal issues and the presidency. In 2003, she was appointed to serve as Dean of the Harvard Law School, becoming the first woman dean in the school's history. In her five years at Harvard Law School, Dean Kagan has overseen both the academic and non-academic aspects of the law school. I will enter into the record a letter from the deans of 11 major law schools in support of the nomination. The letter states in part that the office of Solicitor General is a job that "requires administrative and negotiation skills as well as legal acumen, and Elena Kagan excels along all relevant dimensions. Her skills in legal analysis are first-rate. Her writings in constitutional and administrative law are highly respected and widely cited. She is an incisive and astute analyst of law, with a deep understanding of both doctrine and policy?.Ms. Kagan is also an excellent manager. She has been a superb dean at Harvard?Finally, Elena Kagan is known to us as a person of unimpeachable integrity."

The Solicitor General of the United States holds a unique position in our government. It is one of the few government positions in which the occupant must be "learned in the law", pursuant to a statute enacted by Congress. The Solicitor General is charged with conducting all litigation on behalf of the United States in the Supreme Court, and is often referred to as the "tenth Justice." Indeed, the Supreme Court expects the Solicitor General to provide the Court with candid advice during oral argument and the filing of briefs on behalf of the United States. The office participates in about two-thirds of all the cases the Court decides on the merits each year.

So it is indeed high praise for Dean Kagan that former Solicitors General Walter Dellinger and Ted Olson joined with six other Solicitors General of both parties to endorse her nomination. The letter stated in part that "we are confident that Dean Kagan will bring distinction to the office, continue its highest traditions and be a forceful advocate for the United States before the Supreme Court. Elena Kagan would bring to the position of Solicitor General a breadth of experience and a history of great accomplishment in the law?.[we believe] that she will excel at the important job of melding the views of various agencies and departments into coherent positions that advance the best interests of the national government. She will be a strong voice for the United States before the Supreme Court. Her brilliant intellect will be respected by the Justices, and her directness, candor and frank analysis will make her an especially effective advocate." This letter will also be made part of the record.

At the same time, we expect the Solicitor General to exercise independent judgment from the Department of Justice, the Attorney General, and even the President of the United States. The office is charged with vigorously defending statutes duly enacted by Congress against constitutional challenges. The office also supervises all lower court appellate litigation, and decides whether to appeal decision that are adverse to the government, and what position should be taken on the merits of the case.

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So let me thank the two nominees for agreeing to serve their country and the Department during this critical time, and I look forward to today's confirmation hearing.

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www.kslaw.com

Paul Clement
Partner
[redacted]

February 9, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Chairman Leahy and Senator Specter:

I am writing to recommend the confirmation of Thomas J. Perrelli as Associate Attorney General. I have known him for two decades, and I believe that, if confirmed, he would be an exemplary Associate Attorney General.

I first met Tom two decades ago when he was the Managing Editor of the *Harvard Law Review*, and I served as one of the *Law Review* members whom he had to manage. In that capacity, I could observe his management style and skills first hand. He combined a light touch with people and a dedication to ensuring that the work of the *Review* was completed efficiently. While the management challenges confronting the Associate Attorney General clearly dwarf those faced by the Managing Editor of the *Review*, Tom's management experience and gift for dealing with people would serve him well if he is confirmed as Associate Attorney General.

In the two decades since we first met, Tom has compiled a distinguished record in both public service and private practice. During my own time in the Department of Justice, I worked with many career Justice Department professionals who also worked with Tom during his tenure at the Department. My sense is that those career professionals held him in uniformly high regard for the professional and personable way in which he conducted himself during his time at the Department.

That prior service in the Department should prepare Tom to be a particularly effective Associate Attorney General. His service in the Office of the Attorney General, one of the Department's other senior management offices, provided him with unique insights into the breadth of the Department's responsibilities. His service as the Deputy Assistant Attorney

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General in the Civil Division gave him an opportunity to work at a senior level in one of the litigating divisions that he would supervise if confirmed as Associate Attorney General. As a veteran of supervision from the Associate's Office, he should have a particularly good sense of the proper balance between providing effective management and giving the litigating divisions the autonomy they need to accomplish the work they perform so well.

Finally, his successful career in private practice speaks to the one fact that is inescapable from even a brief glance at his resume: Tom is an incredibly skilled lawyer. Those skills would serve both Tom and the Department very well if he is confirmed as the Associate Attorney General. I urge you to confirm him so he can continue his public service.

Sincerely,

Paul D. Clement

55828.163

January 27, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Senator Specter:

We who have had the honor of serving as Solicitor General over the past quarter century, from 1985 to 2009, in the administrations of Presidents Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush, write to endorse the nomination of Dean Elena Kagan to be the next Solicitor General of the United States. We are confident that Dean Kagan will bring distinction to the office, continue its highest traditions and be a forceful advocate for the United States before the Supreme Court.

Elena Kagan would bring to the position of Solicitor General a breadth of experience and a history of great accomplishment in the law. She has served as a law clerk to Supreme Court Justice Thurgood Marshall, she has been in private practice at one of American's leading law firms, she has served in the office of the Counsel to the President, she has been a policy advisor to the President, she has been a legal scholar of the first rank at two of the nation's leading law schools, Harvard and Chicago, and her research and writing in the fields of constitutional and administrative law will be highly relevant to the substantive work of the office. Most significantly, Kagan has been regarded as one of the most successful law school deans in modern times. All these experiences and accomplishments will serve her well in fulfilling the complex responsibilities required of the Solicitor General.

The well-deserved stature that Kagan has achieved in the legal profession will enhance her tenure as Solicitor General, ensuring that, within the executive branch, her voice and the conclusions reached by the office of the Solicitor General will be accorded the highest respect. The extraordinary skill she has demonstrated in bringing to Harvard an impressive array of new scholars, her ability to manage and lead a complex institution, and the high regard in which she is held by persons of a wide variety of political and social views, suggest that she will excel at the important job of melding the views of various agencies and departments into coherent positions that advance the best interests of the national government.

She will be a strong voice for the United States before the Supreme Court. Her brilliant intellect will be respected by the Justices, and her directness, candor and frank analysis will make her an especially effective advocate.

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We are confident that Elena Kagan, if confirmed, will continue the best traditions and bring added distinction to the office of the Solicitor General.

Respectfully,

Walter Dellinger Theodore B. Olson

on behalf of:

Charles Fried,
Solicitor General, 1985-1989

Kenneth W. Starr,
Solicitor General, 1989-1993

Drew S. Days III,
Solicitor General, 1993-1996

Walter Dellinger,
Acting Solicitor General, 1996-1997

Seth P. Waxman,
Solicitor General, 1997-2001

Theodore B. Olson,
Solicitor General, 2001-2004

Paul Clement,
Solicitor General, 2004-2008

Gregory G. Garre,
Solicitor General, 2008-2009

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January 23, 2009

Brackett B. Denniston, III
Senior Vice President and
General Counsel

GE
3135 Easton Turnpike
Fairfield, CT 06828
USA

[redacted]

The Honorable Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
711 Hart Senate Office Building
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Specter,

I am writing, and writing enthusiastically, in support of the candidacy of Elena Kagan to be Solicitor General of the United States.

I have come to know Elena well from her extraordinary tenure as Dean of the Harvard Law School, in working with her as an alumnus and as a parent of a student now in her final year at Harvard Law School. Elena is a gifted leader and person. She has a brilliant mind, enormous dedication to excellence and a passionate belief in the centrality of the rule of law. As you know, the Solicitor General's office has long standing traditions, although not always uniformly adhered to, of high standards and the preeminent importance of the rule of law. Elena will preserve and extend those important traditions.

But she has far more than those very considerable foundations. She would bring to the Solicitor's position exceptional character as well: integrity, hard work, leadership, inclusiveness and, particularly, her singular sense of balance and fairness. As one example of these characteristics, she has been able to attract teachers of different views and backgrounds and of outstanding quality to Harvard Law School during her tenure.

Elena will also be a formidable advocate and thinker before the Court, with both formidable written and oral skills.

Let me just address one point that has been raised concerning her candidacy, and that is her experience before the Court. I have seen Elena think, I have seen her speak and I have often read what she has written. She is a formidable advocate and thinker, and will be so before the Court.

I am, therefore, pleased to strongly endorse Elena Kagan's nomination. She will not only be a good Solicitor General, she will be a great one. We are fortunate that she is willing to devote her considerable talents and energy to this most important job.

Sincerely,

Brackett B. Denniston III

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PROF. WILLIAM A. WOODRUFF

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

February 12, 2009

Dear Senator Leahy,

I am writing to express concern about the nomination of Harvard Law School Dean Elena Kagan to be Solicitor General of the United States. My organization, the Center for Military Readiness, is an independent public policy organization that specializes in military/social issues.

I understand that Dean Kagan has shown support for campus veterans at dinners and speaking occasions, but token actions do not mitigate the implications of her active opposition to legislation known as the Solomon Amendment. As you know, this law mandates that if a college or university receives federal funds, it must provide campus access for ROTC programs and military recruiters on an equal basis.

In 2005 Ms. Kagan and 53 other law school faculty members filed an *amicus* brief supporting litigation asking the courts to declare the Solomon Amendment unconstitutional. The U.S. Court of Appeals for the Third Circuit agreed with that position, but the Supreme Court overruled on a unanimous vote.

The outcome of this case very likely would have been different if Dean Kagan had been the Solicitor General instead of a law professor endorsing a losing argument. Absent an appeal, the Third Circuit ruling would have nullified the Solomon Amendment by judicial *fiat,* without any review by the Supreme Court.

I am also concerned because the Solicitor General reviews all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, which position should be taken. In view of the far-reaching powers invested in this office, I am disappointed that members of the Judiciary Committee reportedly did not question Ms. Kagan closely to determine her legal philosophy with regard to the Solomon Amendment and other matters affecting the military.

For example, we need to know whether Kagan still endorses the *amicus* argument that the military is no different than other employers. If this is her view, will she respect Supreme Court precedents recognizing the principle of "deference" to the executive branch and Congress on matters of regulation and law affecting the military?

If Dean Kagan was not asked these questions with specific reference to the Solomon Amendment, I hope that you will submit them in writing. If her answers are not satisfactory, she should not be confirmed as the next Solicitor General. Enormous power should not be entrusted to an official whose judicial philosophy would do great harm to the all-volunteer force.

I have sent a similar letter to Senator Arlen Specter, Ranking Member of the Judiciary Committee.

Sincerely,

Elaine Donnelly

Elaine Donnelly
President, Center for Military Readiness

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[redacted]

January 23, 2009

Direct Dial
[redacted]
Fax No.
[redacted]

[redacted]

Via facsimile (202) 224-5225

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
United Sates Senate
SD-224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

Via facsimile (202) 224-9102

The Honorable Arlen Specter
Ranking Member
Senate Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

Re: *Elena Kagan, Nominee for Solicitor General of the United States*

Dear Chairman Leahy and Ranking Member Specter:

I write in support of Elena Kagan's confirmation as the next Solicitor General of the United States.

I first met Elena—now the Dean of the Harvard Law School—when we were first-year law students at Harvard 25 years ago. As luck would have it, the law school assigned us seats next to one another for most of our first-year classes. We then worked together as law review editors and as law clerks to different Supreme Court Justices. We have been friends and kept in touch since then.

I have never met a lawyer who knows Elena and is not utterly impressed by her intellect, temperament, and maturity. Indeed, it would be difficult to do justice to her many accomplishments or to find many lawyers with comparable achievements. She had a distinguished academic career long before she ascended to her current position as the head of one of our preeminent law schools. She has already worked at the highest levels of our government as an advisor to then President Clinton. Her tenure as Dean demonstrates that she is a uniquely gifted administrator—someone who can create consensus even in an institution that had become notorious for its fractiousness. For good measure, she has worked tirelessly to bring intellectual

GIBSON, DUNN & CRUTCHER LLP

The Honorable Patrick Leahy
The Honorable Arlen Specter
January 23, 2009
Page 2

diversity to an institution that for too long had too little of it. I can personally attest, from my service on Harvard's Board of Visitors, that Elena has significantly changed the place for the better.

Having worked as an attorney in the Solicitor General's Office under Solicitors General of both parties, I am also confident that Elena possesses every talent needed to equal the very best among her predecessors. That list includes not only distinguished Supreme Court practitioners but also federal judges and, of course, distinguished academics like Elena, Dean Griswold and then-Professor Bork, to name a few. I am very pleased that President Obama has nominated someone worthy of the highest traditions of that Office, and I strongly urge you to confirm her nomination without delay.

Very truly yours,

Miguel A. Estrada

MAE/vfl

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VIENNA

January 23, 2009

The Honorable Arlen Specter
United States Senator
711 Hart Building
Washington, D.C. 20510

Dear Senator Specter:

I am writing to you to support the nomination of Dean Elena Kagan to be Solicitor General of the United States.

I have worked with Dean Kagan on the Dean's Advisory Board of the Harvard Law School. I have also had the pleasure of serving with her as Trustee of the Skadden Fellowship Foundation. The Foundation's sole purpose is to grant fellowships to encourage law school graduates to work in not-for-profit public interest law.

I have also had an opportunity over several years to debate current legal issues with her.

In all of these relationships, I have found Dean Kagan to have excellent judgment and superlative management and advocacy skills, as well as a comprehensive knowledge of the law and the importance of the rule of law.

I am convinced that if confirmed, Dean Kagan will be an outstanding Solicitor General and that she will make a great contribution to the Office.

Sincerely,

Joseph H. Flom

MAYER • BROWN

January 26, 2009

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The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Office Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee
711 Hart Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Senator Specter:

The undersigned lawyers served in the Office of the Solicitor General in both Republican and Democratic Administrations. In addition, each of us is a member of the Bar of the Supreme Court of the United States and spends a substantial portion of our legal practice handling matters in the Supreme Court. Although we reflect a broad range of political and policy views, we are united in strongly supporting the nomination of Dean Elena Kagan of Harvard Law School to be Solicitor General of the United States.

Dean Kagan has a distinguished professional career, which includes clerkships with Judge Mikva and Justice Marshall, work in private practice at Williams & Connolly, service as Associate Counsel to President Clinton, and professorships at the University of Chicago Law School and Harvard Law School. Dean Kagan's scholarly work has focused on the area of administrative law and the First Amendment, both of which occupy a significant part of the Supreme Court's docket. In addition, as Dean of Harvard Law School since 2003, she has been credited with using a consensus-building leadership style to make major improvements both in the operations of the school and in the lives of its students.

In sum, Dean Kagan is a person of great legal and personal skills, intellect, integrity, independence and judgment. We therefore believe, based on extensive personal experience, that she has all of the attributes that are essential to an outstanding Solicitor General, and we hope that your Committee and the United States Senate will act favorably on her nomination.

Mayer Brown LLP operates in combination with our associated English limited liability partnership
and Hong Kong partnership (and its associated entities in Asia).

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Mayer Brown LLP

Senator Patrick Leahy
Senator Arlen Specter
January 26, 2009
Page 2

Thank you for your consideration of our views.

Sincerely,

Andrew L. Frey
Assistant to the Solicitor General 1972-1973
Deputy Solicitor General 1973-1986

Kenneth S. Geller
Assistant to the Solicitor General 1975-1979
Deputy Solicitor General 1979-1986

Philip Allen Lacovara
Assistant to the Solicitor General 1967-1969
Deputy Solicitor General 1972-1973

Andrew J. Pincus
Assistant to the Solicitor General 1984-1988

Charles A. Rothfeld
Assistant to the Solicitor General 1984-1988

Stephen M. Shapiro
Assistant to the Solicitor General 1978-1980
Deputy Solicitor General 1981-1983

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CHARLES FRIED
Harvard Law School
1545 Massachusetts Avenue
Cambridge, MA 02138
January 23, 2009

Senator Patrick J. Leahy, Chair
Senator Arlen Specter, Ranking Member
The Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senators Leahy and Specter,

I write in support of the nomination of Elena Kagan to be Solicitor General of the United States. I have known Elena Kagan since she came to Harvard Law School as a visiting professor in 1999. She is my friend. I have seen her in action as a teacher when as a member of the appointments committee I visited a first year class she was teaching in Civil Procedure in 2001. I reviewed her scholarly work as part of the process by which she was promoted to full professor. I served on President Summers's dean search committee, and from 2003-2005 I sat on the appointments committee on which she sat as dean. Therefore I believe I know her intellectual power, her knowledge of the law, her character, her personality and her temperament. I am also intimately acquainted with the duties of the Solicitor General having served in that office from 1985-1989. I am quite sure she will be a distinguished Solicitor General and will serve with skill, honor and integrity.

She is a superb lawyer and an awesomely intelligent person. In discussion with students and in conference and dispute with colleagues she has a deftness, a quickness and an aptness of phrase—with no tincture at all of pomposity or self-importance—that show she will be able to argue to the Court with consummate skill. In the years I sat with her on the appointments committee we had as our task the building of the faculty, a faculty depleted by retirements, in need of new, young professors and riven by years of internal doctrinal and professional disputes. We reviewed the work of scores of senior scholars. Her judgment was unerring. But more strikingly, she showed an ability to put aside disagreements with a candidate's political or intellectual disposition and to see only the quality of the candidate's intellectual ability and potential contribution. The result has been the most vibrant and intellectually diverse faculty I have know since coming to the Harvard Law School in 1961.

She has not only been able to manage the faculty, ushering in many needed and much delayed reforms. She has created a thrilling and at the same time warm atmosphere for students, so that they not only recognize how much they are learning but that they enjoy

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being at the school. I will give one anecdote that sums up her temperament and her effect on others.

Some years ago, it came Harvard Law School's turn to host the national convention of the student chapter of the Federalist Society. There was a dinner of some 1,000 guests from all over the country and it was her duty as dean to offer the welcome to our many guests. When she rose she was greeted by prolonged and thunderous applause. Enduring it for a while, she finally raised her hands—a big grin on her face—and said "You are not my people . . . ." There was loud and friendly laughter in the hall, almost drowning out her next words: "But I love the Federalist Society." This was met by applause more lively and prolonged than before. I would guess she loves the American Constitution Society too, but I do not go to those meetings.

She is a rare and wonderful person, direct, honest, and fearless. I shall miss her and consider our loss a sacrifice we make for the good of the country.

Yours,

Charles Fried

Beneficial Professor of Law

55828.174

February 9, 2009

The Honorable Patrick Leahy
Committee Chair
Committee on the Judiciary
United States Senate
224 Dirksen Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter,

As the chief law enforcement officers of our respective states, we write to express our support for the nomination of Thomas J. Perrelli for Associate Attorney General of the United States.

Mr. Perrelli's qualifications and credentials are exceptional. His 17 years of litigation experience, including his service as Counsel to the Attorney General of the United States and then as Deputy Assistant Attorney General, make him extremely well qualified to serve as Associate Attorney General. During his tenure at the Department of Justice, as well as during his time as managing partner of one of the nation's leading law firms, Mr. Perrelli has demonstrated the legal ability, outstanding character and effectiveness needed for the post.

Mr. Perrelli also has the requisite substantive legal background. In addition to his vast experience handling complex litigation involving a public policy or regulatory component, Mr. Perrelli has vast experience defending the constitutionality of federal statutes, defending federal agency actions and regulations, and representing the diplomatic and national security interests of the United States in court of law, as a result of his prior tenure at the Department of Justice.

In his work both in the private and public sector, Mr. Perrelli has proven himself to be a brilliant and ethical lawyer with all the qualities needed to serve as Associate Attorney General and help restore independence and integrity to the Department of Justice. Mr. Perrelli is committed to the priorities and objectives being defined for the Department of Justice by the new administration and we look forward to working with him.

We are confident that Mr. Perrelli would make an exceptional Associate Attorney General and urge you to confirm his nomination.

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Sincerely,

Douglas F. Gansler
Attorney General of Maryland

Signing on behalf of the following Attorneys General:

Attorney General Dustin McDaniel (AR)	Attorney General Jim Hood (MS)
Attorney General Thurbert Baker (GA)	Attorney General Chris Koster (MO)
Attorney General Steve Six (KS)	Attorney General Steve Bullock (MT)
Attorney General Jack Conway (KY)	Attorney General Roy Cooper (NC)
Attorney General James "Buddy" Caldwell (LA)	Attorney General Gary King (NM)
Attorney General Doug Gansler (MD)	Attorney General Drew Edmondson (OK)
Attorney General Martha Coakley (MA)	Attorney General Bob Cooper (TN)

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HARVARD LAW SCHOOL

PROFESSOR JACK L. GOLDSMITH
CAMBRIDGE · MASSACHUSETTS · 02138
[redacted]

Senator Patrick J. Leahy, Chairman
Senator Arlen Specter, Ranking Member
Senate Judiciary Committee
Hart Senate Office Building
Washington, D.C. 20001

January 23, 2009

Dear Senators Leahy and Specter:

I write in enthusiastic support of Elena Kagan for Solicitor General of the United States. I am a professor at Harvard Law School and a former Assistant Attorney General, Office of Legal Counsel (2003-2004), in the Bush administration. I have seen Kagan up close for four and a half years at Harvard Law School, and I know her well. She will make an outstanding Solicitor General.

Kagan has the obvious qualities to make a great Solicitor General. She is one of the smartest lawyers I know and she cares deeply about law and legal craft. Her Supreme Court clerkship, her practice at Williams & Connolly, her years in the White House, and her years teaching and writing about constitutional and administrative law have left her deeply familiar with the issues before the Court – especially the out-of-public-view administrative and statutory issues that make up a big part of the Court's docket and that are important to the running of the government. And while Kagan does not have experience as an appellate oral advocate, she is a famously great teacher and public speaker, and will no doubt do an outstanding job in oral argument before the Court.

But Kagan brings much more to the job beyond these obvious qualifications. Because of her previous government experience and her years teaching administrative law, Kagan will take to the Solicitor General's Office a better understanding of the Congress and the Executive branch that she will represent before the Court than perhaps any prior Solicitor General. This is a very important qualification. The Solicitor General must choose which cases and which arguments to bring before the Court (and the lower appellate courts). In so doing she must understand how those cases and arguments, and the resulting Supreme Court decisions that the Solicitor General has such a heavy hand in influencing, will impact the Executive bureaucracy and the Congress. I can think of few people better qualified to make these choices in an informed and intelligent way. And I can think of no one with better judgment to do so. Good judgment is a hard quality to describe, but Kagan has it. She understands problems in all their dimensions, she thinks

about them clearly and without ideological suppositions, and she has a knack for understanding well the consequences and ramifications of various courses of action.

A final qualification for the job is Kagan's success as the dean of Harvard Law School. This is attributable to her vision and imagination, her fierce work habits, her extraordinary management skills, and her just-mentioned good judgment. Her success at Harvard also resulted from her shrewd ability to bridge disagreement. Kagan does this by listening to all sides of an argument, by engaging interlocutors honestly and empathetically, and by exercising her judgment openly and with good reasons. This is obviously an important quality in her job of trying to find five votes for the government's position among Justices who rarely agree.

It might seem over the top to say that Kagan combines principle, pragmatism, and good judgment better than anyone I have ever met. But it is true. I hope you confirm her for Solicitor General.

Sincerely,

Jack Goldsmith

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CHRISTINE O. GREGOIRE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • www.governor.wa.gov

January 26, 2009

The Honorable Patrick J. Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Specter, and Members of the Committee:

I write to you in support of President Obama's nomination of Mr. Thomas J. Perrelli as Assistant Attorney General. I applaud this appointment. Mr. Perrelli brings the integrity and depth of experience that the Department of Justice demands in these uncertain times.

My personal experience with Mr. Perrelli arose during the period in which he supervised the Justice Department's Tobacco Litigation Team in its litigation against the major cigarette manufacturers. I represented Washington State as Attorney General during that case. Mr. Perrelli's leadership of the federal team was instrumental in producing the landmark Master Settlement Agreement that resulted from that litigation.

After his return to private practice, Mr. Perrelli has gone on to lead the Washington, D.C., office of Jenner & Block, one of the most distinguished firms in the country. His continued experience in complex litigation, especially litigation with a public policy or regulatory focus, will be highly valuable to the Justice Department. Mr. Perrelli brings precisely the blend of experience, dedication and honesty that the Justice Department needs today.

Thank you for the opportunity to lend my support to Mr. Perrelli's nomination. If I can be of any further assistance to you or the Committee, please do not hesitate to contact me.

Sincerely,

Christine Gregoire

Christine O. Gregoire
Governor

February 9, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Ranking Member Specter:

We write in support of Dean Elena Kagan's nomination to serve as Solicitor General of the United States. We are former Harvard Law School students who attended that institution during Dean Kagan's tenure. We have experienced firsthand her uncompromising integrity, sound judgment, compelling scholarship, and commanding but patient leadership. We are confident that Dean Kagan would bring these same qualities to the Office of the Solicitor General. Each of us believes firmly that Dean Kagan would serve the United States as a passionate and effective advocate of the highest order, and accordingly, we urge her confirmation without delay.

We are representative of the vastly divergent backgrounds, interests, and accomplishments that characterize each class of Harvard Law students. We have pursued careers in private practice, public interest, and government service. And we have actively supported and worked on behalf of organizations, elected and appointed officials, and candidates spanning a broad range of ideologies. Our common thread is that we entered Harvard Law School as aspiring young lawyers, excited by the storied history of the Law School yet apprehensive of our ability to thrive in that historically challenging environment. But because of Dean Kagan's leadership, we experienced a Law School firmly dedicated not only to instilling students with a sincere respect for the rule of law, but also to providing a genuine sense of community. Her guidance and example inspired a student body diverse in viewpoints and experiences, but united in a desire to confront and resolve the complex legal, ethical, and social questions that challenge us daily.

During her tenure, Dean Kagan significantly increased the ranks of students pursuing government and public interest careers, and she greatly expanded the Law School's clinical programs and pro bono opportunities. She successfully encouraged more collegial, open interactions between faculty and students in and out of the classroom, and she developed a reputation for her ability to mediate conflicts with fairness and composure. Her efforts in these and a multitude of other respects established a cooperative spirit that benefited students, faculty, and alumni alike and has led to a Law School more dynamic, engaged, and robust than ever before.

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We are but few among thousands of students and alumni who feel indebted to Dean Kagan for the countless ways in which she shaped our legal educations, and our futures, for the better. We would be saddened to see her leave Harvard, and she would be greatly missed. But we are proud that she would be serving our nation at such a critical period in its history. And we are confident that you will find no better advocate to speak for the United States and uphold our laws and our Constitution.

Respectfully,

Kevin M. LoVecchio, Class of 2007

George W. Hicks, Jr., Class of 2005

on behalf of:

Katie Biber Chen, Class of 2004
Anjan Choudhury, Class of 2004
Justin Driver, Class of 2004
Isaac J. Lidsky, Class of 2004
Meaghan McLaine, Class of 2004
Carrie A. Jablonski, Class of 2004
Jeffrey A. Pojanowski, Class of 2004
Beth A. Williams, Class of 2004
John S. Williams, Class of 2004

David W. Foster, Class of 2005
Courtney Gregoire, Class of 2005
Rebecca Ingber, Class of 2005
Lauren Sudeall Lucas, Class of 2005
Kathryn Grzenczyk Mantoan, Class of 2005
Anton Metlitsky, Class of 2005
Chris Murray, Class of 2005
Rebecca L. O'Brien, Class of 2005
Beth A. Stewart, Class of 2005
Ryan L. VanGrack, Class of 2005

David S. Burd, Class of 2006
Eun Young Choi, Class of 2006
Matt Cooper, Class of 2006
Brian Fletcher, Class of 2006
David S. Flugman, Class of 2006
Adam D. Harber, Class of 2006
Jeffrey E. Jamison, Class of 2006
Nathan P. Kitchens, Class of 2006
Tracy Dodds Larson, Class of 2006
Benjamin S. Litman, Class of 2006
Dana Mulhauser, Class of 2006
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Matthew Price, Class of 2006
John M. Rappaport, Class of 2006
Kimberly J. Ravener, Class of 2006
Rachel Rebouché, Class of 2006
Zoe Segal-Reichlin, Class of 2006
Jeremiah L. Williams, Class of 2006
Tally Zingher, Class of 2006

L. Ashley Aull, Class of 2007
Daniel F. Benavides, Class of 2007
Robert P. Boxie, III, Class of 2007
Damaris M. Diaz, Class of 2007
Gabriel Kuris, Class of 2007
Adam R. Lawton, Class of 2007
John A. Mathews II, Class of 2007
Michele A. Murphy, Class of 2007
Michael A. Negron, Class of 2007
Alexi Nunn, Class of 2007
Josh Paul Riley, Class of 2007
Jasmin Sethi, Class of 2007
Jane Shvets, Class of 2007
Jason M. Spitalnick, Class of 2007
James Weingarten, Class of 2007

Amy C. Barker, Class of 2008
Kathryn Baugher, Class of 2008
Margaux Hall, Class of 2008
Rochelle Lee, Class of 2008
Daniel P. Pierce, Class of 2008
Elizabeth Russo, Class of 2008
Megan Ryan, Class of 2008
Andrew M. Woods, Class of 2008

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Honorable Patrick Leahy
Chairman, U.S. Senate Committee on the Judiciary

Honorable Arlen Specter
Ranking Member, U.S. Senate Committee on the Judiciary

Honorable Herb Kohl
Member, U.S. Senate Committee on the Judiciary

Honorable Dianne Feinstein
Member, U.S. Senate Committee on the Judiciary

Honorable Orrin G. Hatch
Member, U.S. Senate Committee on the Judiciary

Honorable Russell D. Feingold
Member, U.S. Senate Committee on the Judiciary

Honorable Charles E. Grassley
Member, U.S. Senate Committee on the Judiciary

Honorable Charles E. Schumer
Member, U.S. Senate Committee on the Judiciary

Honorable Jon Kyl
Member, U.S. Senate Committee on the Judiciary

Honorable Richard J. Durbin
Member, U.S. Senate Committee on the Judiciary

Honorable Jeff Sessions
Member, U.S. Senate Committee on the Judiciary

Honorable Benjamin L. Cardin
Member, U.S. Senate Committee on the Judiciary

Honorable Lindsey Graham
Member, U.S. Senate Committee on the Judiciary

Honorable Sheldon Whitehouse
Member, U.S. Senate Committee on the Judiciary

Honorable John Cornyn
Member, U.S. Senate Committee on the Judiciary

Honorable Ron Wyden

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Member, U.S. Senate Committee on the Judiciary

Honorable Tom Coburn
Member, U.S. Senate Committee on the Judiciary

Honorable Amy Klobuchar
Member, U.S. Senate Committee on the Judiciary

Honorable Edward E. Kaufman
Member, U.S. Senate Committee on the Judiciary

Dear Chairman Leahy, Ranking Member Specter, and Committee Members

We are writing on behalf of Americans who are concerned with the lack of scrutiny that could be applied to some of President Obama's most important nominees. As new nominations come before your Committee, we hope you will reject pressure from the White House or others to rubber stamp nominations. Instead, it is our hope that you will give the American people an opportunity to hear about nominees and their records.

If confirmed by the U.S. Senate to serve in high offices within the Department of Justice, Dawn Johnsen, David Ogden, and Thomas J. Perrelli could have a dramatic impact on the state of this nation's legal order. Each of these nominees has made public comments or has taken positions indicating strong support for a shift in national policy regarding the culture of life. Whatever one thinks of the culture of life, dramatic shifts in policy on such important national questions should not happen without serious deliberation.

Consider the following facts:

--David Ogden has been nominated for Deputy Attorney General. His hearing is next week, less than a month after his nomination. On behalf of the American Psychological Association, he filed a terrible amicus brief in Casey v. Planned Parenthood, and here are the relevant quotes:

(1) "The conclusions from the most rigorous scientific studies are consistent: for the overwhelming majority of women who undergo abortion, there are no long-term negative emotional effects..."
(2) "Abortion rarely causes or exacerbates psychological or emotional problems. When women do experience regret, depression, or guilt, such feelings are mild and diminish rapidly without adversely affecting general functioning. Those few women who do experience negative psychological responses after abortion appear to be those with preexisting emotional problems ...."
and

(3) "In sum, it is grossly misleading to tell a woman that abortion imposes possible

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detrimental psychological effects when the risks are negligible in most cases, when the evidence shows that she is more likely to experience feelings of relief and happiness, and when child-birth and child-rearing or adoption may pose concomitant (if not greater) risks or adverse psychological effects ...."

--Dawn Johnson has been nominated to serve as head of the Office of Legal Counsel. She is the former Legal Director to NARAL and was a Staff Counsel Fellow for the ACLU Reproductive Freedom Project—a project which recently served as lead counsel in Ayotte v. Planned Parenthood of Northern England. This is absolutely stunning. For eight years, the Democrats and the Left complained that this office, charged with providing the government with objective opinions about the constitutionality of acts it wishes to undertake (this is the office that opined on detainees and interrogation, for example), had been politicized in an unprecedented way. And, now, without any debate or discussion, the Obama Administration is putting forward an absolute political zealot from two of the nation's most Leftist groups.

--Thomas Perrelli, nominated to serve as Associate Attorney General, is most infamous for his defense of Terri Schiavo's husband in the battle over withdrawing life-sustaining treatment. Perrelli even worked with pro-euthanasia attorney George Felos on the case, sending a clear message about his own end-of-life views. The appointment of Perrelli is hardly a surprise—President Obama voted with a unanimous Senate to pass the Schiavo bill, but now calls it one of his biggest mistakes.

Millions of Americans reasonably expect their elected representatives in the Senate to provide meaningful review of the President's nominees, particularly when they could dramatically change national policy. We urge the Committee to provide ample time for meaningful review to take place, and we urge members to ask probative questions of these nominees and demand serious answers so that the American people can continue to play a part in defining the cultural fabric of our nation.

Sincerely,

Kristan Hawkins
Executive Director, Students for Life of America

Tony Perkins
President, Family Research Council

David N. O'Steen, Ph. D.
Executive Director, National Right to Life Committee

Charmaine Yoest
President, Americans United for Life

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Austin Ruse
President, Catholic Family and Human Rights Institute

Marjorie Dannenfelser
President, Susan B. Anthony List

Kris Mineau
President, Massachusetts Family Institute

Bradley Mattes
Executive Director, Life Issues Institute

Phyllis Schlafly
President, Eagle Forum

J. C. Willke, MD
President, International Right to Life Federation

Thomas Brejcha
President & Chief Counsel, Thomas More Society

Peter Breen
Executive Director & Legal Counsel, Thomas More Society

Joseph A. Brinck
President, Sanctity of Life Foundation

Jennifer Giroux
Executive Director, Women Influencing the Nation

Samuel B. Casey
General Counsel, Law of Life Project, Advocates International

Gary Bauer
President, American Values

Brian Burch
President of CatholicVote.org

David Bereit
National Director, 40 Days for Life

Phil Burress
President, Citizens for Community Values

Jill Stanek, RN

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WorldNetDaily columnist

Peggy Hartshorn
President, Heartbeat International

Michael Geer
President, Pennsylvania Family Institute

Bryan Kemper
President, Stand True- Christ Centered Pro-life

John T. Bruchalski, MD, FACOG
Divine Mercy Care

James Nolan
President, Crossroads Pro-Life

Marie Bowen
Executive Director, Presbyterians Pro-Life

Jennifer Kimball, Be.L.
Executive Director, Culture of Life Foundation

Jo Tolek
Executive Director, Human Life Alliance

Dean Nelson
Executive Director, Network of Politically Active Christians

Chris Slattery,
President, Expectant Mother Care-EMC FrontLine Pregnancy Centers, New York City

Rev. Louis Sheldon
Chairman, Traditional Values Coalition

Andrea Lafferty
Executive Director, Traditional Values Coalition

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National Association of Women Lawyers®
the voice of women in the law™

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Washington, DC

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Chicago, IL

January 21, 2009

Chairman Patrick Leahy
U.S. Senate
433 Russell Senate Office
Washington, DC 20510

Senator Arlen Spector
U.S. Senate
711 Hart Senate Office
Washington, DC 20510

Re: Dean Elena Kagan

Dear Senators Leahy and Spector:

This letter is submitted on behalf of the National Association of Women Lawyers (NAWL)® in support of the nomination of Elena Kagan, presently Dean of Harvard Law School, as Solicitor General in the United States Department of Justice. NAWL heartily supports this nomination and urges that Dean Kagan be speedily confirmed.

Since 1899, NAWL has been committed to fostering diversity and advancing women in the legal profession. NAWL is the only national women's bar association with individual and organizational members nationwide, including law firms, law firm attorneys, corporations, in-house counsel, government attorneys, law schools, and law school professors.

NAWL offers, among other initiatives, educational programs for women lawyers at every stage of their careers; promotes networking opportunities; implements a mentoring program matching experienced women lawyers with newly minted lawyers; conducts a high profile survey measuring the advancement of women into leadership in law firms; and tracks legislative agendas of importance to women's rights.

One of our proudest moments in 2008 was to present Dean Kagan with our highest award, the Arabella Babb Mansfield Award, in honor of the first woman admitted to the bar in the United States. We give this award in recognition of professional achievements, positive influence and valuable contributions in the advancement of women in the law. We were convinced that it would be hard to find a more worthy recipient than Dean Kagan. The award was presented at our Annual Luncheon in New York City on July 16, 2008, before an appreciative audience of 1,000 people from around the country.

Indeed, Elena Kagan has had an impressively lofty career, especially given her relatively young age. She received her bachelor's degree summa cum laude from Princeton University in 1981; she received her M. Phil. from Oxford in 1983; and a J.D. from Harvard Law School in 1986, where she was supervising editor of the Law Review. Thereafter she clerked for Judge Abner Mikva for the U.S. Court of Appeals for the D.C. Circuit, and for Justice Thurgood Marshall on

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the U.S. Supreme Court. She spent some time in private practice at Williams & Connolly, and then began her academic career as a law professor at the University of Chicago. From there she went to the White House, from 1995 to 1999, where she served first as Associate Counsel to the President (1995-96) and then as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council (1997-99).

Dean Kagan came to Harvard Law School as a visiting professor in 1999 and became Professor of Law in 2001. While on the faculty, Dean Kagan has taught administrative law, constitutional law, and civil procedure. A leading scholar of administrative law, Dean Kagan's recent work focuses on the role of the President of the United States in formulating and influencing federal administrative and regulatory law. In 2003, she was named the 11th Dean of Harvard Law School, serving as the first woman dean.

In addition to a highly impressive curriculum vitae, Dean Kagan has always been very willing to use her platform in a most conspicuous position to advance the concerns of women in the law, one of the many reasons that NAWL has supported her. She is an accomplished public speaker, informal and humorous, and full of fresh insights and perspective.

Dean Kagan's intellect is second to none, her judgment superb, and her perspective a judicious mix of scholarship and common sense. For all of these reasons, NAWL believes she will make a first-rate Solicitor General, and formally supports her for the position of Solicitor General.

Respectfully submitted,

Lisa Horowitz

Lisa Horowitz, President
NAWL Board, 2008-09

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DAVID GREENWALD
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JOEL F. HEROLD
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GEORGE F. SCHOEN
ERIK R. TAVZEL
CRAIG F. ARCELLA
TEENA-ANN V. SANKOORIKAL
ANDREW R. THOMPSON
DAMIEN R. ZOUBEK
LAUREN ANGELILLI
TATIANA LAPUSHCHIK
ERIC L. SCHIELE
ALYSSA K. CAPLES
JENNIFER S. CONWAY
MINH VAN NGO

SPECIAL COUNSEL
SAMUEL C. BUTLER
GEORGE J. GILLESPIE, III

January 23, 2009

Dear Senators Leahy and Specter:

I write to support with great enthusiasm Elena Kagan's nomination to be Solicitor General of the United States.

I have known Elena well since 2003 when she became Dean of the Harvard Law School. I am an active law school alumnus and have served since before her tenure as Dean on the Harvard Law School Dean's Advisory Board. I have met with her numerous times each year she has been Dean. These meetings have taken place at advisory board meetings, which sometimes take place over the course of two days, at law school functions, and at my firm's offices, where I served for eight years as presiding partner.

In all the venues that I have worked with Elena and observed her in action, I have been tremendously impressed with her and her abilities. I have no doubt that she is a superb lawyer, one of the finest in the United States. She has a razor sharp legal mind, is a forceful and persuasive advocate and is possessed with great personal skills and the highest character.

She has been a wildly successful Dean at the Harvard Law School, no mean feat. She has successfully handled all the school's various constituencies, students, faculty, alumni, donors, the Cambridge community and the larger public.

I have seen her again and again handle difficult groups with varying interests, forcefully advocate her position, and prevail based on the strength and logic of her argument. One last point, Elena is highly respected by the legal community. I have never heard a lawyer, regardless of political views, speak ill of her abilities or for that matter of her. I have no doubt she would make a great Solicitor General and urge her

confirmation. I would be happy to try to answer any questions you or your staff might have.

Very truly yours,

Robert D. Joffe

Hon. Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Hon. Arlen Specter
United States Senate
711 Hart Building
Washington, D.C. 20510

Elena Kagan
Opening Statement
February 10, 2009

Thank you, Mr. Chairman. And thank you, Senator Reed, for that kind introduction. It has been a pleasure and privilege getting to know you these last few years.

Mr. Chairman and Members of the Committee, I am deeply honored to be sitting here today. And I am grateful. I am grateful to the President for nominating me, to the Attorney General for supporting me, and to the Committee for holding this hearing and considering my nomination. I am particularly grateful to the many members of the Committee, from both sides of the aisle, who met and talked with me before this hearing.

I would like to say a few words about some people who are here with me today and some people who could not be. I have two terrific brothers who are high school teachers in New York City. I know how hard they work, and I excused them from coming down today. They both teach social studies, and I suspect the transcript or tape of this hearing will somehow become part of a lesson plan. Doubtless I'll be graded on my performance.

My older brother's daughter, my niece Rachel, is here today. She is graduating from college this year and looking forward to law school. I think she will be a simply splendid lawyer. And many of my friends from Harvard Law School – the place that has been my home, in every sense of the word, for the last ten years – are here with me as well. Law professors, you'll understand, don't work quite as hard as high school teachers, so I gave them permission to come down. I'm pleased to introduce: Charles Fried, himself a former Solicitor General, Jack Goldsmith, John Manning, Dan Meltzer, Martha Minow, and Carol Steiker. They are my best friends at Harvard, but doubtless they will be grading me too.

I wish my parents could have lived to see this day. My father was a lawyer himself and took great pride in my professional accomplishments. He died about 15 years ago now, but he lived to see me clerk for the Supreme Court and become a professor at the University of Chicago, and he thought that was pretty great. My mother died just last summer, so her absence here is especially difficult for me. She grew up in a time when few women pursued high-powered professional careers; and maybe for that reason, she relished my doing so. She would have loved this day. Both my parents wanted me to succeed in my chosen profession. But more than that, both drilled into me the importance of service, character, and integrity. I pray every day that I live up to those standards.

I hope one other person is looking down on this hearing room today. As you know, I had the privilege of clerking for Justice Thurgood Marshall – the greatest lawyer, I think, of the 20th century. Justice Marshall had some awfully good jobs in his life. But he always said that the best, bar none, was being Solicitor General. I'm sure there were many reasons for that, but I've been thinking recently about one in particular. I think he must

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have been so deeply moved to walk into the most important court in this country when it was deciding its most important cases and to say, "I represent the United States of America." And I think he would have liked that a former clerk of his would be nominated for the same job and, if confirmed, would be able to say those same most thrilling and most humbling words for a lawyer.

To have the opportunity to lead the Solicitor General's Office is, indeed, the honor of a lifetime. As you know, this is an office with a long and rich tradition not only of extraordinary legal skill but of extraordinary professionalism and integrity. That is due in part to the people who have led it, and I especially want to acknowledge Generals Olsen, Clement, and Garre for their superb service during these last eight years. In a time of some difficulty for the Justice Department, they have maintained the highest standards of the office, and they have served their client, this nation, very well. They have been joined in this regard by the career lawyers and other public servants in the Solicitor General's office. Those men and women have been justly called the finest law firm in this country, and they represent the gold standard in federal public service.

The Solicitor General's Office is unusual in our government in owing responsibilities to all three of the coordinate branches in our system of separated powers. Because of this striking feature of the office, the Solicitor General traditionally has been accorded a large measure of independence.

Most obviously, of course, the Solicitor General reports to the Attorney General and, through him, to the President, and defends the regulations, policies, and practices of the executive branch when these are challenged. In this role, the Solicitor General is the principal advocate of the executive branch in the courts of the United States.

At the same time, the Solicitor General has critical responsibilities to Congress – most notably, the vigorous defense of the statutes of this country against constitutional attack. Traditionally, the Solicitor General has defended any federal statute in whose support any reasonable argument can be made, outside of a very narrow band of cases involving the separation of powers. I pledge to continue this strong presumption that the Solicitor General's office will defend each and every statute enacted by this body.

Finally, the Solicitor General's office has unique obligations to the Supreme Court of the United States. It is frequently said that the Solicitor General serves as the 10th Justice – though I suspect the Justices think of her more as the 37th clerk. Regardless, the Solicitor General must honor the principle of stare decisis, exercise care in invoking the Court's jurisdiction, and most important of all, be scrupulously candid in every representation made to the Court. In this sense, the most important of all the Solicitor General's responsibilities is to be true to the rule of law.

Mr. Chairman and Senators, it would be an honor to serve as Solicitor General, and I commit that if the Senate sees fit to confirm me, I will do everything possible to live up to the great traditions, expectations, and responsibilities of the Solicitor General's Office. Thank you.

55828.192

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Tel: [redacted] | Fax: [redacted] | e-mail: [redacted]

Robert J. Katz
Senior Director

Goldman Sachs

January 22, 2009

Hon Patrick J. Leahy,
Chairman,
and
Hon Arlen Specter,
Ranking Member,

Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senators Leahy and Specter,

I am delighted to write in unreserved support of the President's nomination and the Senate's confirmation of Dean Elena Kagan as Solicitor General of the United States.

I am a magna cum laude graduate of Harvard Law School. Following a Harvard fellowship and a clerkship for the Chief Judge of the Second Circuit Court of Appeals, I spent six years as a Litigation associate and eight years as a Litigation partner of the New York City law firm of Sullivan & Cromwell. In 1988 I became General Counsel and a partner (later, managing director) of Goldman Sachs. I served in that capacity for nearly 13 years (and as a member of the firm's management committee and partnership committee), through and beyond the time of our becoming a publicly-held corporation. Since relinquishing leadership of the Legal Department, I have continued to serve Goldman Sachs as a Senior Director.

I have known Elena Kagan since she was appointed Dean six years ago. Throughout that period, I have worked closely with her as a member of the Dean's Advisory Board, on whose Executive Committee I have sat for the past few years, as well as in various other advisory, fundraising and teaching roles. I even have the peculiarly valuable perspective of being the father of a current student who has spent the past four years in the Law School-Kennedy School joint degree program, and will graduate this spring.

With apologies for its length, I wanted to begin from this recitation of background and perspective for my averring without qualification that, if confirmed, Dean Kagan will make not merely an excellent but an exceptional Solicitor General. She is a quintessential legal scholar,

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educator, leader and public servant, with few if any peers in her generation. She has excelled -- an overworked term, but quite accurate here -- as a student at Princeton, Oxford and Harvard Law School, as a judicial clerk in the DC Circuit and the Supreme Court, in senior legal and policy roles in the White House, as a tenured professor at two of the nation's great law schools, and as Dean of mine.

The Solicitor General's is an appellate lawyering role to which Dean Kagan will bring not just brilliant legal knowledge, analysis and articulation -- personal skills and capacities to which her track record is an unbroken testament. It is also a leadership role, requiring a wise sense of the public's interest, a strategic -- not just tactical -- perspective and how to position and present it, and the organizational and motivational talents to inspire and deploy the skills of some of the country's best lawyers, serving in the Office of the SG. Dean Kagan has gained and displayed these talents consistently over her educational and public careers as student, judicial clerk, scholar, teacher, public servant and dean -- perhaps most of all as Dean of the highly accomplished and often fractious thousands of constituents who populate the faculty, students, graduates and "users" of Harvard Law School. She accomplished the near impossible of uniting them all behind curricular, instructional and faculty-recruitment decisions of once-a-century proportions, while leading a massive strategic renovation that began in good times and was completed during far more stressful ones.

There is genuine grieving at the prospect of her departure, matched with universal pride, good wishes and awareness that if she must leave, she is leaving at a point and in a way that is impeccable. It is almost trivializing to say that she will be leaving Harvard Law School a far stronger, and also a far better, place for her tenure as professor and Dean. Another university of which I am a trustee founded its highly-ranked law school in the ideal of producing "lawyers in the best sense." Elena Kagan is truly a lawyer in the best sense, and that is the sense in which she will serve as the people's senior advocate if, as I hope, she is confirmed as Solicitor General.

I would be delighted to respond to any questions that you or your staff may have.

Respectfully,

Robert J. Katz

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January 30, 2009

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
433 Russell Office Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Senate Committee on the Judiciary
711 Hart Office Building
Washington, DC 20510

Re: Nomination of Elena Kagan to be Solicitor General of the United States

Dear Senators Leahy and Specter:

It is my pleasure to write in support of Elena Kagan's nomination to be our next Solicitor General.

I have known Elena since we clerked together. Although we served different Supreme Court Justices, I came to know her well. Our clerk colleagues were an impressive group, but Elena was a standout even in that setting. She was a wonderful person with whom to discuss a challenging legal problem. She was brilliant, thoughtful, independent, and creative, but without even a hint of the arrogance that sometimes accompanies such talent.

She has retained – indeed, built upon -- all of those qualities throughout the intervening years. Indeed, I am confident that it is precisely this combination of strong intellectual capabilities, thoughtful judgment, and her way of dealing respectfully with everybody that enabled her to become such a unifying and universally respected figure at Harvard. And these qualities are also among the many reasons she will be a superb Solicitor General, and will represent the government so well before the Court.

Sincerely,

Peter D. Keisler

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Jeffrey B. Kindler
Chairman of the Board
Chief Executive Officer

January 23, 2009

The Honorable Patrick J. Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Elena Kagan

Dear Chairman Leahy and Ranking Member Specter:

I am writing to express my strong support for the confirmation of Elena Kagan as Solicitor General of the United States.

Dean Kagan's experience and reputation speak for themselves—but I so strongly endorse her confirmation that I feel compelled to impart my personal opinion of her outstanding qualifications for this position of utmost importance to our nation.

I have known Dean Kagan both professionally and personally for some 20 years. In order to provide some background to my assessment, I will briefly outline my legal background. I graduated from Harvard Law School in 1980, where I was an editor of the Harvard Law Review, and I later served as law clerk for Judge David Bazelon of the U.S. Court of Appeals for the D.C. Circuit and for U.S. Supreme Court Justice William J. Brennan. I practiced law for more than 25 years as an attorney at the Federal Communications Commission, as a partner at the Washington, D.C. law firm of Williams & Connolly, as the head of litigation at the General Electric Company, as the General Counsel of McDonald's Corporation, and as the General Counsel of Pfizer Inc until 2006, when I assumed my present position at Pfizer.

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I first came to know Dean Kagan when she joined Williams & Connolly in 1989. Beginning at that time and over the years since, I have developed enormous respect for her and I hold her brilliance and professionalism as a lawyer in the highest esteem. We worked very closely together on difficult and sensitive problems during her tenure at the law firm and, in that connection, I witnessed time and again Ms. Kagan's judicious and thoughtful approach to tackling tough legal issues with skill, determination, and the highest level of integrity.

My appreciation for Dean Kagan's talent and professionalism was reinforced when she left the firm to join President Clinton's White House staff as Associate Counsel to the President and then as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. Her work there consistently reflected her unassailable integrity, her broad knowledge of legal and judicial matters, and her thoughtful approach to considering all sides of an issue while remaining focused and decisive. Later, when she returned to Harvard as the Dean of the Law School, I was privileged, as an alumnus, to observe as she exercised extraordinary leadership in establishing a powerful culture of collegiality and academic excellence. As Dean, she has brought a large group of diverse and strong-willed people together in support of a common mission while holding them to the highest standards of performance—and she has done so with steadfast fairness, openness, and dedication to the highest principles of the law.

The responsibility of the Solicitor General of the United States is, above all else, to uphold the sanctity of justice for our nation. After knowing Dean Kagan for nearly twenty years, I have developed an ever-deepening respect for her clear commitment to deploying her considerable talents to that cause. I can wholeheartedly attest that Elena Kagan is of the right character, intellect, and experience to discharge the duties of Solicitor General of the United States with honor and distinction.

Thank you for allowing me to write to you on Dean Kagan's behalf. If I may offer any further insights or answer any questions, I am at your disposal.

Sincerely,

Jeff Kindler

55828.197

StanfordLawSchool

January 30, 2009

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Senator Patrick Leahy
Senator Arlen Specter
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Senators Leahy and Specter:

We are writing in support of Dean Elena Kagan's nomination to become the Solicitor General of the United States. We write from the unique perspective of being deans at fellow law schools. From these vantage points we have observed Ms. Kagan's work and accomplishments at Harvard. In the interest of full disclosure, we should add that some of us are personal friends of the nominee.

The Solicitor General not only crafts legal arguments and presents them to the Supreme Court, but also manages a high-quality law office. She must oversee the national appeals process and forge workable agreements and compromises among the countless agencies and offices that have conflicting, or competing, stakes in cases. It is a job that requires administrative and negotiation skills as well as legal acumen and Elena Kagan excels along all relevant dimensions. Her skills in legal analysis are first-rate. Her writings in constitutional and administrative law are highly respected and widely cited. She is an incisive and astute analyst of law with a deep understanding of both doctrine and policy. She is superbly qualified to fulfill the role of representing the United States in the Supreme Court.

Ms. Kagan is also an excellent manager. She has been a superb dean at Harvard, where she has managed to forge coalitions, attract excellent faculty, and satisfy demanding students. She has innovated in an environment where change does not come quickly or easily. She has exhibited patience, intelligence, a willingness to listen, and an ability to lead. These are qualities that will serve the nation well.

Finally, Elena Kagan is known to us as a person of unimpeachable integrity. She will inspire those around her to pursue justice and the national interest in a way that makes us all proud.

Sincerely yours,

Larry D. Kramer, Dean and Richard E. Lang Professor of Law
Stanford Law School

On behalf of the following Law School University Deans

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Georgetown University Law Center

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The University of Michigan Law School

Michael A. Fitts, Dean
University of Pennsylvania Law School

Harold H. Koh, Dean and Gerard C. and Bernice Latrobe Smith
Professor of International Law
Yale Law School

David F. Levi, Dean
Duke University School of Law

Saul Levmore, Dean and William B. Graham Professor of Law
The University of Chicago Law School

Paul G. Mahoney, Dean
University of Virginia School of Law

Richard L. Revesz, Dean and Lawrence King Professor of Law
New York University School of Law

David M. Schizer, Dean
Columbia University School of Law

David van Zandt, Dean
Northwestern University School of Law

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Leadership Conference on Civil Rights

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Washington, D.C. 20006

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Mexican American Legal Defense and Educational Fund
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American Federation of Teachers
Mary G. Wilson
League of Women Voters

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Karen K. Narasaki
Asian American Justice Center
PRESIDENT & CEO
Wade J. Henderson

February 9, 2009

Senator Patrick Leahy
U.S. Senate
433 Russell Senate Office Building
Washington, DC 20510-4502

Senator Arlen Specter
U.S. Senate
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Leahy and Ranking Member Specter:

The Leadership Conference on Civil Rights, the nation's oldest, largest, and most diverse civil rights coalition, writes to express our support for the nomination of Thomas J. Perrelli to the position of Associate Attorney General of the United States. Mr. Perrelli's broad and diverse experiences serving in the Justice Department and in the private sector ensure that he will bring a sense of perspective and integrity to this position. Moreover, Mr. Perrelli's demonstrated ability to manage and oversee complex situations, his capacity to work cooperatively, and his background both in and out of the Department will enable him to restore independence and confidence to the Department.

Mr. Perrelli has a wealth of experience in both public service and private practice working to advance civil rights causes. From 1997-2001, Mr. Perrelli worked at the Department of Justice in various roles, including Counsel to Attorney General Janet Reno, overseeing the Civil Rights Division and serving as chair of the Indian Country Law Enforcement initiative; and Deputy Assistant Attorney General in the Civil Division, where he continued to work on issues important to the civil rights community, including the impact of the census on disadvantaged communities and the federal regulations governing an individual's right to privacy in his or her own medical records. In 2001, Mr. Perrelli rejoined Jenner & Block, where he currently serves as Managing Partner. In private practice, Mr. Perrelli has been an advocate for voting rights, representing voters and public officials in redistricting cases in Texas, Oklahoma, and Pennsylvania. In addition, he defended the First Amendment rights of his clients, the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors, and others.

Mr. Perrelli is well-qualified to serve as Associate Attorney General, a position that will require him to assist the Attorney General and the Deputy Attorney General in formulating and implementing Departmental policies and programs pertaining to a broad range of civil justice, federal and local law enforcement, and public safety matters. As Deputy Assistant Attorney General from 1999-2001, Mr. Perrelli was in charge of the Federal Programs Branch of the Civil Division, which represents virtually every federal agency in complex civil litigation. In this role, he led a staff of 100 attorneys in defending federal agency action and regulations, representing the diplomatic and national security interests of the United States, and conducting significant Title VII, personnel, and Social Security litigation. During his tenure as Counsel to Attorney General Reno

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from 1997-1999, Mr. Perelli gained knowledge of a number of issues important to the civil rights community, including voting rights, racial profiling, police violence, and affirmative action.

Over the past eight years, the Department has been embroiled in scandal and controversy, and ideology has replaced commitment to the rule of law as its guiding principle. It is imperative that the Department be restored to its former position of integrity and competence. We are confident that Mr. Perrelli will work well with Attorney General Holder and Deputy Attorney General nominee Ogden to reverse these trends, and we urge you to support the nomination of Thomas Perrelli for the position of Associate Attorney General.

If you have any questions, please contact Lisa Bornstein, LCCR Senior Counsel, at [redacted] or [redacted] or Nancy Zirkin, [redacted] or [redacted]

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

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February 24, 2009

Senator Patrick Leahy
U.S. Senate
433 Russell Senate Office Building
Washington, DC 20510-4502

Senator Arlen Specter
U.S. Senate
711Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Leahy and Ranking Member Specter:

The Leadership Conference on Civil Rights, the nation's oldest, largest, and most diverse civil rights coalition, writes to express our support for the nomination of Thomas J. Perrelli to the position of Associate Attorney General of the United States. Mr. Perrelli's broad and diverse experiences serving in the Justice Department and in the private sector ensure that he will bring a sense of perspective and integrity to this position. Moreover, Mr. Perrelli's demonstrated ability to manage and oversee complex situations, his capacity to work cooperatively, and his background both in and out of the Department will enable him to restore independence and confidence to the Department.

Mr. Perrelli has a wealth of experience in both public service and private practice working to advance civil rights causes. From 1997-2001, Mr. Perrelli worked at the Department of Justice in various roles, including Counsel to Attorney General Janet Reno, overseeing the Civil Rights Division and serving as chair of the Indian Country Law Enforcement initiative; and Deputy Assistant Attorney General in the Civil Division, where he continued to work on issues important to the civil rights community, including the impact of the census on disadvantaged communities and the federal regulations governing an individual's right to privacy in his or her own medical records. In 2001, Mr. Perrelli rejoined Jenner & Block, where he currently serves as Managing Partner. In private practice, Mr. Perrelli has been an advocate for voting rights, representing voters and public officials in redistricting cases in Texas, Oklahoma, and Pennsylvania. In addition, he defended the First Amendment rights of his clients, the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors, and others.

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If you have any questions, please contact Lisa Bornstein, LCCR Senior Counsel, at [redacted] or Nancy Zirkin [redacted].

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

THE NATIONAL CENTER FOR
Victims of Crime

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January 21, 2009

Senator Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Senator Arlen Specter, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510-3802

Re: Nomination of Thomas Perrelli for Associate Attorney General

Dear Chairman Leahy and Ranking Member Specter:

I am writing to express my strong support for the nomination of Thomas Perrelli for Associate Attorney General of the United States Department of Justice. As you may know, I served in the Department of Justice with Mr. Perrelli from 1997 - 2001 and consider him to have a strong intellect, excellent leadership skills, and the highest moral character.

At the National Center for Victims of Crime, our mission is to forge a national commitment to help victims of crime rebuild their lives. The Department of Justice's fulfillment of its mission of ensuring justice for all is particularly critical for victims of both local and federal crime across the country, and significantly impacts the work of victim advocacy organizations like the National Center.

As Associate Attorney General, Mr. Perrelli will have oversight of agencies that are critical to victim service providers as well as local law enforcement: the Office of Justice Programs (OJP), the Office on Violence Against Women (OVW), and the Community Oriented Policing Services (COPS) Office. As former Acting Assistant Attorney General for OJP and former Acting Director of the COPS Office, I am keenly aware of how important the integrity and strong management skills of the Associate Attorney General are to effective oversight of those components of DOJ. In my view, Mr. Perrelli possesses the skills and experience that make him an outstanding candidate for the position.

We urge Mr. Perrelli's speedy confirmation in the interests of enabling the Department of Justice to turn its attention to the work of ensuring justice for all.

Sincerely,

Mary Lou Leary

2000 M Street, NW • Suite 480 • Washington, DC 20036 • Tel. 202 / 467-8700 • Fax 202 / 467-8701 • www.ncvc.org

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http://judiciary.authoring.senate.gov/hearings/testimony.cfm

United States Senate Committee on the Judiciary

< Return To Hearing

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 10, 2009

STATEMENT OF SENATOR PATRICK LEAHY
CHAIRMAN, SENATE JUDICIARY COMMITTEE
ON NOMINATIONS TO BE ASSOCIATE ATTORNEY GENERAL AND SOLICITOR GENERAL
FEBRUARY 10, 2009

Today, the Senate Judiciary Committee will hear from two more of President Obama's supremely qualified nominees who have chosen to give up important positions and return to public service.

The Committee continues the work of restoring the Department of Justice that it began last month with the hearing on the nomination of Eric Holder to be Attorney General. We continued that work last week by confirming Attorney General Holder in a strong bipartisan vote, and with the hearing I chaired on the nomination of David Ogden to be Deputy Attorney General, the number two position at the Department.

As Deputy Attorney General, Mr. Ogden would be responsible for the day to day management of the Department. He would also occupy a critical national security post at a time when we face threats and challenges. While I left the record for written questions after last week's hearing open for a week, I urged Senators to submit their questions as soon as possible so as not to delay consideration of Mr. Ogden's nomination. No Senators heeded the request to submit questions by noon yesterday. As a result, I held off expediting his nomination, and did not list it on the agenda for our executive business meeting this week. I hope there will not be further delays when we return from the Presidents' Day recess, and that the three weeks that will have passed from Mr. Ogden's hearing are sufficient so that we can vote on his nomination without holding it over.

Today, we turn to the nomination of Thomas J. Perrelli to be Associate Attorney General, the number three position at the Department with management responsibility over 13 vital components, and Elena Kagan to be Solicitor General of the United States, a critical post that encompasses duties quite different from any other lawyer in the Government. The Solicitor General is not only one of the highest ranking officials at the Justice Department and the chief advocate on behalf of the United States Government, but also holds a unique position as an officer of the court, with a duty to bring forward aspects of cases that the Supreme Court might not otherwise know. Because of this critical role, the Solicitor General is often called "the Tenth Justice."

Nearly ten years ago, President Clinton nominated Elena Kagan for a seat on the Court of Appeals for the D.C. Circuit. At that time, she was a highly-regarded former clerk for Supreme Court Justice Thurgood Marshall and former law professor at the University of Chicago who had served as Special Counsel to the Senate Judiciary Committee, Associate Counsel to the President, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council. Her impressive credentials also included a clerkship for Judge Abner Mikva on the court to which she had been nominated, two years at Williams & Connolly, and a stellar academic career, graduating with honors from Princeton, Oxford, and Harvard Law School, where she was Supervising Editor of the Harvard Law Review.

Despite Elena Kagan's outstanding record, however, the Republican Chairman and Republican Majority on the Judiciary Committee refused to act on her nomination. They pocket-filibustered her nomination with

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impunity, apparently holding the seat open like many others to be filled by a Republican President, irregardless of the quality of the nominees they refused to consider. That did not stop the far right wing from launching baseless and partisan attacks at Elena Kagan and her record, attacks I hope we do not see renewed today.

Elena Kagan returned to teaching while her nomination was pending, becoming a Professor at Harvard Law School and, in 2003, she became the first woman to be Dean of Harvard Law School. In that position, Dean Kagan has earned praise from Republicans and Democrats, students and professors alike for her consensus-building and inclusive leadership style.

Now Dean Kagan is poised to break another glass ceiling. If confirmed, she would be the first woman to serve as Solicitor General of the United States. Like Justice Thurgood Marshall, for whom she clerked, Elena Kagan would make history if confirmed to what Justice Marshall described as the best job he ever had.

Those who have done the job support her nomination. In fact, every Solicitor General who served from 1985 to 2009 has endorsed her nomination: Charles Fried, Ken Starr, Drew Days, Walter Dellinger, Seth Waxman, Ted Olson, Paul Clement and Greg Garre. In a letter of support, they wrote: "We who have had the honor of serving as Solicitor General over the past quarter century, from 1985 to 2009, in the administrations of Presidents Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush, write to endorse the nomination of Dean Elena Kagan to be the next Solicitor General of the United States. We are confident that Dean Kagan will bring distinction to the office, continue its highest traditions and be a forceful advocate for the United States before the Supreme Court."

Prominent lawyers who served in the Office of the Solicitor General under Democratic and Republican administrations have written to tout Dean Kagan's "great legal and personal skills, intellect, integrity, independence and judgment," concluding that "she has all the attributes that are essential to an outstanding Solicitor General."

Deans of 11 of the most prominent law schools in the country, who are in a key position to judge Dean Kagan's accomplishments at Harvard, describe Dean Kagan as "a person of unimpeachable integrity" who "has been a superb dean at Harvard where she has managed to forge coalitions, attract excellent faculty, and satisfy demanding students." They call her "superbly qualified to fulfill the role of representing the United States in the Supreme Court."

One of the conservative professors Dean Kagan helped to bring to Harvard Law School was Professor Jack Goldsmith, who took charge of the Office of Legal Counsel after the disastrous tenures of Jay Bybee and John Yoo. Professor Goldsmith praised Dean Kagan's "judgment" and wrote that because of Dean Kagan's "previous government experience and the years teaching administrative law," she will, "take to the Solicitor General's Office a better understanding of the Congress and the Executive branch that she will represent before the Court than perhaps any prior Solicitor General."

Three Iraq war veterans who are students at Harvard Law School wrote a letter to the editor of the The Washington Times stating that Dean Kagan "has created an environment that is highly supportive of students who have served in the military" describing the annual Veterans Day dinner for former service members and spouses that she hosts, and the focus she has placed on veterans at Harvard Law School and the military experience of students.

Tom Perrelli, Managing Partner of the Washington D.C. office of Jenner & Block, and who held important Justice Department posts during the Clinton administration, is another outstanding nominee. He served as Counsel to the Attorney General where he assisted the Attorney General in overseeing the civil litigation components of the Department of Justice. He then served as Deputy Assistant Attorney General in the Civil Division, where he supervised the Federal Programs Branch of the Civil Division, which defends Federal agencies in important constitutional, regulatory, national security, personnel and other high-profile litigation. In those capacities, Mr. Perrelli earned a reputation for independence and integrity as well as the respect of career lawyers at the Department. Like the President's other nominees to leadership positions at the Department, Mr. Perrelli's career demonstrates that he understands that the role of the Department of Justice is to be the people's lawyer, with first loyalty to the Constitution and the laws of the United States.

Numerous major law enforcement organizations have written to endorse Mr. Perrelli's nomination. Chuck Canterbury, National President of the Fraternal Order of Police, described Mr. Perrelli's "remarkable record of public service," particularly in management of the Federal Programs Branch of the Civil Division while at the Department, and praised his "commitment to public service" by leaving one of the top law firms in Washington to return to the Department. The Major Cities Chiefs Association wrote to the Committee about

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Mr. Perrelli's "distinguished career" and welcomed "his pledge to strengthen the partnership between state and local law enforcement and the Department of Justice." William J. Johnson, Executive Director of the National Association of Police Organizations, wrote that "Mr. Perrelli's career at the DOJ has given him extensive knowledge of the department's policies, programs and statutes, which NAPO believes will be invaluable to the position of Associate Attorney General."

Ernie Allen, President & CEO of the National Center for Missing & Exploited Children, wrote that Mr. Perrelli's "unique private sector experience coupled with his exemplary public service will make him a strong effective Associate Attorney General."

Paul Clement, Solicitor General under President George W. Bush, wrote that career professionals at the Department who had worked with both him and Mr. Perrelli "held him in uniformly high regard" and that Mr. Perrelli's "prior service in the Department should prepare [him] to be a particularly effective Associate Attorney General." He also described Mr. Perrelli as "an incredibly skilled lawyer" whose "skills would serve both Tom and the Department very well if he is confirmed as the Associate Attorney General."

The many letters we have received in support of both of the nominees before the Committee today reinforce my view and the view of many that these are superb picks for the important posts to which they have been nominated.

Rather than move forward at last to consider Dean Kagan's nomination and the nomination of Mr. Perrelli, some on the Republican side of the aisle appear eager to revisit past tactics of obstruction and delay.

I scheduled the hearings today and last week after consultations between my staff and Senator Specter's staff. I accommodated the Ranking Member's request not to hold the hearing on Dean Kagan's nomination last week, and instead scheduled it for this week. We are proceeding in line with the pace for the Committee's consideration of a new Administration's first nominations for Justice Department leadership, when it is particularly important to put a new team in place to get the Department up and running. This is especially true given the threats and challenges we face.

Dating back to the Carter administration, the average days from designation of the Deputy Attorney General nominee to confirmation hearing is 37 days. We held David Ogden's hearing 31 days after his designation. Dating back the same time, the average time from designation to hearing for nominations to be Associate Attorney General is 37 days. Tom Perrelli's hearing today is being held 36 days after his designation. While the time for Dean Kagan's hearing will be a little over a week shorter than the average time from designation to the start of hearings for a Solicitor General in a new administration, it is close to the time between designation and hearing for Paul Clement's nomination to be Solicitor General in Alberto Gonzales' Justice Department. Moreover, Dean Kagan is well known to the Committee, since her last nomination was before the Committee for two years. Since that time, she has been the highly successful Dean of Harvard Law School.

I suspect that the schedule seems rushed to some on the other side of aisle because of the extensive delays in consideration of Eric Holder's nomination to be Attorney General, which extended his confirmation into last week. Had we followed the schedule I set out on that nomination, we would have completed work weeks ago, leaving more time for to prepare for these hearings.

I look forward to the hearing today and to moving forward without delay to continue to restore the Department of Justice.

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LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.
ATTORNEYS AT LAW
1330 BROADWAY, SUITE 1800
OAKLAND, CALIFORNIA 94612-2519

[redacted]

January 30, 2009

Chairman Patrick Leahy
Senate Judiciary Committee
U.S. Senate
433 Russell Senate Office Building
Washington, DC 20510-4502

Ranking Member Arlen Specter
Senate Judiciary Committee
U.S. Senate
711 Hart Senate Office Building
Washington, DC 20510-3802

RE: Thomas Perrelli's Nomination for Associate Attorney General

Dear Chairman Leahy and Ranking Member Spector:

I write to support the nomination of Thomas Perrelli to the position of Associate Attorney General.

Tom is exceptionally qualified for the job for many reasons, his legal acumen, education, background, prior government service, pro bono activities and legal practice. I would like to focus on his important civil rights work.

As Assistant Attorney General for Civil Rights in the Clinton Administration I worked with Tom on many civil rights matters both when he was Counsel to the Attorney General and Deputy Assistant Attorney General for the Civil Division. That experience has convinced me that Tom is committed to the vigorous enforcement of our nations's civil rights laws, and will prioritize civil rights enforcement as Associate Attorney General should the Senate confirm him.

I worked with Tom on voting rights, racial profiling, and police misconduct matters particularly. I believe the Division's enforcement in these areas benefitted from Tom's rigor, insights and keen sense of fairness in framing its enforcement programs in these areas. I recall in particular Tom's work on the Indian Country Law Enforcement Initiative. Indian Country is an often-ignored part of our country, but it is an area where civil rights violations that victimize Native Americans occur with disheartening frequency. It is also an area of intense poverty and high crime. As head of the Attorney General's Initiative, Tom worked successfully to develop an innovative, coordinated approach to civil rights enforcement, policing, and crime prevention that involved not only law enforcement, but technical assistance, training efforts, and funding programs. When Tom was at the Civil Division he coordinated the development of joint Civil and Civil Rights Division positions on census issues involving disadvantaged communities and privacy rights of individuals in their medical records. Tom was not only helpful on the work of the Civil Rights Division, but has a special ability to find common ground and craft workable solutions. That and his temperament made him a valued colleague.

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Patrick Leahy
Arlen Specter
January 30, 2009
Page 2

After his time with the Department, Tom continued to work on civil rights matters as counsel on voting rights cases and representing the Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors. Tom has always taken his pro bona responsibilities seriously. More to the point, that he has devoted these efforts to civil rights matters evidences a fundamental commitment to the principles of equal justice.

Tom's commitment to civil rights enforcement will help him greatly in performing the duties of the Associate Attorney General in supervising the work of the Civil Rights Division as well as the other litigating divisions.

I have no hesitation recommending Tom Perrelli for Associate Attorney General and do so with enthusiasm. If I can be of further assistance to the Committee, please feel free to contact me.

Sincerely,

Bill Lann Lee

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WILMERHALE

William F. Lee
Co-Managing Partner

[redacted]

January 23, 2009

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

Re: Elena Kagan

Dear Senator Leahy:

I am the Co-Managing Partner of Wilmer Cutler Pickering Hale and Dorr LLP. I also have served as a member of the Board of Overseers of Harvard College and the Visiting Committee to Harvard Law School. I am writing on behalf of Elena Kagan, who has been nominated by President Obama to serve as Solicitor General.

I have known Elena for nearly a decade. I have had an opportunity to work closely with her on matters concerning the Harvard Law School. In addition, I was a member of the Presidential Search Committee for Harvard University and worked with Elena in that capacity. As a result, I have come to know Elena very well both professionally and personally.

Elena is an exceptional lawyer. She is bright and engaging. Her prior public service and her academic work demonstrate a deep understanding of the importance of the Rule of Law to our legal system. Her unique combination of exceptional analytical ability and communication skills will make her a very effective advocate for the United States.

She has also been an outstanding leader at the Harvard Law School. She brought new energy and creativity to the law school and was able to create bridges among faculty members with deeply differing ideologies. She moved a great law school forward and was able to implement fundamental curriculum reform and curriculum expansion with the unanimous support of her faculty. She also took deliberate steps to politically balance the faculty and was extremely successful in doing so. She will leave behind a law school that has never been better.

Most critically, Elena is an individual of the highest integrity and character. She will bring those qualities and her outstanding intelligence and leadership skills to the position of Solicitor General. I believe that these qualities will make her an exceptional Solicitor General, and I recommend her highly to you.

I hope that she will be confirmed promptly and unanimously. If I can provide any further information, I would be happy to do so.

Very truly yours,

William F. Lee

William F. Lee

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national partnership
for women & families
Because actions speak louder than words.

judith l. lichtman
senior advisor

January 23, 2009

Senator Patrick Leahy
United States Senate
433 Russell Senate Office Building.
Washington, D.C.

Dear Senator:

It is with great pleasure that I write to wholeheartedly support the nomination of Elena Kagan for the position of Solicitor General of the United States.

I can think of no other lawyer in the country better qualified for this most important post. I have known Elena since 1993 and worked closely with her when she served in the Clinton Administration as Deputy Assistant to the President for Domestic Policy, and Deputy Director, Domestic Policy Council, and Associate Counsel to the President. We worked together to ensure that the legal rights of women and our families were protected.

She is a towering intellect, possesses the strongest commitment to legal scholarship, and is fair and thoughtful in her approach to legal issues. She has dedicated her life to seeking a just society. Elena has a demonstrated commitment to equal justice.

I am proud to be her friend and her colleague and believe that we as a nation will be, indeed, lucky to have her serve as Solicitor General.

Sincerely,

Judith L. Lichtman
Senior Advisor

1875 connecticut avenue, nw ~ suite 650 ~ washington, dc 20009 ~ phone: 202.986.2600 ~ fax: 202.986.2539
email: info@nationalpartnership.org ~ web: www.nationalpartnership.org

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JAMES H. FOGELSON (1967-1991)

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MATTHEW M. GUEST
DAVID E. KAHAN
DAVID K. LAM

January 22, 2009

Senator Patrick J. Leahy, Chairman
Senator Arlen Specter, Ranking Member
United States Senate
Committee on the Judiciary
The United States Capitol
Washington, DC 20510

Dear Senators Leahy and Specter:

I write to strongly recommend Dean Elena Kagan for confirmation as Solicitor General of the United States. I have known Dean Kagan for a substantial number of years. I have participated in programs at the Harvard Law School and have discussed legal and policy issues with Dean Kagan. Dean Kagan is an outstanding legal scholar, an excellent administrator and has great judgment as to issues and people.

To my knowledge, Dean Kagan is held in the highest esteem in both the academic legal community and by the practicing bar. As Chairman of the Board of Trustees of New York University, I have had significant contact with and discussions about Dean Kagan with other law school deans and university presidents and trustees. Again, she is held in the highest esteem.

I know that the Nation will be well served by Dean Kagan as Solicitor General, and I strongly recommend favorable consideration and approval by your committee.

Very truly yours,

Martin Lipton

MAJOR CITIES CHIEFS ASSOCIATION

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Baltimore City, Maryland
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San Francisco, California
San Jose, California
Seattle, Washington
St. Louis, Missouri
Suffolk Co., New York
Toronto, Ontario
Tucson, Arizona
Tulsa, Oklahoma
Vancouver, British Columbia
Virginia Beach, Virginia
Washington, DC
Winnipeg, Manitoba

January 25, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Messrs. Leahy and Specter:

On behalf of the Major Cities Chiefs, I am writing to support the nomination of Thomas Perrelli to become Associate Attorney General. The Major Cities Chiefs represents the 56 largest jurisdictions across the Nation.

Mr. Perrelli has a distinguished career and we welcome his pledge to strengthen the partnership between state and local law enforcement and the Department of Justice. We look forward to working with Mr. Perrelli throughout his term and we look forward to working with you on issues like Byrne-JAG, COPS and other critical law enforcement issues.

American law enforcement has always looked to you for leadership and we again turn to you to move the nomination of Thomas Perrelli quickly through the confirmation process.

Sincerely,

Gil Kerlikowske
President

55828.213

John F. Manning
1525 Massachusetts Ave.
Cambridge, MA 02138

January 23, 2009

Hon. Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

I write in enthusiastic support of Dean Elena Kagan's nomination to serve as Solicitor General of the United States. I have known Dean Kagan since 1984, when we served together on the Harvard Law Review. The primary basis for my opinion has been formed, however, in the past four-and-a-half years as a member of the Harvard Law School Faculty (where I am presently the Bruce Bromley Professor of Law). For three of those years, I served as chair of lateral appointments committee, a position which requires working closely with and observing the Dean in many situations. Based on my experience with her, I believe that Elena Kagan has the intelligence, legal acumen, fair-mindedness, and impartiality to be an outstanding Solicitor General.

Before I elaborate on my reasons, let me give you some of my background so that you will have a basis for evaluating my assessment. I should say, at the outset, I am not a member of Dean Kagan's political party; I am a lifelong Republican. I clerked for Judge Robert Bork on the U.S. Court of Appeals for the D.C. Circuit and for Justice Antonin Scalia on the Supreme Court. I served for two years (1986-88) in the Office of Legal Counsel under Assistant Attorney General Charles Cooper and for almost three years (1991-94) in the Office of the Solicitor General, first under Solicitor General Starr and then under Solicitor General Days. This background, I think, gives me the advantage of being able to report how Dean Kagan appears to someone who does not start with all of her presuppositions about the law and a clear sense of the demands and workings of the Office to which she has been nominated.

Dean Kagan has the skill set and values needed to be a successful Solicitor General. She has a deep knowledge of constitutional and administrative law. She is a quick study. She manages to be, at once, both decisive and reflective. She expresses herself with clarity and economy. And she combines respect for the rule of law with a deep interest in the way law works in the world. I think that she will represent the interests of the United States effectively, while preserving the precious capital that Solicitors General have accumulated through years of practicing extra scrupulousness in their dealings with the Court.

Dean Kagan also has a temperament that lends itself well to the demands of impartiality that go with the Office of the Solicitor General. In my time at Harvard, I have witnessed that she is fair, respectful, and inclusive of people with a wide variety of views. She has been supportive of hiring conservatives as well as progressives to our faculty. She has been an enthusiastic

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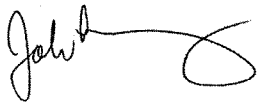
proponent of the interests of the Federalist Society and the American Constitution Society. She has, with respect and enthusiasm, welcomed and honored, on behalf of the Harvard Law School, Justices with viewpoints as diverse as those of Justice Scalia and Justice Breyer. She is fair- and open-minded; it is just part of who she is. I am confident that she will bring that quality to the Government.

Finally, Dean Kagan cares deeply about public service. She has shown that again and again through the career choices she has made and through many of the policies she has pursued as Dean of the Harvard Law School. She will be a wonderful public servant. I hope that you will confirm her promptly so that she will be able to bring her enormous talents to bear on the important work of that great Office.

Best regards,



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February 9, 2009

Chairman Patrick Leahy
U.S. Senate
433 Russell Senate Office Building
Washington, DC 20510-4502

Ranking Member Arlen Specter
U.S. Senate
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Leahy and Ranking Member Specter:

We are writing in support of the President's nomination of Thomas J. Perrelli to be Associate Attorney General. Our recommendation is based on our close working experience with Mr. Perrelli at the Department of Justice from 1997 to 2001, during our respective tenures as Associate Attorney General or Acting Associate Attorney General. During this period Mr. Perrelli served at the Department initially as Counsel to the Attorney General and then as Deputy Assistant Attorney General of the Civil Division (which reports to the Associate Attorney General). In the latter capacity he supervised the Federal Programs Branch, which defends the Government in some of the most sensitive cases handled by the Department. Throughout this period Mr. Perrelli was the "go to" lawyer for the Attorney General, the Deputy Attorney General and us on other litigation and policy matters of special importance.

The reason that we turned to Mr. Perrelli for advice and help on many important and sensitive matters was simple: He is not only a highly skilled lawyer, but also a wise one who has a deep understanding of government and public policy as well as the law. Mr. Perrelli also has the personal qualities we look for in public servants who are entrusted with high responsibility – personal honesty and integrity, and a respect for the views of others. He will be an excellent colleague for those who work with him, and an excellent leader for the Department at this critical time.

We strongly urge the Committee to recommend Mr. Perrelli's confirmation to the full Senate.

Very truly yours,

Daniel Marcus

Daniel Marcus
Associate Attorney General, 2000-2001
Acting Associate Attorney General, 1999-2000

Raymond C. Fisher DM

Raymond C. Fisher
Associate Attorney General, 1997-1999

John C. Dwyer DM

John C. Dwyer
Acting Associate Attorney General, 1997

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BOYS & GIRLS CLUBS
OF AMERICA

January 23, 2009

The Honorable Patrick J. Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senator Leahy and Senator Specter:

I am writing to express support for the nomination of Thomas J. Perrelli to be Associate Attorney General. Early in his public service career, Mr. Perrelli served as Counsel to Attorney General Janet Reno. During their tenure, Attorney General Reno and Mr. Perrelli addressed a wide range of issues relating to children and their protection. They were fierce advocates for keeping America's youth safe. Mr. Perrelli, as Counsel, was a key advisor and supporter of those efforts.

Under Attorney General Reno, Mr. Perelli rose to Deputy Assistant Attorney General, where he supervised the Federal Programs Branch of the Civil Division. This branch represents virtually every federal agency in complex civil litigation. Mr. Perrelli led a staff of 100 attorneys charged with defending the constitutionality of federal statutes, defending federal agency action and regulations, representing the diplomatic and national security interests of the United States in courts of law, and conducting significant Title VII, personnel and social security litigation.

Mr. Perrelli understands the importance of keeping kids safe by giving them a safe and fun place to go like a Boys & Girls Club. He recognizes the role Clubs play in preventing crime, and he supports the work of our 4500 Clubs that are working with the over 4.8 million kids in Clubs across the country to help them improve their lives.

At Boys & Girls Clubs of America, we are striving to help America's youth reach their full potential and to do so in a safe environment. We believe that Mr. Perrelli's past history with us, and his unique private sector experience, will make him a strong, effective Associate Attorney General. That is why Boys & Girls Clubs of America wholeheartedly supports his confirmation.

Sincerely,

Kevin R. McCartney
Senior Vice President Government Relations

Office of Government Relations • 1325 G Street NW, Suite 500 • Washington, DC 20005 • Tel (202) 478-6200 • Fax (202) 552-7407

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Judith A. Miller

[redacted]

January 21, 2009

The Honorable Patrick Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Specter:

I am writing in support of Elena Kagan's nomination to be the Solicitor General of the United States. I have respected and admired Elena since I first met her at Williams & Connolly in 1989. I wasn't alone in that admiration—my partners immediately recognized her ability and talent, and promptly started competing for her help on some of our most challenging and complex civil cases. She exhibited from the beginning the best traits of a lawyer's lawyer: effective oral and written advocacy; mastery of the facts and the law; and exceedingly well-informed and thoughtful judgment.

I saw her exhibit those same qualities during the Clinton administration, when she was first an Associate Counsel. At the time, I was fortunate to be the General Counsel of the Department of Defense. I found Elena to be as well grounded and effective with respect to legal questions affecting national security as she had been previously in private practice. In both roles she displayed a maturity of insight and judgment—and importantly for her current nomination—an ability in those contexts to make compelling legal arguments of Supreme Court quality.

From my prior experience, my current vantage point as Senior Vice President and General Counsel of Bechtel Group, Inc., and as the immediate past Chair of the American Bar Association's Section of Litigation, I have had the opportunity to see in action many genuinely extraordinary lawyers. I put Elena at the very top. I know that, if confirmed, she will represent the United States before the Supreme Court with the greatest skill and ability, and that she will be recognized as doing so. She will also, I believe, lead the storied Solicitor General's office with the people skills as well as legal skills that have marked her remarkable tenure as Dean of the Harvard Law School. I enthusiastically commend her to you, and hope that you will support her nomination. I would of course be pleased to answer any questions you might have.

Sincerely,

Judith Miller

Judith A. Miller

WIFLE

WIFLE
PMB204 2200 Wilson Blvd. Suite 102 Arlington, VA 22201
Phone: (703) 548-9211 | Web: www.WIFLE.org | E-mail: WIFLE@comcast.net

January 21, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

On behalf of Women in Federal Law Enforcement (WIFLE) organization and the 16,000 women in federal law enforcement that we represent, I am pleased to voice our support for the honorable Dean Elena Kagan's nomination for the office of Solicitor General of the United States.

WIFLE believes that having the first woman serve in this capacity is indeed an honor and one that is befitting the credentials, character and intellect of this outstanding nominee. Dean Kagan has been on the forefront advocating leadership roles for women in law and certainly she will serve as a leading role model for all women in law and law enforcement.

As Dean of Harvard Law School, Ms. Kagan promoted partnership, collaboration, mentorship and career counseling for women. She knows the value and perspective that women bring and her experience will serve our nation well. She is strong and impartial and has the integrity and independence to deal with the business that comes before the Solicitor General. She will be responsible and will ensure that the United States speaks with one voice and that voice is one that speaks on behalf of the rule of law.

It is without hesitation that we urge the Senate Judiciary committee to act promptly in reviewing and reporting out on this nomination. Thank you for your consideration and we await a speedy confirmation.

Respectfully,

Margaret M. Moore
Director

National Office
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New York, NY 10013

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www.naacpldf.org

LDF
DEFEND EDUCATE EMPOWER

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1444 Eye Street, NW, 10th Floor
Washington, DC 20005

T 202.682.1300
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January 23, 2009

Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
433 Russell Senate Office Bldg.
Washington, D.C. 20510-4502

Honorable Arlen Specter
Ranking Member
Senate Judiciary Committee
711 Hart Senate Office Bldg.
Washington, D. C. 20510-3802

Dear Chairman Leahy & Ranking Member Specter:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), I write in support of the nomination of Dean Elena Kagan to be Solicitor General of the United States. Founded by the late Thurgood Marshall (who served as Solicitor General between 1965 and 1967), LDF is the nation's oldest civil and human rights law firm. Because of the special role that the United States Constitution and federal civil rights laws have played in the effort to achieve full recognition of the rights of African Americans, LDF cares deeply that those appointed to service within the Department of Justice be persons committed to delivering justice and equality for all people in the United States.

As the third highest ranking official in the Department of Justice, the Solicitor General occupies an extremely important role in our federal government. The Solicitor General is the chief representative of the Executive Branch before the Supreme Court of the United States, and -- whether as friend of the Court or as party -- now plays a role in the vast majority of all cases heard by the Court. With a range of important cases concerning civil rights, civil liberties and other issues concerning the proper interpretation of and enforcement of our Constitutional protections coming before the Court each term, it is critical that the Solicitor General be someone who has established a record of exceptional legal thinking, leadership and fairness. In all respects, Dean Kagan is well-positioned to serve in this special role.

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LDF
DEFEND EDUCATE EMPOWER

Dean Kagan has served at the highest levels of the Executive Branch, been a law clerk for distinguished jurists including Supreme Court Justice Thurgood Marshall, worked in the private sector for a highly regarded law firm, been a law professor and is currently the Dean of the nation's leading law school. Through these various roles, she has proven to be one of the most capable and distinguished legal minds today.

But these are not mere "paper" credentials. The range and depth of her broad experience has produced a leader with both a vision and deep commitment to justice and equality. That leadership and that commitment have been evident throughout her tenure at Harvard Law School. Let me mention one example. LDF was founded by Thurgood Marshall, but it was conceived by Charles Hamilton Houston. The country's jurisprudence of racial justice and equality is in large part their collective legacy. Houston, the first African American editor of the Harvard Law Review, was Marshall's Dean and mentor at Howard Law School and the first full-time Counsel at the NAACP. One of Dean Kagan's first decisions at Harvard was to become the first Charles Hamilton Houston Professor of Law at Harvard Law School. That is her Dean's Chair. This was a decision that has enormous symbolic value but also, more significantly, reflects the real content of her character.

I know Dean Kagan. She combines intellectual depth with curiosity and dynamism. I am also a Harvard Law School graduate and I regularly visit the campus. Harvard Law School has undergone tremendous transformation and development under her leadership -- in its curriculum, in its diversity, and in its vibrancy.

LDF participates in a significant number of cases in the Supreme Court and other federal courts. The Solicitor General's office frequently participates in those cases as well. We believe that it is in the best interests of the nation for the next Solicitor General -- as the representative of the people of the United States before our nation's highest court -- to be someone with vision and demonstrated leadership on issues of racial justice and equality. While serving as Solicitor General following his appointment in 1965, Thurgood Marshall established an enduring legacy and commitment to using the office of Solicitor General to remedy injustice while giving voice to the voiceless. I am confident that Elena Kagan embodies that commitment.

There is also an historic aspect to Dean Kagan's nomination to be Solicitor General. Since 1870, all 47 persons selected to serve as Solicitor General have been men; thus, Dean Kagan would be our nation's first woman to hold the honor of serving in this distinguished role. As an organization founded and consistently committed to securing equal justice under law, we believe that it is important that this appointment would also signal that opportunities for service at the highest levels of the Executive Branch are available to our entire talent pool. She was also the first woman to serve as

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Dean of Harvard Law School. I am confident that she will be just as successful as Solicitor General as she has been as Dean. I urge the Senate to confirm Dean Elena Kagan as the next Solicitor General of the United States.

Respectfully Submitted,

John Payton
President and Director-Counsel
NAACP Legal Defense and
Educational Fund, Inc.

55828.222

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Florida Police Benevolent Association

CHRIS COLLINS
Executive Secretary
Las Vegas Police Protective Association

NATIONAL HEADQUARTERS

WILLIAM J. JOHNSON
Executive Director

January 22, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the National Association of Police Organizations (NAPO), representing more than 241,000 law enforcement officers throughout the United States, I am writing to advise you of our endorsement of the nomination of Thomas J. Perrelli for Associate Attorney General of the United States. As Associate Attorney General, Mr. Perrelli would assist the Attorney General and Deputy Attorney General in formulating and implementing U.S. Department of Justice (DOJ) policies and programs pertaining to federal and local law enforcement and public safety matters. Importantly, he will head the Community Oriented Policing Services (COPS) program, which, since its inception in 1994, has put over 118,000 law enforcement officers on our nation's streets.

Mr. Perrelli is a nationally recognized litigator with a distinguished career both in the private and public sectors. After five years as a litigator in the private sector, Mr. Perrelli left to serve his country as Counsel to Attorney General Janet Reno in 1997. He subsequently rose to Deputy Assistant Attorney General, supervising the Federal Programs Branch of the Civil Division, which represents virtually every federal agency in complex civil litigation, including cases involving international terrorism and crime. Mr. Perrelli's career at the DOJ has given him extensive knowledge of the department's policies, programs and statutes, which NAPO believes will be invaluable to the position of Associate Attorney General.

We believe Mr. Perrelli has the experience and institutional understanding necessary to aid in the development of an effective multilateral national crime-fighting strategy in which state and local law enforcement play a key role. Therefore, we urge you to confirm the nomination of Thomas Perrelli for Associate Attorney General. If you have any questions, please feel free to contact me, or NAPO's Director of Governmental Affairs, Andrea Mournighan, at (703) 549-0775.

Sincerely,

William J. Johnson
Executive Director

February 6, 2009

The Honorable Patrick J. Leahy, Chair
Senate Judiciary Committee
224 Dirksen Building
Washington, DC 20510

Dear Chairman Leahy:

On behalf of the National Crime Prevention Council (NCPC), I am writing to express our strong support for the nomination of Thomas J. Perrelli to be the Associate Attorney General of the United States.

Established in 1980 by officials from nine states, the U.S. Department of Justice, the FBI, and generous private individuals, the NCPC-led Campaign and related initiatives feature McGruff the Crime Dog® and his signature message that beckons all Americans to help "Take A Bite Out of Crime®." This call to action and national citizen mobilization represents the embodiment of the fundamental principle that preventing crime is everyone's business.

During his tenure at the Department of Justice, Mr. Perrelli oversaw the Comprehensive Indian Resources for Community and Law Enforcement (CIRCLE) initiative involving seven grant making agencies within the Department. This strategy helped strengthen tribal justice systems, encourage more effective and comprehensive tribal-level planning, and support three Native American nations as they combatted the complex and interrelated problems of crime, violence, substance abuse, and juvenile delinquency. These partnerships have proven successful at engaging community members, families, tribal courts, and tribal law enforcement in reducing crime in some of the most vulnerable communities in America. And, as you know from your experience as a prosecutor, a collaborative and coordinated approach to reducing and preventing crime saves money and lives.

Mr. Perrelli has a very strong record of public service throughout his tenure as Counsel to the Attorney General of the United States and Deputy Assistant Attorney General, where he oversaw the Federal Programs Branch of the Civil Division. As a key advisor and leader of efforts to uphold federal law and regulations, he displayed keen judgment in confronting the wide range of legal and crime issues the Department of Justice is charged to address. His private sector experience advocating for First Amendment rights and examining cutting-edge issues about intellectual property, technology, and piracy demonstrates his keen awareness of trends affecting the public and private sectors. These qualities will be vitally important as the Department helps law enforcement agencies and communities throughout

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the nation address emerging and persistent crime challenges, especially those brought on by the recent economic downturn.

Over 23 million Americans of all ages were victims of crime in 2008. Individuals victimized by these crimes can experience significant losses of property and injury. These individuals, their neighbors, and area businesses are too often victimized further by the fear of crime and victimization. The best, most cost-effective way to prevent these unacceptable assaults on Americans' sense of security is to provide citizens the information, tools, and strategies to help them learn how to stay safe in their homes, neighborhoods, schools, online, and in their workplaces. The effort to provide these resources directly, and in partnership with law enforcement, is the mission of NCPC and the National Citizens' Crime Prevention Campaign we lead.

We believe that as a leading official at the Department of Justice, Mr. Perrelli will take advantage of the opportunity to coordinate resources to help law enforcement agencies and all levels of government reduce crime, reinforce hometown security, and ensure our communities are safe places to live, learn, work, and play. His private sector experience tells us he appreciates the need to devise prevention-focused and collaborative approaches to address emerging crime trends, including the use of technology (cyberbullying) and the Internet (fraud, identity theft, victimization of children) to commit crime. NCPC and the nearly 400-member agencies of the Crime Prevention Coalition of America stand ready to assist the new leadership of the Department of Justice in any way possible.

Again, on behalf of the nation's leading resource in helping keep individuals, families, and communities safe from crime, we call on the United States Senate to confirm Thomas J. Perrelli as the next Associate Attorney General of the United States.

I have taken the liberty of sending a similar letter to Senator Specter and ask that the letters be made part of the hearing record for Mr. Perrelli's nomination.

Respectfully,

Alfonso E. Lenhardt
President and CEO

55828.225

NATIONAL
FRATERNAL ORDER OF POLICE®

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WASHINGTON, DC 20002
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CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

22 January 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Specter,

I am writing on behalf of the members of the Fraternal Order of Police to advise you of our support for the nomination of Thomas J. Perrelli to be the next Associate Attorney General of the United States.

Mr. Perrelli has a remarkable record of public service, which began in 1997 when he left private practice to join the U.S. Department of Justice as counsel to U.S. Attorney General Janet Reno. In 1999, Mr. Perrelli became Deputy Assistant Attorney General, supervising the Federal Programs Branch of the Civil Division, which represents virtually every Federal agency in complex civil litigation. In this position, Mr. Perrelli led a staff of one hundred attorneys charged with defending the constitutionality of Federal statutes, defending Federal agency actions and regulations, and representing the diplomatic and national security interests of the United States in courts of law.

Mr. Perrelli left the Department in 2001 and joined one of the top law firms in Washington, D.C. as Managing Partner. It is indicative of his commitment to public service that Mr. Perrelli has once again agreed to leave private practice to be Associate Attorney General. I sincerely believe that both the Department and the Administration will be better off with his service to our nation.

On behalf of the more than 327,000 members of the Fraternal Order of Police, I urge you and your Committee to expeditiously confirm Mr. Perrelli's nomination. If I can be of any further assistance in this matter, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington office.

Sincerely,

Chuck Canterbury
National President

—BUILDING ON A PROUD TRADITION—

EXECUTIVE DIRECTOR
John E. Echohawk

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Natalie A. Landreth

Website: www.narf.org

February 6, 2009

Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Bldg
Washington, DC 20510

Senator Arlen Specter
Ranking Member, Senate Judiciary Committee
711 Hart Building
Washington, DC 20510

Dear Senators Leahy and Specter:

I am writing on behalf of the Native American Rights Fund (NARF), which is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian tribes, organizations and individuals nationwide, to express our support for the nomination of Thomas Perrelli to serve as Associate Attorney General in the Department of Justice. Mr. Perrelli is a stellar candidate, and we urge his swift confirmation.

The Department of Justice plays a vitally important role in ensuring public safety in Indian Country and safeguarding the federal trust relationship. Under federal law, many Indian communities are completely dependent on the Department of Justice for investigation and prosecution of violent crimes and other felonies committed on Indian reservations.

During the Clinton Administration, Mr. Perrelli served on Attorney General Janet Reno's staff as her counsel and served as the lead on a number of her partnerships with tribal governments. Mr. Perrelli was the co-chair of the Indian Country Law Enforcement Initiative, which sought to enhance the efforts of federal and tribal law enforcement entities and tribal communities to address violence and crime in tribal communities. He also led the task force that created the

CIRCLE Project, a model partnership with three tribal governments that sought to address public safety, juvenile justice, judicial, and other needs of tribal communities in a comprehensive and efficient way. From those experiences, it is clear that Mr. Perrelli has an understanding of the problems faced by tribal communities and has an interest in working with tribal leaders to address them in a manner that recognizes the nation-to-nation relationship between the United States and tribal nations.

Unfortunately, despite the federal trust relationship and obligations to provide for public safety in Indian Country, funding for investigators and prosecutors at the federal level, and for tribal justice programs at the local tribal level have steadily decreased over the past six fiscal years. The lack of dedicated resources and funding has led to the existing public safety crisis that tribal communities face. Rates for violent crime, domestic abuse, and sexual assault on Indian reservations remain significantly higher than the national average. A February 8, 2008 Report from the Centers for Disease Control finds that American Indian and Alaska Native women experience the highest rates of domestic violence in the United States. The survey found that two in five Native women (39 %) have been victims of intimate partner violence in their lifetime, compared with one in four women overall.

The incoming Administration has an opportunity to reverse this trend with swift action that will begin to restore public safety in tribal communities and confidence among tribal members in the federal government's commitment to providing justice for all Americans. Prompt confirmation of Mr. Perrelli will allow this important work to begin.

I thank you in advance for your consideration of this request.

Sincerely,

John E. Echohawk

55828.228

1410 HLS Holmes Mail Center
Cambridge, MA 02138

February 6, 2009

Members of the Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Specter, and Members of the Senate Judiciary Committee:

We are sending this letter due to an op-ed by Flagg Youngblood titled "Solicitor general flimflam," which appeared in the January 30, 2009 edition of *The Washington Times*. This article unfairly labeled Dean Elena Kagan as an "anti-military zealot." As Iraq War veterans who currently attend Harvard Law School, we wanted to inform the Committee of Dean Kagan's strong record of welcoming and honoring veterans on campus. We have enclosed the letter to the editor that we submitted to *The Washington Times* in response to Mr. Youngblood's piece. This letter highlights Dean Kagan's support for the student veteran community. Thank you very much for your time and consideration.

Sincerely,

Geoff Orazem

Hagan Scotten

Erik Swabb

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STATEMENT OF THOMAS J. PERRELLI
NOMINEE FOR ASSOCIATE ATTORNEY GENERAL

Mr. Chairman, Senator Specter, and Members of the Committee, thank you for giving me this opportunity to appear before the Committee as nominee for the position of Associate Attorney General. I am grateful to the President and the Attorney General for giving me the opportunity to be considered for this post and to serve again in the Department of Justice, an organization that I revere.

I would like to thank the Members of the Committee and their staffs who have met with me to start what I hope will be a dialog about the issues facing the country and the Department of Justice. There is deep knowledge in this Committee about the many challenges ahead, and I hope that I have the opportunity to work with you to overcome them.

Finally, I would like to thank Senators Webb and Warner for the statements of support they have submitted for the record. As a lifelong Virginian, I greatly appreciate and respect their leadership and service to the Commonwealth.

I would not be here today without the love of my family and a great deal of good fortune. I want to thank first the love of my life, my wife Kristine for all of her love, help, and support -- especially now with a new baby arriving any day. She is here with our wonderful, albeit fidgety son, James Francis.

I also want to thank my mother, Nancy Perrelli, who has been an inspiration to me for many reasons, not the least of which is all that I learned by watching her, as a single parent, work full days, take care of me and my sister, and go to law school at night. She is here with my aunt Lucy Wolcott from Barre, Vermont. Lucy recently celebrated her 90th birthday and is the rock of our family.

I also want to thank my sister, Caryn and her husband Scott, for supporting me and our family, and Scott's brothers, Lieutenant Matthew Trivett of the Montgomery County, Maryland Fire Marshall Bomb Squad and Sergeant David Trivett of the Baltimore County Police Department's homicide unit. I also want to thank my brother-in-law Kevin Lucius, who made the trip from Madison, Wisconsin to be here today.

Missing from this group behind me is my father, also Tom Perrelli. He passed away in 2002 after a long struggle with cancer. I think of him today because my father was one of the career professionals who are the heart of the Department of Justice. He made his career there and it was central to his being; indeed, he refused to retire until a day or two before he died -- it was a part of what defined him.

My own reverence for the Department of Justice began through my father. As a college student, I worked summers at the Immigration & Naturalization Service, then part of DOJ. I began working primarily on IT projects, but I had the chance to work briefly in an office that focused on Cuba policy, worked on brainstorming ideas for how to use Ellis Island, and got to visit the men and women on the border in San Diego to learn more about the extraordinary challenges

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that they face and the remarkable job that they do. In my time as a summer intern, I also had the unusual opportunity to talk with then Attorney General Meese, who stopped to talk to me when he was exiting the building and I was waiting at the bus stop for a DOJ shuttle.

When I completed law school, I clerked for the Honorable Royce Lamberth of the U.S. District Court for the District of Columbia -- himself a lifelong public servant and veteran of the Judge Advocate General's Corps and the U.S. Attorney's Office in D.C. In that job, I saw the best of government lawyers, prosecuting cases from Iran-Contra to drug gangs and defending the United States in cases from the savings and loan crisis to environmental regulation of nuclear power plants.

All of those early experiences left me with a deep appreciation for the Department -- its mission and the extraordinary people who carry it out. That appreciation increased exponentially later in my career when I served first as Counsel to the Attorney General and later as Deputy Assistant Attorney General in the Civil Division. The men and women who serve in the Department from administration to administration, from the law enforcement agents of the FBI, DEA, and ATF who put their lives on the line every day, to lawyers and staff whose sole goal is fairness, evenhanded application of the law, and zealous representation of the United States, are remarkable and deserve more praise than they ever receive.

I am honored to have been nominated to serve as Associate Attorney General and to have the opportunity to work again among the career professionals at the Department. But I have no illusions about the size of the task. The challenges that the Department of Justice faces today are enormous. Its challenges derive from its mission, which has expanded greatly since September 11, 2001, from the constraints on its resources, which have limited its ability, and from management and other problems that are to a large extent self-inflicted.

My vision is a Justice Department of which all Americans can be proud -- a Department that keeps America safe from threats foreign and domestic, a Department that at every level makes the evenhanded application of the law and the representation of the interests of the United States without regard to party or personal views its priority; a Department that works in partnership with state, local, and tribal authorities to most efficiently protect the public and make communities safe; a Department that is transparent and gives to the American public confidence that the rule of law and the Constitution are paramount; and a Department that works with this Committee and others in government to collaborate on the many challenges ahead.

I look forward to answering your questions.

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POLICE EXECUTIVE
RESEARCH FORUM

Chuck Wexler
Executive Director

January 22, 2009

Sen. Patrick J. Leahy, Chairman
Sen. Arlen Specter, Ranking Member
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Senators Leahy and Specter:

On behalf of the Police Executive Research Forum (PERF), I am writing to support President Obama's nomination of Thomas J. Perrelli to be Associate Attorney General.

PERF is a Washington, D.C.-based professional association of police chiefs and other leaders of local and state police departments. PERF also serves as a research and consulting firm specializing in helping police agencies to improve their policies and operations. PERF is governed by a board of directors of leading police chiefs.

Mr. Perrelli's illustrious career is well known and was recently recognized by the National Law Journal, which named him one of the nation's most promising young lawyers. In 1997, Mr. Perrelli left his practice at Jenner & Block to join the U.S. Justice Department as counsel to then-Attorney General Janet Reno. Those of us in the world of local policing recall those years as an era when the federal government worked hand in hand with local police chiefs to advance the principles of community policing. We are confident that, as Associate Attorney General in the Obama Administration, Mr. Perrelli will again bring to the Justice Department a strong understanding of local policing issues and an eagerness to work with local police executives. Together, we can achieve a new period of reduced crime and violence in American communities.

On behalf of PERF, I urge you to give expeditious consideration to Mr. Perrelli's nomination and to confirm his appointment to this critically important post in the Obama Administration.

Respectfully,

Chuck Wexler
Executive Director

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MODRALL SPERLING

LAWYERS

VIA ELECTRONIC MAIL

Roberta Cooper Ramo
[redacted]
Fax: [redacted]

January 27, 2009

The Honorable Patrick Leahy, Chair
Judiciary Committee of the United States Senate

The Honorable Arlen Spector, Ranking Member
Judiciary Committee of the United States Senate

Re: Nomination of Elena Kagan as Solicitor General

Dear Senator Leahy and Senator Spector:

It is an honor to write you in support of President Obama's nomination of Elena Kagan to become the Solicitor General of the United States. I have known Dean Kagan since her time at my alma mater the University of Chicago Law School. Additionally I had a chance to work with her in my position as President of the American Bar Association when she was in the White House and more recently in conversations about the work of The American Law Institute of which I am currently president.

Dean Kagan's outstanding record as a lawyer and an educator is well known to you I am sure. Her tenure as the Dean of Harvard Law School, the first woman Dean, has been productive in every way. While leading a legendarily productive faculty, she at the same time attracted first rate academics from other major law schools to her faculty (sadly including some from the University of Chicago), did significant scholarly work herself and from my conversations with many students, changed the culture of the law school to one which while supporting academic rigor at the same time also supported a very positive student experience.

The importance of the Solicitor General is of course well understood by you. However, as a private citizen let me note how grateful I will be to have someone of Dean Kagan's enormous intellect, integrity and judgment representing the United States in front of our Supreme Court. The role of Solicitor General is unparalled in its ability to state the legal basis of the position of our Government in front of our highest court and in those moments of oral argument in front of our nation's citizens. Her many years of teaching along with her scholarship and straightforward demeanor will do a great deal to impart the best picture of the rule of law in our justice system to anyone who sees or hears her in that role.

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Roehl Harris & Sisk P.A.

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500 Fourth Street NW
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Albuquerque,
New Mexico 87102

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Albuquerque,
New Mexico 87103-2168

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It would be my honor and pleasure to answer any questions you have about Dean Kagan's fitness for this position. I hope she is confirmed quickly. Thank you for what you do to guard the importance and independence of the American justice system.

With great respect,

Roberta Cooper Ramo

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The Honorable Jack Reed

Senator
Rhode Island
February 10, 2009

Senator Jack Reed
Introduction of Solicitor-General Nominee Elena Kagan
February 10, 2009

I am honored to appear before the committee this morning to introduce a distinguished scholar, lawyer, and public servant, Dean Elena Kagan.

Dean Kagan and I both attended Harvard Law, although as you can tell, she is a lot younger than I, and a much better lawyer, and our time there did not overlap. However, I have followed her remarkable career with a great deal of pride.

After studying at Princeton University and Oxford, Ms. Kagan graduated magna cum laude from Harvard Law School in 1986 and went on to clerk for Judge Abner Mikva on the U.S. Court of Appeals for the D.C. Circuit and for Justice Thurgood Marshall on the United States Supreme Court.

She went on practice law before joining the faculty at the University of Chicago Law School in 1991.

She then served in the executive branch, as a legal and domestic policy advisor in the Clinton White House before returning to Harvard Law School in 1999.

During her tenure as Dean of Harvard Law, she has drawn acclaim as a pragmatic problem solver who could bridge ideological divides among the faculty. She hired new professors with diverse areas of expertise and views, and ushering in a slew of student-oriented reforms. She has also won praise from current and former students who have served our country in uniform for creating an environment that is highly supportive of students who have served in the Armed Forces.

Dean Kagan is eminently qualified to become the first female Solicitor General of the United States.

It is not just her impressive resume and brilliant legal mind that make her well suited to serve as the nation's advocate before the Supreme Court, but also her wisdom, temperament, maturity, judgment, and above all else, her strong commitment to the Constitution.

In October 2007, Dean Kagan gave a speech at my alma mater, West Point, where she told the cadets that our nation is most extraordinary because we quote: "live in a government of laws, not of men or women."

As a touchstone for this speech, she used a place on campus called Constitution Corner. One of the plaques at this site is etched with the phrase: "Loyalty to the Constitution," which reminds future soldiers and all Americans that the United States broke with the ancient tradition of swearing loyalty to an individual, and instead requires American officers to "swear loyalty to our basic law, the Constitution."

Dean Kagan also spoke to the cadets that day about how fundamental the rule of law is to our society, especially during difficult times and trying circumstances. She used the examples of President Nixon's Attorney General, Archibald Cox, and President Bush's Attorney General, John Ashcroft, as examples of men who sought to uphold the rule of law in very trying circumstances, and put doing the right thing above all else.

If confirmed, I believe General Kagan will be an outstanding Solicitor General. She brings exceptional qualifications to the job and will be a tough, fair, and powerful advocate for the Constitution, and for the people of the United States.

I commend Dean Kagan to the Committee and I thank her for her service to the nation.

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February 2, 2009

The Honorable Patrick J. Leahy, Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Arlen Specter, Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

We are proud to support the nominations of Elena Kagan to be Solicitor General of the United States and of Dawn Johnsen to be Assistant Attorney General for the Office of Legal Counsel. No woman has ever been confirmed by the Senate to hold either of these crucial offices. Because these two offices carry the broadest immediate responsibility for constitutional law, the confirmations of these two women will represent an important milestone for the Department of Justice and for women in the legal profession.

Each of us has been the first woman, or among the first women, to hold her office in the Justice Department. Based on our experiences in the Department, we fully understand the demands of the offices to which Ms. Johnsen and Ms. Kagan have been nominated. We have no hesitation in concluding that each of them possesses the skills and character to excel in the position for which she has been nominated. We therefore urge their prompt confirmation.

The Department of Justice is one the nation's most significant legal institutions. Across the broad spectrum of practice areas, the Department handles some of the most consequential and complicated matters that confront our legal system. By opening its highest offices to outstanding lawyers without respect to race, creed or gender, the Department has long played a pioneering role in opening the practice of law to all. This openness has also allowed the Department to benefit from access to a diverse range of the finest legal talents the bar has to

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offer. By confirming Elena Kagan and Dawn Johnsen, the Senate will help the Department advance this honorable tradition.

Sincerely,

Janet Reno
Attorney General (1993-2001)

Jamie S. Gorelick
Deputy Attorney General (1994-1997)

Patricia Wald
Assistant Attorney General
Legislative Affairs (1977-1979)

Eleanor D. Acheson
Assistant Attorney General
Office of Policy Development (1993-2001)

Loretta C. Argrett
Assistant Attorney General
Tax Division (1993-1999)

Jo Ann Harris
Assistant Attorney General
Criminal Division (1993-1995)

Lois Schiffer
Assistant Attorney General
Environment and Natural Resources
Division (1993-2001)

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Opposing Elena Kagan for Solicitor General

Senator Patrick Leahy, Chairman
Senator Arlen Specter, Ranking Minority Member
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman and Senator Specter:

We the undersigned express our strong opposition to the nomination of Harvard Law School Dean Elena Kagan for Solicitor General of the United States. Furthermore, we protest the Committee's undue haste in considering this vitally important nomination.

The nomination of Elena Kagan undermines President Obama's own announced position: "the notion that young people...anywhere, in any university, aren't offered the choice, the option of participating in military service, I think is a mistake."

Elena Kagan has made a career out of making this mistake. She has stood at the forefront of the fight against the Solomon Amendment, the law Congress passed and President Clinton signed, to provide students the opportunity to meet with military recruiters and to participate in ROTC on campus. Because elite schools such as Harvard have a history of obstructing students' military participation, the law conditions their federal taxpayer funding on providing access.

Elena Kagan has characterized military recruiting policy as "discriminatory," "deeply wrong," "unwise" and "unjust." She has called the Solomon Amendment "immoral."

Large bipartisan majorities enacted the Solomon Amendment to protect students' military rights, and the United States Supreme Court unanimously ruled the Solomon Amendment is constitutional.

We urge the Judiciary Committee to vote "NO" on the nomination of Elena Kagan for Solicitor General.

Sincerely,

Ron Robinson
President
Young America's Foundation

Colin A. Hanna
President
Let Freedom Ring

Flagg Youngblood
Director of Military Outreach
Young America's Foundation

Tom McClusky
Vice President of Government Affairs
Family Research Council

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Opposing Elena Kagan for Solicitor General, p. 2

Ron Pearson
President
Council for America

Frank Gaffney
President and CEO
Center for Security Policy

William J. Murray
Chairman
Religious Freedom Coalition

Tom Fitton
President
Judicial Watch

Cliff Kincaid
President
America's Survival, Inc.

Alex-St. James
Chairman
African American Republican Leadership Council

C. Preston Noell III
President
Tradition, Family, Property, Inc.

Elaine Donnelly
President
Center for Military Readiness

Keith Wiebe
President
American Association of Christian Schools

Angelise Anderson
Executive Administrator
Coalition on Urban Renewal and Education

Gary Marx
Executive Director
Judicial Confirmation Network

Kay Daly
President
Coalition for a Fair Judiciary

Richard W. C. Falknor
Chairman
Maryland Center-Right Coalition

Jim Martin
President
60 Plus Association

Phyllis Schlafly
President and Founder
Eagle Forum

Larry Cirignana

Jeff Gayner
Chairman
Americans for Sovereignty

Clare M. Lopez
Vice President
Intelligence Summit

Dee Hodges
Chairman
Maryland Taxpayers Association

Mark Williamson
Founder and President
Federal Intercessors

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STEPHANIE A. SCHARF

[redacted]

February 9, 2009

Via Facsimile

Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Arlen Specter
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington , DC 20510

Dear Senators Leahy and Specter:

I am writing to express strong support for the nomination of Thomas Perrelli to serve as Associate Attorney General in the Department of Justice. Mr. Perrelli is a stellar candidate, and I fully support his swift confirmation.

My support stems from my work for the advancement of women in the law and women's rights, including in such roles as President of the National Association of Women Lawyers ("NAWL") in 2004-2005, Founder and Chair of the annual National Survey of Retention and Promotion of Women in Law Firms (2006-present), current President of the Board of the NAWL Foundation, and a practicing lawyer and partner at one of the largest women-owned law firms in the country, Schoeman, Updike, Kaufman & Scharf.

By way of background, NAWL, founded in 1899, is the oldest women's bar association in the country and the largest national organization of women lawyers in the U.S. Its individual and law firm members span all 50 states. NAWL provides superior programming for women lawyers at every stage of their careers, strengthening their skills, networking, negotiating, re-entering the workforce after some time off, or attending the highly acclaimed General Counsel Institute for women in-house counsel. In short, NAWL is all about skills, solutions and success for women lawyers. The organization also provides broader services for women lawyers and support for women's legal issues, by participating in *amicus* briefs on such important topics as domestic violence, gender discrimination and other areas of laws impacting women, review of Supreme Court nominees, and other activities.

Senator Patrick J. Leahy
Senator Arlen Specter
Page 2
February 9, 2009

The Department of Justice plays a vitally important role in enforcing our nation's anti-discrimination laws as well as administering millions of dollars of grants, a significant portion of which benefits women, particularly under the Violence Against Women Act.

Tom Perrelli has dedicated a significant amount of his career to public service and pro bono efforts. From 1997 to 1999, Mr. Perrelli served as Counsel to Attorney General Janet Reno. As part of his responsibilities, Mr. Perrelli was the point person on the AG's staff with the primary oversight role for the Civil Rights Division, which included general oversight of work to expand the federal hate crimes law to include gender, sexual orientation, and disability. In addition, during his time at the Department of Justice, Mr. Perrelli led a task force that created the CIRCLE Project, a model partnership with three tribal governments that sought to address public safety, juvenile justice, judicial, and other needs of tribal communities in a comprehensive and efficient way. A key part of the CIRCLE project included initiatives to address domestic violence and sexual assault against Native American women, which occurs at an alarming rate in this country.

After leaving the Department of Justice, Mr. Perrelli became a partner and is currently Managing Partner of the Washington, D.C., office of Jenner & Block LLP (where, for a period of time, Mr. Perrelli and I were both partners in the Firm). I know Mr. Perrelli to be an outstanding lawyer with unquestioned integrity. Moreover, Mr. Perrelli has devoted a substantial amount of his time to pro bono efforts. In 2005, he was awarded the Albert E. Jenner Pro Bono Award. Throughout his tenure at the Firm, most recently as Managing Partner, Mr. Perrelli has worked to ensure the retention and advancement of women at his Firm.

As the nation's law firm, the Department of Justice employs a large number of lawyers in the federal government, particularly women. Mr. Perrelli has a proven track record of advocating for programs that benefit women as well as promoting women in the legal profession. The incoming Administration has an opportunity to restore confidence among the American public following some of abuses during the past several years. Prompt confirmation of Mr. Perrelli will allow this important work to begin.

I thank you in advance for your consideration of this letter of support.

Sincerely,

Stephanie A. Scharf

Stephanie A. Scharf, J.D., Ph.D.

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OCEANA • EARTHJUSTICE • NATIONAL AUDUBON SOCIETY • CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

February 4, 2009

Hon. Patrick J. Leahy
Chairman

Hon. Arleen Specter
Ranking Minority Member

Senate Judiciary Committee
SD-224 Dirksen Senate Building
Washington, DC 20510-6275

Re: Confirmation of Thomas Perrelli as Associate Attorney General

Dear Senators Leahy and Specter:

We write to express enthusiastic support for confirmation of Tom Perrelli as Associate Attorney General of the United States. As leaders of national conservation organizations, we are keenly interested in the selection of the new Associate Attorney General because this position supervises, among other Justice Department components, the Environment and Natural Resources Division.

The new Associate Attorney General must be fair, open to new perspectives, effective, creative in tackling difficult problems, willing to give close consideration to the facts and the law, and committed to public service. Some of our staff have worked with Mr. Perrelli during his previous service in the Department of Justice and have observed his leadership of the Obama-Biden transition effort on environmental issues at the Department. As a result, we are fully confident that Mr. Perrelli strongly demonstrates all these qualities.

We were impressed that the transition team led by Mr. Perrelli listened energetically and with care to the issues that our organizations believed should be a priority for the new administration. We understand that this same interest in outside views was impartially exhibited to many others, including organizations whose perspectives and positions may differ from our own.

At the Department of Justice, Mr. Perrelli served as Counsel to the Attorney General and worked closely with the civil litigating components which report to the Associate Attorney General, including the Environment and Natural Resources Division. In addition, he led teams handling some of the most controversial and difficult issues, including establishment of the Department's office to provide ethics advice to Department attorneys, litigation against tobacco companies to address the public harms derived from cigarette smoking; policy on medical records privacy; and an approach balancing Indian tribes' right to gain revenue from gaming

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with state and federal law enforcement. He also oversaw the Federal Programs Branch of the Civil Division which conducts some of the most high-profile litigation in the government. Whatever one's views on those issues, it is noteworthy that Mr. Perrelli was effectively able to devise nuanced positions taking into account many perspectives. His advocacy respected the complexity of the facts, as well as Congressional objectives in enacting the laws. He exhibited creativity in finding solutions.

We are convinced that these qualities will enable Mr. Perrelli to provide excellent leadership of, and support to, the Environment and Natural Resources Division, which is especially important at this time when sensible environmental and energy policies are necessary to protect our planet's climate as well as our country's security. For this reason, we urge you speedily to confirm Mr. Perrelli as Associate Attorney General.

Sincerely,

Andrew Sharpless
Chief Executive Officer
Oceana
1350 Connecticut Ave, NW, 5th Floor
Washington, DC 20036

Trip Van Noppen
President
Earthjustice
426 Seventeenth Street, 6th Floor
Oakland, CA 94612

Daniel B. Magraw, Jr
President
Center for International Environmental Law
1350 Connecticut Ave., NW, Suite 1100
Washington, DC 20036

Greer S. Goldman
Assistant General Counsel
National Audubon Society
1150 Connecticut Ave. N.W., Ste. 600
Washington, D.C. 20036

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Clifford M. Sloan

DIRECT DIAL
[redacted]
DIRECT FAX
[redacted]
EMAIL ADDRESS
[redacted]

January 23, 2009

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510-4502

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Senator Leahy and Senator Specter:

I am writing to enthusiastically support the nomination of Elena Kagan for Solicitor General.

I had the honor of serving in the Solicitor General's office as an Assistant to the Solicitor General from 1989 to 1991. I know the office well, and I am confident that Elena Kagan will serve in the very highest traditions of the office.

I have known Ms. Kagan since we both were in law school. She will be one of our most distinguished and well-respected Solicitors General. She has precisely the qualities that one would want in a Solicitor General -- a brilliant legal mind, an unerring sense of fairness and balance, and a deep respect for the values and constraints of law.

I have known Elena Kagan in many capacities -- as a fellow law student; as a practicing lawyer when she first moved to Washington; as a colleague who, like me, worked in the White House during the Clinton Administration; as an insightful law professor; and as the Dean of the law school from which I graduated. The most striking quality about Elena Kagan is that, in every position she has held, she has been universally respected and admired. She is widely known as somebody who is principled, thoughtful, and conciliatory.

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The Honorable Patrick J. Leahy
The Honorable Arlen Specter
January 23, 2009
Page two

As one who has had the privilege of serving in Administrations of both political parties, I am convinced that Elena Kagan will be the kind of government official who is viewed as exemplifying the very best type of public servant – an individual who is known solely for her dedication to the public interest. And, as one who cares deeply about the Supreme Court (as a former Supreme Court law clerk; as a practitioner before the Supreme Court in public and private life; and as the author of a forthcoming book about the Supreme Court's landmark decision in Marbury v. Madison), I know that Elena Kagan will deeply appreciate and respect the unique role of the Solicitor General before the Supreme Court.

Please let me know if any additional information would be of assistance. I am a partner at Skadden, Arps, Slate, Meagher & Flom in Washington, DC, and I would be pleased to be helpful to you and the Committee in any way.

Sincerely,

Clifford M. Sloan

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THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

1111 East 60th Street | Chicago, Illinois 60637
PHONE [redacted] | FAX [redacted]
EMAIL [redacted]
www.law.uchicago.edu

David A. Strauss
Gerald Ratner Distinguished Service Professor of Law

January 24, 2009

The Honorable Patrick J. Leahy
The Honorable Arlen Specter
Committee on the Judiciary
United States Senate
Washington, D C. 20510

Dear Chairman Leahy and Ranking Member Specter:

I am writing in support of the nomination of Elena Kagan to be Solicitor General of the United States. I served in the Solicitor General's Office from 1981 to 1985, and in the Office of Legal Counsel before that; I have appeared before the United States Supreme Court on a number of occasions. I have known Dean Kagan for almost two decades, and I have worked with her in a variety of capacities, both in academia and when she was in the government.

Dean Kagan is an inspired choice to be Solicitor General. She is, first of all, extraordinarily able. She is a great lawyer, as her academic record shows. She also understands how institutions work, as her brilliant tenure as Dean of the Harvard Law School amply testifies.

Perhaps even more important, Dean Kagan has the qualities of personal and intellectual integrity that, in my view, are important in any government lawyer but absolutely indispensable in the Solicitor General. The Solicitor General is the chief advocate for a complex, demanding, multi-faceted client—the government, and ultimately the people, of the United States; and the Solicitor General must represent that client's interests while maintaining absolute fidelity to the rule of law. The Solicitor General has to ask tough questions, think through difficult legal issues, and present the government's positions to the Supreme Court in a way that reflects the highest standards of professionalism. I have seen Dean Kagan demonstrate, over and over, that she has the energy, the intelligence, the skill, and the integrity to do exactly those things.

I was fortunate enough to serve under two outstanding Solicitors General, Wade McCree and Rex Lee. In my view Elena Kagan has the potential to be on a very short list of the greatest Solicitors General of the last one hundred years.

I hope these views are helpful to the Committee. I am happy to provide anything else that might be useful.

Sincerely,

David A. Strauss
Gerald Ratner Distinguished Service Professor of Law
The University of Chicago

HARVARD UNIVERSITY
Hauser Hall 420
Cambridge, Massachusetts 02138
[redacted]

Laurence H. Tribe
Carl M. Loeb University Professor

Tel.: [redacted]
Fax: [redacted]

January 23, 2009

Chairman Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510-4502

Ranking Member Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Leahy and Ranking Member Specter:

I write to endorse with great enthusiasm the nomination of Elena Kagan to be Solicitor General of the United States. She is a remarkable lawyer, administrator, scholar, colleague, teacher, advocate, and human being. I have known her ever since she was my law student and have long marveled at her unique combination of talents. No Dean of Harvard Law School during my forty years on its faculty has come close to Elena in finding ways to make the whole greater than the sum of its parts. Harvard is, as you know, an environment populated with outsize egos and occasionally cantankerous dispositions while containing some of the most productive and sparkling intellects in the world, both among its faculty and among its students, one of whom went on to become Chief Justice of the United States and another of whom was just inaugurated as our 44th President. It is quite a challenge to bring out the best in such a group of powerful personalities. Yet Elena has always managed to do just that. I have no doubt that she would do the same with the enormously talented and justly confident lawyers in the Solicitor General's Office and that, over time, she would help even the United States Supreme Court to become the best institution it is capable of becoming.

Dean Kagan's impressive level of experience in the Clinton White House and in the Justice Department of the Clinton Administration will, of course, stand her in good stead as Solicitor General and will reduce the angle of whatever learning curve she confronts at the Department of Justice under President Obama and his Attorney General. But the skills she demonstrated in navigating the shoals at Harvard, both within the law school and throughout the university, make her much more than simply a first-rate bureaucratic player. No-one I have met at this or any other university has been better at orchestrating the abilities and energies of faculty, staff, and students without ruffling anyone's feathers or leaving hard feelings among those who cannot, by the nature of things, always get their way. That Elena Kagan was able to achieve that kind of harmony and cooperation while creating genuine intellectual excitement as she spearheaded the expansion of the Harvard Law School faculty in size, ideological range, and substantive

depth is nothing short of remarkable. And that she was able to do all of that while skyrocketing the level of student satisfaction and raising the already high level of student achievement has made her nothing less than a legend in her own time.

Even a President as committed to the Constitution and laws of the United States as Barack Obama is bound to be buffeted by demands that may at times translate into pressures that the ideal Solicitor General, representing not simply the executive branch but the entire United States Government, and acting as an Officer of the Court in the truest sense, ought to resist. The independence of mind and spirit required to sustain that resistance is difficult to find in an advocate who could faithfully and enthusiastically represent the administration before the Supreme Court. In Elena, that independence is amply present: I have seen it demonstrated in many contexts both within the law school and at the interface of the school with the larger university and the surrounding community.

The independence and integrity of which I speak are in part functions of an individual's character and backbone—dimensions along which Dean Kagan is unsurpassed. But they are functions as well of how strongly someone understands the substantive matters with which she must deal. The less deeply grounded someone is in the history and structure of habeas corpus, federal preemption, international human rights, or executive privilege—to name just a few examples—the more difficult it would be for that individual, acting in the role of Solicitor General, to display the independence of judgment that a President and an Attorney General should be able to assume in someone occupying that office. In those respects, Elena Kagan could not be better equipped. For among the many things that make Elena a perfect fit for the position to which she has been nominated is her incomparable command of the many substantive legal areas with which the Solicitor General must deal in making difficult decisions about the position the United States should take, and how the United States Government should manage, the multitude of challenging cases and controversies confronting it. That command has been developed and displayed by Dean Kagan in her own scholarship and teaching and in the course of evaluating scholars and lawyers across the country for possible positions at Harvard, a process in which Elena has not simply relied on rumor and reputation but has read deeply the work of others and has developed a breathtaking command of the entire array of substantive areas of law with which the Office of the Solicitor General must deal. Whether the topic is federal constitutional law or federal administrative and executive procedure, antitrust or intellectual property, environmental law or securities law, bankruptcy or the regulation of complex financial instruments, she has become an expert in her own right. And the same is true of the range of theoretical and philosophical issues presented by the recurring disputes over methodology and jurisprudence with which the ideal Solicitor General ought to be familiar.

Nor is Elena's expertise limited to a deep understanding of substantive and methodological issues in the law. She understands as well the range of personalities that populate the legal landscape. To hear her talk about the inclinations and perspectives of Justices as different as Sam Alito and David Souter, Steve Breyer and Antonin Scalia, Anthony Kennedy and Ruth Ginsburg, is to listen to someone who appreciates just what

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it would take to speak to their varying dispositions—far more perspicaciously, I must say, than just about any experienced Supreme Court advocate I know. The fact that she has not in fact argued before the Court, or indeed in any appellate court, should not, in Elena's case, be taken as a drawback. I have personally witnessed her ability to identify just what it would take to persuade people at least as self-assured and stubborn in their ways as any of these jurists. Indeed, that Elena Kagan would be a fresh face and a new personality at the Supreme Court Bar would make it easier, not more difficult, for her to convince that unusually challenging collection of minds to see things in the light that seemed to her most appropriate to the occasion.

In identifying what that light might be, Elena Kagan would combine precision and attention to detail with a degree of foresight and predictive capacity that is little short of uncanny. In tackling difficult problems within the Harvard community, including problems bearing on Harvard's relationships with the federal and state governments, Elena has been uniquely prescient, avoiding missteps that less acutely perceptive administrators and academics would surely have made. Simultaneously respectful of the views of others and capable of diplomatically identifying and correcting gaps in their understanding, Elena Kagan is the ideal advocate for an administration that seeks common ground among partisan opponents and that must grapple with the most difficult domestic and foreign challenges any incoming President has had to face in many generations.

I cannot think of anyone in the nation who would be better suited to the post to which Elena has been nominated and am confident that Elena Kagan will be a truly great Solicitor General of the United States.

Yours truly,

Laurence H. Tribe

Laurence H. Tribe

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The Washington Times

Print Close

Thursday, February 5, 2009

LETTER TO EDITOR: In defense of Elena Kagan

As Iraq War veterans who currently attend Harvard Law School, we believe that Flagg Youngblood's referring to Dean Elena Kagan as an "anti-military zealot" is a gross mischaracterization ("Solicitor general flimflam," Op-Ed, Friday). Like Mr. Youngblood, we support military recruiting on campus and hope that the Obama administration vigorously defends the Solomon Amendment.

However, this position has not diminished our appreciation for Miss Kagan's embrace of veterans on campus. During her time as dean, she has created an environment that is highly supportive of students who have served in the military. For the past three years, Miss Kagan has hosted a Veterans Day dinner for all former service members and spouses. She pioneered this event on her own initiative, which has meant a great deal to students.

Indeed, every year, Miss Kagan makes a point to mention the number of veterans in the first-year class during her welcome address to new students. Under her leadership, Harvard Law School has also gone out of its way to highlight our military service, publishing numerous articles on the school Web site and in alumni newsletters. These are not actions of an "anti-military zealot," and greater care should be exercised before someone is labeled as such.

ERIK SWABB, GEOFF ORAZEM, HAGAN SCOTTEN

Cambridge, Mass.

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February 5, 2009

Dear Senator:

We write to you to express our grave concern over the pending nomination of Elena Kagan to serve as Solicitor General of the United States.

As you know, the Solicitor General is charged with conducting all litigation on behalf of the United States in the Supreme Court and with supervising the handling of litigation in the federal appellate courts. Given her past actions and statements, we are particularly concerned that Ms. Kagan would not faithfully carry out her duties on a broad range of federal laws that are under attack by homosexual activists. These laws include the Defense of Marriage Act, the federal law codifying the so-called "Don't Ask, Don't Tell" policy governing homosexuals in the military, and the Solomon Amendment. Vigorous and thorough questioning of Ms. Kagan is warranted on these matters.

As dean of Harvard Law School, Ms. Kagan fiercely opposed the Solomon Amendment, the federal law that denies federal funding to institutions of higher education that discriminate against military recruiters. In explaining her opposition, Ms. Kagan stated that "I abhor the military's discriminatory recruitment policy"—that is, the "Don't Ask, Don't Tell" policy that was adopted in 1993 by a Democratic-controlled Congress and signed into law by President Clinton. In remarkably extreme rhetoric, Ms. Kagan labeled the "Don't Ask, Don't Tell" policy "a profound wrong—a moral injustice of the first order."

In furtherance of her opposition to the Solomon Amendment, Ms. Kagan signed her name to a Supreme Court amicus brief in *Rumsfeld v. FAIR* that offered a highly implausible reading of the Solomon Amendment that would have rendered it, as Chief Justice Roberts's opinion put it, "largely meaningless." The Chief Justice's opinion rejecting Ms. Kagan's implausible reading was unanimous: not even any of the liberals on the Court sided with her argument.

As Solicitor General, Ms. Kagan would be charged with enforcing and defending both the "Don't Ask, Don't Tell" law and the Solomon Amendment—and with developing winning litigation strategies. Is it plausible that someone who believes that these laws inflict "a profound wrong—a moral injustice of the first order" could faithfully carry out those tasks?

Further, Ms. Kagan's extreme rhetoric makes it highly likely that she also favors same-sex marriage, both as a matter of policy and as a supposed federal constitutional right. President Obama ran for president maintaining that he was opposed to same-sex marriage. Does Ms. Kagan oppose same-sex marriage? Does Ms. Kagan firmly reject the notion that there is a federal constitutional right to same-sex marriage? If the answer to either question is no, is it reasonable to expect Ms. Kagan to carry out her obligation to defend the Defense of Marriage Act? That federal law was enacted by overwhelming majorities of both houses of Congress (85-14 in the Senate and 342-67 in the House) in 1996 and signed into law by President Clinton.

These and related questions call for very careful scrutiny of Ms. Kagan's nomination.

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Sincerely yours,

Donald E. Wildmon
Founder and Chairman
American Family Association

Gary L. Bauer
President
American Values

Tom Minnery
Senior Vice President, Government
and Public Policy
Focus on the Family

Mr. Kelly Shackelford, Esq.
President
Free Market Foundation

Dr. Carl Herbster
President
AdvanceUSA

Micah Clark
Executive Director
American Family Association of Indiana

Phil Jaurequi, Esq.
President
Judicial Action Group, Inc.

Diane Gramley
President
American Family Association of Pennsylvania

David Crowe
Restore America

Dr. Dale Burroughs
Founder and President
Biblical Heritage Institute

John Stemberger, Esq.
President and Chief Counsel
Florida Family Action

Maurine Proctor
President
Family Leader Network

Tom Shields
Chairman
Coalition for Marriage and Family

David E. Smith
Executive Director
Illinois Family Institute

Jeremiah G. Dys, Esq.
President and General Counsel
The Family Policy Council of West Virginia

Ron Shuping
Executive VP of Programming
The Inspiration Networks

Colin A. Hanna
President
Let Freedom Ring

Jim Garlow
Executive Director
California Pastors Rapid Response Team

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WBA

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of the District of Columbia

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February 3, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the Women's Bar Association of the District of Columbia ("WBA"), I write to express our strong support for Thomas Perrelli's nomination to be Associate Attorney General of the United States. We are convinced by Mr. Perrelli's experiences both in and out of government, as well as our discussions with a number of his legal peers and clients, that he has the essential traits to be an outstanding Associate Attorney General who is dedicated to equal rights under the law and the needs and concerns of women nationwide.

Throughout Mr. Perrelli's career, from his work as an experienced litigator and managing partner at the D.C. office of a major national law firm to his service at the Department of Justice in multiple capacities, Mr. Perrelli has demonstrated his commitment to equal justice for all. As a practicing lawyer, he has earned a reputation of being a lawyer of the highest caliber and has worked on behalf of individuals who constitutional rights have been infringed. As managing partner of Jenner & Block's D.C. office, he has been viewed as an excellent leader who is committed to equal opportunity. During his years at the Department of Justice, he demonstrated a commitment to public service, earned a reputation for integrity, and gained relevant experience for the post of Associate Attorney General by overseeing the Department's civil litigating components, including the Civil Rights Division, and in working in Indian Country to improve law enforcement responses in the areas of violence against women and juvenile justice.

As Associate Attorney General, Mr. Perrelli will have oversight of Department of Justice components that are critical to promoting women's advancement and opportunities, including the Office on Violence Against Women and the Civil Rights Division. The former is a key component of the federal government's leadership in reducing violence against women and helping state, local, tribal, and non-profit entities properly respond to violence against women. The latter Civil Rights Division is the coordinating office for federal civil rights enforcement efforts. We are pleased that Mr. Perrelli, a man of integrity and with a fundamental sense of fairness, if confirmed, will be overseeing these two important offices.

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In sum, our due diligence led us to conclude that Mr. Perrelli possesses all the skills and experience to make him an excellent Associate Attorney General at the United States Department of Justice. He has demonstrated a commitment to equality in every sphere of his life. We wholeheartedly recommend him and hope these comments will assist you in your evaluation. We urge the committee to report promptly Mr. Perrelli's nomination to the full Senate.

Sincerely,

Jennifer Maree
President, Women's Bar Association
of the District of Columbia

cc: WBA's Executive and Judicial Endorsements Committee Co-Chairs:
Elizabeth A. Scully
Maria Lerner
Cecily Baskir
Avril Ussery Sisk

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February 5, 2009

The Honorable Pat Leahy
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy, Ranking Member Specter, and Committee Members:

On behalf of Concerned Women for America's (CWA) 500,000 members nationwide, we write to respectfully request you oppose the nominations of Elena Kagan for Solicitor General and Thomas Perrelli for Associate Attorney General.

Elaine Kagan has advocated for policies that undermine military standards and treat our national security as a social experiment. Ms. Kagan is a staunch critic of the Solomon Amendment, which bars federal aid to universities that prevent military recruitment on campus, and coauthored a brief against it because she believes that the military's position against homosexuals is a "profound wrong – a moral injustice of the first order." Her opposition to military recruitment on campuses based on her own prejudice against standards that respect the mission and members of our military reveals a terrible lack of judgment on constitutional freedoms and bias against those dedicated to serving our country.

CWA believes that Ms. Kagan may have difficulty separating the law from her political positions and may not defend federal laws that she disfavors.

Thomas Perrelli represented Terry Schiavo's husband in his suit to kill his wife. There are several end-of-life issues that could make their way to the federal level in the next four years and having Mr. Perrelli at the department would be detrimental to protecting and promoting the dignity of human life.

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Also, Mr. Perrelli was heavily involved in redistricting cases resulting from the 2000 census. As Associate Attorney General, Mr. Perrelli would likely be pivotal in issues related to the 2010 census. His actions make it difficult to trust his ability to deal impartially on these crucial issues.

It is for these reasons that we urge you to oppose Ms. Kagan's nomination for Solicitor General and Mr. Perrelli's nomination for Associate Attorney General.

Sincerely,

Wendy Wright
President
Concerned Women for America

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