

THE NOMINATION OF ELENA KAGAN TO BE
AN ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

JUNE 28-30 and JULY 1, 2010

Serial No. J-111-98

Printed for the use of the Committee on the Judiciary



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THE NOMINATION OF ELENA KAGAN TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 28, 2010

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

The Committee met, Pursuant to notice, at 12:32 p.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Specter, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good afternoon. I welcome everybody here. Just so you know the procedure—Senator Sessions and I have discussed this—we are going to recognize Senators in order of seniority doing the usual back and forth. Senator Sessions and I will each give an opening statement and, following our opening statement, take turns back and forth. I would urge Senators to stay—in fact, we are going to have to stay within the 10 minutes just simply to keep on schedule.

Of course, Solicitor General Kagan, welcome to our Committee room. There are somewhat more people here than usual.

But let me begin. One of the things that will change slightly our schedule this week is the death of Senator Byrd. All of us, I believe it is safe to say, both Republican and Democratic Senators, are saddened by his death. No Senator came to care more about the Constitution or to be a more effective defendant of our constitutional Government than the senior Senator from West Virginia. In many ways, he was the keeper of the Senate flame, the fiercest defender of the Senate's constitutional role and prerogatives. I do not know how many times we saw Senator Byrd hold up a copy of the Constitution. The difference between him holding it up and any one of us holding it up, he could put it back in his pocket and recite it verbatim, the whole Constitution. Others will speak of his record for the time served in the Senate and Congress, for the number of votes case.

I knew him as a mentor and a friend. He served for a time on this Committee. I was honored to sit near him in the same row on

the Senate floor and engage in many discussions about the Senate and its rules or about the issue of the moment or about our families. And it was a privilege to stand with him and fight against assaults on the Constitution and what the two of us felt was an unnecessary and costly war in Iraq.

He was a self-educated man. He learned much throughout his life. He had much to teach us all.

Senator Byrd was such an extraordinary man of merit and grit and determination who loved his family and drew strength from his deep faith, who took to heart his oath to support and defend the Constitution. The arc of his career in public service is an inspiration to all and should inspire generations of Americans.

Now, on the issue before us today, there have been 111 Justices on the Supreme Court of the United States. Only three have been women. If she is confirmed, Solicitor General Kagan will bring the Supreme Court to a historical high-water mark.

Elena Kagan earned her place at the top of the legal profession. Her legal qualifications are unassailable. As a student, she excelled at Princeton, Oxford, and Harvard Law School. She was a law clerk to the great Supreme Court Justice, Justice Thurgood Marshall, and I appreciate seeing Justice Marshall's son, Thurgood Marshall, in the audience here today. She worked in private practice and briefly for then-Senator Biden on this Committee. She taught law at two of the Nation's most respected law schools. She counseled President Clinton on a wide variety of issues. She served as Dean of Harvard Law School and is now the Solicitor General of the United States, sometimes referred to as "the tenth Justice." I believe we are a better country for the fact that the path of excellence Elena Kagan has taken in her career is a path now open to both men and women.

As Chief Justice Marshall wrote, our Constitution is "intended to endure for ages . . . and consequently, to be adapted to the various crises of human affairs." He and other great Justices have recognized that the broadly worded guarantees and powers granted in the Constitution adapt to changing circumstances.

Consequently, our Constitution has withstood the test of time. The genius of our Founders was to establish a Constitution firm enough to enshrine freedom and the rule of law as guiding principles, yet flexible enough to sustain a young Nation that was destined to grow into the greatest, the richest, most powerful Nation on Earth, and I might say one of the most diverse nations on Earth.

It took more than four score years and a Civil War that claimed the lives of hundreds of thousands to end the enslavement of African-Americans and include as citizens "all persons born or naturalized in the United States." Through the Civil War amendments that followed, we transformed the Constitution into one that more fully embraced equal rights and human dignity. The country and our democracy were stronger for it. But the job was not complete. It was halfway through the last century that racial discrimination was dealt a blow by the Supreme Court in the modern landmark case of *Brown v. Board of Education*, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and America

began to provide a fuller measure of equality to those who were held back for so long because of the color of their skin.

Our path to a more perfect Union also included the rejection 75 years ago of conservative judicial activism by the Supreme Court and our establishing a social safety net for all Americans. It began with us outlawing child labor and guaranteeing a minimum wage. Through Social Security, Medicare, and Medicaid, Congress ensured that growing old no longer means growing poor, and that being older or poor no longer means being without medical care. That progress continues today. All of us are the better for it.

Now, the 100 members of the Senate stand here in the shoes of more than 300 million Americans as we discharge our constitutional duty with respect to this nomination. The Supreme Court exists for all Americans. Only one person gets to nominate somebody for the Court. Only 100 Americans get to vote on whether that person should be on the Court or not. It is an awesome responsibility, and I urge the nominee to engage with this Committee and through these proceedings with the American people in a constitutional conversation about the role of the courts and our Constitution.

When we discuss the Constitution's Commerce Clause or spending power, we are talking about congressional authority to pass laws to ensure protection of our communities from natural and man-made disasters, to encourage clean air and water, to provide health care for all Americans, to ensure safe food and drugs, to protect equal rights, to enforce safe workplaces, and to provide a safety net for all seniors.

Now, I reject the ideological litmus test, from either the right or the left, that some would apply to Supreme Court nominees. I expect judges to look to the legislative intent of our laws, to consider the consequences of their decisions, to use common sense, and to follow the law. In my view, a Supreme Court Justice needs to exercise judgment, should appreciate the proper role of the courts in our democracy, and should consider the consequences of decisions on the fundamental purposes of the law and in the lives of Americans.

I will urge Solicitor General Kagan here publicly what I have urged her privately: to be open, to be responsive, to share with us but even more importantly with the American people her judicial philosophy, but also to assure us of her judicial independence from either the right or the left. I believe that fair-minded people will find her judicial philosophy well within the legal mainstream. I welcome questions to Solicitor General Kagan about judicial independence, but I would urge Senators on both sides to be fair. There is no basis to question her integrity, and no one should presume that this intelligent woman, who has excelled during every part of her varied and distinguished career, lacks independence.

And it is essential that judicial nominees understand that, as judges, they are not members of any administration. The courts are not subsidiaries of any political party or interest group, and our judges should not be partisans. That is why the Supreme Court's intervention in the 2000 Presidential election in *Bush v. Gore* was so jarring and why it shook, in many people's minds throughout this country, the credibility of the Court. That is why the Supreme

Court's recent decision in *Citizens United*, in which five conservative Justices rejected the Court's own precedent, rejected the bipartisan law enacted by Congress, rejected 100 years of legal developments in order to open the door for massive corporate spending on elections, was such a jolt to the system.

The American people live in a real world of great challenges. The Supreme Court needs to function in that real world within the constraints of our Constitution. My own State of Vermont, the 14th State in the Union, did not vote to join the Union until the year the Bill of Rights was ratified. We are cautious in Vermont. Those of us from the Green Mountain State are protective of our fundamental liberties. We understand the importance the Constitution, and its amendments, have had in expanding individual liberties over the last 220 years.

I hope that Elena Kagan will demonstrate through this hearing that she will be the kind of independent Justice who will keep faith with these principles and keep faith with the words that are inscribed in Vermont marble over the front doors to the Supreme Court: "Equal Justice Under Law."

I will put the rest of my statement in the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I would like to join you in recognizing this special moment of the loss of Senator Byrd who was such an institution here. He taught all of the new Senators something about the Senate. He believed there were two great Senates—the Roman Senate and the American Senate—and he wanted ours to be the greatest ever.

I remember one day he gave a speech on a Friday morning that I heard in which he complained about textbooks and the failure to distinguish between a republic and a democracy. He went on at some length demonstrating that and then called them "touchy-feely twaddle."

[Laughter.]

But he loved the Constitution, he loved our country, and he loved clarity of thought, and we will certainly miss him.

Ms. Kagan, let me join Chairman Leahy in welcoming you here today. This nomination is certainly a proud day for you, your family, and your friends, and rightfully so. I enjoyed very much our meeting a few weeks ago and appreciated the chance to talk with you then.

Mr. Chairman, thank you for your work on this nomination. As I have pledged, Republicans are committed to conducting this hearing in a thoughtful and respectful manner. It is not a coronation, as I have said, but a confirmation process. Serious and substantive questions will be asked. Ms. Kagan will be given ample opportunity to respond.

Ms. Kagan certainly has numerous talents and many good qualities, but there are serious concerns about this nomination. Ms. Kagan has less real legal experience of any nominee in at least 50

years, and it is not just that the nominee has not been a judge. She has barely practiced law and not with the intensity and duration from which I think real legal understanding occurs. Ms. Kagan has never tried a case before a jury. She argued her first appellate case just 9 months ago. While academia certainly has value, there is no substitute, I think, for being in the harness of the law, handling real cases over a period of years.

What Ms. Kagan's public record does reveal is a more extensive background in policy, politics, mixed with law. Ms. Kagan's college thesis on socialism in New York seems to bemoan socialism's demise there. In her master's thesis, she affirmed the activist tendencies of the Earl Warren Court, but complained that they could have done a better job of justifying their activism.

President Obama's nominee started her political career in earnest as a staff on the Presidential campaign of Michael Dukakis. She took leave from teaching at law school to work for this Committee under then-Chairman Joe Biden to help secure the nomination of Ruth Bader Ginsburg, a former counsel for the ACLU and now one of the most active members of Justices on the Supreme Court.

I know you would join with me, Mr. Chairman, expressing our sympathy to Justice Ginsburg on the loss of her husband also.

Chairman LEAHY. A wonderful man.

Senator SESSIONS. Professor Kagan left teaching law to spend 5 years at the center of politics, working in the Clinton White House, doing, as she described it, mostly policy work. Policy is quite different than intense legal work, for example, in the Office of Legal Counsel or some of the Divisions in the Department of Justice.

During her White House years, the nominee was the central figure in the Clinton-Gore effort to restrict gun rights and as the dramatic 5-4 decision today in the *McDonald* case shows, the personal right of every American to own a gun hangs by a single vote on the Supreme Court.

Ms. Kagan was also the point person for the Clinton administration's effort to block congressional restrictions on partial birth abortions. Indeed, documents show that she was perhaps the key person who convinced President Clinton to change his mind from supporting to opposing legislation that would have banned that procedure.

During her time as Dean at Harvard, Ms. Kagan reversed Harvard's existing policy and kicked the military out of the recruiting office in violation of Federal law. Her actions punished the military and demeaned our soldiers as they were courageously fighting for our country in two wars overseas.

As someone who feels the burden of sending such young men and women into harm's way and who spent much time drafting and redrafting legislation to ensure military recruiters were treated fairly on campus, I cannot take this issue lightly.

Dean Kagan also joined with three other law school deans to write a letter in opposition to Senator Graham's legislation establishing procedures for determining who was an enemy combatant in the war on terror. She compared this legislation, which passed 84-14, to the fundamentally lawless actions of a dictatorship.

Most recently, the nominee served as Solicitor General for little over a year, but her short tenure there has not been without controversy. In her first appellate argument, Ms. Kagan told the Court that the speech and press guarantees in the First Amendment would allow the Federal Government to ban the publication of pamphlets discussing political issues before an election. I would remind my colleagues that the American Revolution was in no small part spurred by just such political pamphlets: Thomas Paine's "Common Sense." To suggest that the Government now has the power to suppress that kind of speech is breathtaking.

Also as Solicitor General, Ms. Kagan approved the filing of a brief to the Supreme Court asking that it strike down provisions of the Legal Arizona Workers Act, which suspends or revokes business licenses of corporations which knowingly hire illegal immigrants, even though Federal law expressly prohibits such hiring. She did this even after the liberal Ninth Circuit had upheld the law. This is an important legal issue that the Court will resolve during the next term.

And despite promises to this Committee that she would vigorously defend the Congress' "Don't ask, don't tell" policy for the military if it were challenged in court, the actions she has taken as Solicitor General do appear to have deliberately and unnecessarily placed that law in jeopardy.

Importantly, throughout her career, Ms. Kagan has associated herself with well-known activist judges who have used their power to redefine the meaning of words of our Constitution and laws in ways that, not surprisingly, have the result of advancing that judge's preferred social policies and agendas.

She clerked for Judge Mikva and Justice Marshall, each well-known activists, and she has called Israeli judge Aharon Barak, who has been described as the "most activist judge in the world," as her hero. These judges really do not deny their activist ideas. They advocate it, and they openly criticize the idea that a judge is merely a neutral umpire.

Few would dispute this record tells us much about the nominee. In many respects, Ms. Kagan's career has been consumed more by politics than law, and this does worry many Americans. In the wake of one of the largest expansions of Government power in history, many Americans are worried about Washington's disregard for limits on its power. Americans know that our exceptional Constitution was written to ensure that our Federal Government is one of limited separated powers and part of a Federal-State system with individual rights reserved to our free people.

But we have watched as the President and Congress have purchased ownership shares in banks, nationalized car companies, seized control of the student loan industry, taken over large sectors of our Nation's health care system, and burdened generations of Americans with crippling debt.

So this all sounds a lot like the progressive philosophy which became fashionable among elite intellectuals a century ago and which is now seeing a revival. They saw the Constitution as an outdated impediment to their expansive vision for a new social and political order in America. Even today, President Obama advocates a judicial philosophy that calls on judges to base their decisions on empa-

thy and their broader vision of what America should be. He suggests that his nominee shares those views.

Our legal system does not allow such an approach. Americans want a judge that will be a check on Government overreach, not a rubber stamp. No individual nominated by a President of either party should be confirmed as a judge if he or she does not understand that the judge's role is to fairly settle disputes of law and not set policy for the Nation.

Broad affirmations of fidelity to law during these hearings will not settle the question. One's record also speaks loudly. Indeed, it is easy to pledge fidelity to law when you believe you can change its meaning later if you become a judge. Ms. Kagan has called previous confirmation hearings "vapid and hollow"—some probably have been—and has argued that nominees for a lifetime position owe a greater degree of candor and openness to the Committee. I agree with that. I agree that candor is needed and look forward to this good exchange this week, Mr. Chairman.

Chairman LEAHY. Thank you very much.

We will go next to Senator Kohl, and then we will go to Senator Hatch. Senator Kohl.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman, and good afternoon to you, Solicitor General Kagan. We welcome you to the Committee and extend our congratulations to you on your nomination. If confirmed, you will bring to the Court an impeccable resume and a formidable track record of accomplishments, and you will bring a new perspective to the bench, as each new Justice does, based on your life and on your career.

You come before us today not from the halls of our judicial monastery, but with the insight of a scholar and a teacher and the political policy and legal acumen of a White House aide, law school dean, and the Solicitor General of the United States.

Your encounters with the law have formed the lens through which you will judge the dilemmas of our democracy and the constitutional questions we face. At this hearing, we will try to learn from you how that lens will affect your judgment on the Court.

Should you be confirmed, your decisions will impact our pocket-books and our livelihoods and determine the scope of our most cherished rights, from the right to privacy to the right to equal education, employment, and pay, from the right to an attorney and a fair trial for the accused, to the right to speak and worship freely.

In these difficult economic times in the wake of what could be the worst environmental crisis in our Nation's history, and as we continue our fight against terrorism, we are mindful of the great influence you will have on the issues and cases that wash up on the shores of our courts.

The questions you will confront are not only concepts for lawyers and courts to contemplate. Behind the volumes of legal briefs are real people with real problems, and beyond the individual parties to each case will stand the rest of us who will feel either the brunt or the bounty of your decisions.

We hear the overused platitudes from every nominee that he or she will apply the facts to the law and faithfully follow the Constitution. But deciding Supreme Court cases is not merely a mechanical application of the law. There will be few easy decisions, and many cases will be decided by narrow margins. You will not merely be calling balls and strikes. If that was the case, then Supreme Court nominations and our hearings would not be the high-stakes events that they are today.

But all of these things do matter, and we care deeply about the Supreme Court precisely because it rules on only the toughest and the most challenging problems.

We can all agree that your decisions will impact society long after you have left the Court. Justice Oliver Wendell Holmes put it plainly, and I quote: "Presidents come and go, but the Supreme Court goes on forever."

That is why it is so important for us to know who you are, Solicitor General Kagan, what is in your heart, and what is in your mind. We can gain some insight from your work for President Clinton and Justice Thurgood Marshall. But we have less evidence about what sort of judge you will be than on any nominee in recent memory. Your judicial philosophy is almost invisible to us. We do not have a right to know in advance how you will decide cases, but we do have a right to understand your judicial philosophy and what you think about fundamental issues that will come before the Court.

As you said in your own critique of these hearings in 1995, it is "an embarrassment that Senators do not insist that a nominee reveal what kind of Justice she would make by disclosing her views on important legal issues."

The President has his vetting process, and we in the Senate have our vetting process, but this hearing is the only opportunity for the American public to learn who you are. They deserve to learn about your views and motivations before you don the black robes of a Justice for a lifetime appointment.

For each Supreme Court nomination in which I have participated, I have put each nominee to a test of judicial excellence, and your nomination will be no different. First, the nominee must demonstrate that she has the competence, character, integrity, and temperament necessary for any judge or Justice, and that she will have an open mind, not only willing to hear cases with an open mind, but also willing to decide cases with an open mind.

I also look for a nominee to have the sense of values and judicial philosophy that are within the mainstream of legal thought in our country. No one, including the President, has the right to require ideological purity from a member of the Supreme Court. But we do have a right to require that the nominee accept both the basic principles of the Constitution and its core values implanted in society.

And, finally, we want a nominee with a sense of compassion. Compassion does not mean bias or lack of impartiality. It is meant to remind us that the law is more than a mental exercise or an intellectual feast. It is about the real problems that will share the fabric of American life for generations to come.

The great dilemmas of our democracy invite us to engage in a robust debate, and my hope is that we can engage in a substantive

and candid dialog that will benefit not only those here on the Committee, but also, and most importantly, the public. The American people want and deserve a process that is more than what you characterized as a “vapid and hollow charade” and which so frustrated you just 15 years ago.

In a tribute to Justice Marshall, you said that the stories he told to his law clerks served the purpose of reminding you that, “Behind the law there are stories, stories of people’s lives as shaped by the law, and stories of people’s lives as might be changed by the law.”

So we are gathered here today to hear your stories, how your life has been shaped by the law, and how our lives might be changed by the law when you are on the Court.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Kohl.
Senator Hatch.

**STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM
THE STATE OF UTAH**

Senator HATCH. Well, thank you, Mr. Chairman. Today is a sad day with the passing of our great colleague Senator Robert Byrd this morning and the death yesterday of Justice Ruth Bader Ginsburg’s husband, Marty.

Senator Byrd was a towering presence in the Senate for decades, and his love for the Constitution and for this legislative body was well known. He stood up for it all the time, and, of course, I had nothing but great respect for him. I remember in the early years when I led the fight against labor law reform, he was not very happy with me. And, frankly, I was not very happy with him, either. But in the end, I gained such tremendous respect for him and love, even though we differed on so many issues. He was a towering figure.

The Ginsburgs celebrated their 56th wedding anniversary just a few days ago—not as long as the 68 years that Senator and Erma Byrd were married before her death, but a good long time, nonetheless. Cancer was a part of the Ginsburgs’ individual lives and their life together for many years, and I know that each of them was a source of strength and stability to the other. The Ginsburgs have been a model of dignity and grace, and Justice Ginsburg and her children will be in my prayers.

Now I want to welcome you back to the Judiciary Committee, General Kagan. Something tells me this is likely to be your last confirmation hearing.

As America’s founders designed it, the Senate’s role of advice and consent is a check on the President’s power to appoint. Fulfilling that role requires us to evaluate a nominee’s qualifications for the particular position for which she has been nominated. Qualifications for judicial service include both legal experience and judicial philosophy.

While legal experience summarizes the past, judicial philosophy describes how a nominee will approach judging in the future. My primary goal in this confirmation process is to get the best picture I can of General Kagan’s judicial philosophy, primarily from her record, but also from this hearing as well.

I have to make my decision whether to support or not support her nomination on the basis of evidence, not on blind faith. I have never considered the lack of judicial experience to be an automatic disqualifier for a judicial nominee. Approximately one-third of the 111 men and women who have served on the Supreme Court have had no previous judicial experience. What they did have, however, was an average of more than 20 years of private practice experience. In other words, Supreme Court nominees have had experience behind the bench as a judge, before the bench as a lawyer, or both. Ms. Kagan worked for 2 years in a law firm, the rest of her career in academia and politics.

As the Washington Post described it, she brings experience "in the political circus that often defines Washington."

One of my Democratic colleagues on this Committee recently said that Ms. Kagan's strongest qualifications for the Supreme Court are her experience in crafting policy and her ability to build consensus. The value of such experience depends on whether you view the Supreme Court as a political circus or view its role as crafting policy.

I believe that the most important qualification for judicial service is the nominee's judicial philosophy or her approach to interpreting and applying the law to decide cases. This is what judges do. But different judges do it in radically different ways. Our liberty, however, requires limits on Government, and that includes limits on judges.

Chief Justice Marshall wrote in *Marbury v. Madison* that America's Founders intended the Constitution to govern the judicial branch as much as the legislative branch. Unfortunately, many judges today do not see it that way but believe that they may themselves govern the Constitution. The Senate and the American people need to know which kind of Justice General Kagan will be.

Will the Constitution control her or will she try to control the Constitution? Does she believe that the words of the Constitution and statutes can be separated from their meaning so that the people and their elected representatives put words on the page but judges may determine what those words actually mean? Does she believe it is valid for judges to mold and steer the law to achieve certain social ends? Does she believe that a judge's personal experiences and values may be the most important element in her decisions? Does she believe that clerks exist to protect certain interests? Does she believe that judges may control the Constitution by changing its meaning? Does she believe that judges may change the meaning of statutes in order to meet what judges believe are new social objectives?

These are just some of the questions that go to the heart of a nominee's judicial philosophy.

I want to clarify as best I can what kind of a Justice General Kagan would be. To do that, I have to examine her entire record. As in previous hearings, there will no doubt be some tension during this hearing between what Senators want to know and what General Kagan is willing to tell us. Unlike previous hearings, however, Ms. Kagan has already outlined quite clearly what she believes a Supreme Court nominee should be willing to talk about at a hearing like this. Without this information, Ms. Kagan has written, the

Senate “becomes incapable of either properly evaluating nominees or appropriately educating the public.”

Now, Ms. Kagan identified the critical inquiry about a Supreme Court nominee as “the votes she would cast, the perspective she would add, and the direction in which she would move the institution. But the bottom line issue in the appointments process must concern the kinds of judicial decisions that will serve the country and correlatively the effect the nominee will have on the Court’s decisions. If that is to results-oriented, so be it.”

Now, Ms. Kagan outlined that approach which she argued is necessary for Supreme Court confirmation hearings to be more than the acuity and farce in a law journal article when she was a tenured law professor after working for this Committee on a Supreme Court confirmation. I believe you will hear a lot about your remarks in the past and your law review article in the past.

She was not a student writing a blog about some hypothetical topic that she knew nothing about. I am confident that Senators will give Ms. Kagan many opportunities in the next few days to provide the information and insight that she has argued is critical for the Senate properly to make a decision on her confirmation.

This is a critical decision, and it is about more than just one person. Our decision will affect liberty itself. George Washington said this in his Farewell Address: “The basis of our political systems is the right of the people to make and alter their constitutions of Government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.”

The people’s right to make and alter the Constitution means nothing if the people choose the Constitution’s words. Judges choose what those words mean. A judge with that much power would effectively take an oath to support and defend not the Constitution but herself.

Now, I hope that this hearing will help me further understand what kind of a Justice Ms. Kagan would be, and I wish you well and look forward to the rest of these hearings.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Hatch.
Senator Feinstein.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I would like to begin with a word about Senator Byrd.

I have served on the Appropriations Committee for 16 out of my 18 years in the Senate. Senator Byrd was the Chairman. He was tough, he was strong, he cared. Many times the Constitution popped out of his vest pocket. He certainly was, I think in anyone’s book, a titan in the Senate, and he has left an indelible imprint. He will be missed.

But today, it is welcome, Solicitor General Elena Kagan. Over the past few weeks there has been a drift net out trying to find some disqualifying fact or factor in your record. But, to date, I do not believe any such factor has been found. I believe that you are eminently confirmable.

Your experience, I think, makes you a very strong nominee for the Court. You are the first woman Solicitor General of the United States—as such, the top litigator before the Supreme Court. And the Solicitor General is the only Federal official that is required in statute to be “learned in the law.”

Of the 45 people who have held the job, five have gone on to the Supreme Court. You have filed hundreds of briefs before the Court. You have successfully defended the law, and you have the support of nearly every living Solicitor General.

You were the first woman dean of Harvard Law School. There, you developed a reputation as a leader who brought all sides to the table. You were legal advisor to President Clinton, served as Associate White House Counsel, Deputy Director of the Domestic Policy Council, and you covered some tough issues: tobacco reform, importation of rapid-fire assault weapons, campaign finance, women’s health, abortion. What comes across in reviewing your writings is that you are a valuable advisor, smart, reasonable, highly respected, principled.

You also served as a special counsel to this Committee during the Ginsburg confirmation hearings.

The biggest criticism I have seen out there is that you have never been a judge. Frankly, I find this refreshing. The Roberts Court is the first Supreme Court in history to be comprised entirely of former Federal court of appeals judges. Throughout the history of the Court, over one-third of the Justices, 38 out of 111, have had no prior judicial experience. They included Chief Justice William Rehnquist, who was a law clerk for the Supreme Court, worked for a law firm, and then was Assistant Attorney General in the Nixon administration. They include Chief Justice Earl Warren, who returned from World War II to prosecute cases as an Assistant District Attorney before becoming California’s Attorney General and Governor. And they include Chief Justice Harlan Fiske Stone, who was dean of Columbia Law School and then Attorney General. These Justices also had no prior judicial experience, but their backgrounds proved valuable nonetheless.

Judicial interpretation, I believe, is not a mechanical endeavor, like completing a math equation. The most powerful computer cannot tell us whether the President’s powers as Commander in Chief allow him to exceed the bounds of the Foreign Intelligence Surveillance Act and other statutes in wartime. Nor can they tell us whether Congressional laws barring guns from the grounds of schools or implementing new health insurance requirements are within Congress’ Article I powers. Nor can they tell us what the 14th Amendment’s promise of equal protection under the law means for students in our public schools. These questions are among our Nation’s most important, and it takes more than an umpire to find their answers.

In recent years, there has been a radical change on the Supreme Court which was on display even this morning. This morning, I was extremely dismayed to learn of the Court’s decision in *McDonald v. City of Chicago*, holding that common sense State and local gun laws across the country now will be subject to Federal lawsuits. This decision and its predecessor, *District of Columbia v. Heller*, have essentially disregarded the precedent of 71 years em-

bedded in *United States v. Miller*, a 1939 case. I find that shocking as a former mayor.

I believe the proliferation of guns have made this Nation less safe, not more safe. We now have more guns than people in this country. They are sold everywhere, on street corners, in gun shows, with no restraint whatsoever, any type of weapon. They fall into the hands of juveniles, criminals, and the mentally ill virtually every day of the year. And the Supreme Court has thrown aside seven decades of precedent to exacerbate this situation.

From the documents that have been revealed thus far, I am encouraged that Solicitor Kagan holds stare decisis in high regard. We will see. She has shown determination to uphold the law even when she may personally disagree with it.

For example, at Harvard, she expressed strong disagreement with "Don't Ask, Don't Tell." But she allowed military recruitment to continue and, in fact, the number of recruits from the law school did not diminish. I believe it increased. And as Solicitor General, she defended the policy's constitutionality, arguing in a brief that the Court should defer to Congress's judgment.

During the Clinton administration, she advised the Bureau of Alcohol, Tobacco, and Firearms that it could not ban importation of pre-1994 large-capacity ammunition feeding devices by Executive order. The Bureau of Alcohol, Tobacco, and Firearms and I both wanted to ban these imports, but she argued successfully that the law simply did not give the Bureau that authority.

Elena Kagan has written that the confirmation process should be a substantive one, that the kind of inquiry that would contribute most to the understanding and evaluation of a nomination would include discussion first of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues. I agree, and I look forward to a meaningful discussion this week.

By all accounts, this nomination has been smooth so far. One newspaper even called it a "snooze fest." If it is, it is because Elena Kagan is unquestionably qualified. Over 170,000 documents have unmasked her as an even-handed legal scholar with a sterling reputation. Each new set of documents makes it clearer that her views fall within the moderate mainstream of legal thinking in this country. So at this stage, I see no impediment to confirmation. I hope the week ends the same way. I look forward to proceeding.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Feinstein. I also want to thank Senators. They have been keeping under the time limit, which means we are ahead of schedule.

Senator Grassley.

STATEMENT OF HON CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

General Kagan, congratulations on your nomination. It is an extremely important appointment, obviously a real honor. I also welcome your family and friends. They are obviously proud of your nomination, and I am glad that they are here to support you.

I am committed to ensuring that this process is fair and respectful but also thorough. The Constitution tasks our Senate with con-

ducting a comprehensive review of the nominee's record and qualifications. You have been nominated to a lifetime position. Consequently the Senate has a tremendous responsibility to ensure that you truly understand the proper role of a Justice and the Supreme Court in our system of Government. We want to ensure that, if confirmed, you will be true to the Constitution and the laws as written.

We had a nice meeting in my office. You have an accomplished academic and policy background. You have excelled at Princeton University and Harvard Law School. You were an Oxford scholar. You clerked on the D.C. Circuit and the Supreme Court. You were a law professor at the University of Chicago Law School as well as Dean of Harvard Law School. You were a lawyer here on the Judiciary Committee and then with President Clinton's administration. You are now United States Solicitor General. Nobody can question such accomplishments.

What is lacking from your background is any experience on any court or much experience as a practicing lawyer. We do not have any substantive evidence to demonstrate your ability to transition from being a legal scholar or political operative to a fair and impartial jurist. We will need to acquire that evidence through your writings and the positions you have taken over the years as well as your testimony. Answering our questions in a candid and forthright manner hopefully will fill that void.

We know you cannot commit to ruling in a certain way or for a particular party. Our goal is to see if you will exercise judicial restraint. We want to know that you will exercise the preeminent responsibilities of a Justice by adhering to the law and not public opinion.

Policy choices need to be reserved for those of us elected to the legislative branch of Government. It is our duty to confirm a nominee who has superior intellectual abilities but, more importantly, it is our duty to confirm a nominee who will not come with a results-oriented philosophy or an agenda to impose his or her personal politics and preferences from the bench. It is our duty to confirm a Supreme Court nominee who will faithfully interpret the law and Constitution without personal bias.

The fact that you have not been a judge is not dispositive, but because of lack of judging experience, it is even more critical that we are persuaded that you have the proper judicial philosophy and will practice it. We must be convinced that you have the most important qualification of a Justice. That qualification is the ability to set aside your personal feelings and political beliefs so that you can administer equal justice for all in a dispassionate way.

Your relatively thin record clearly shows that you have been a political lawyer. Your papers from the Clinton Library have been described as having—and these are not my words—“a flair for the political” and “a flair for political tactics.” You have been described as having, another quote, “finely tuned political antennae” and “a political heart.”

You were involved in a number of high-profile, hot-button issues during the Clinton Administration, including gun rights, welfare reform, abortion, and the Whitewater and Paula Jones controversies. A review of the material produced by the Clinton Library

shows that you forcefully promoted liberal positions and offered analyses and recommendations that often were more political than legal. Not only that, your Marshall memos indicate a liberal and seemingly outcome-based approach to your legal analysis.

You have admitted that your upbringing steeped you in deeply held liberal principles. We should know whether, as you have said, you have “retained them fairly intact to this date.”

A judge needs to be an independent arbiter, not an advocate for a political agenda. This point is absolutely crucial for Justices since the Supreme Court is not as constrained to follow precedent to the same extent as judges of lower courts. You will have the final say on the law.

You have been a prominent member of President Obama’s team. In nominating you to be an Associate Justice, President Obama clearly believes that you measured up to his judicial empathy standard, a judge’s ability, in other words, to empathize with certain groups over others. Indeed, President Obama said that you credited your hero, Justice Marshall, with reminding you “that behind the law there are stories, stories of people’s lives as shaped by the law, stories of people’s lives as might be changed by the law.”

This empathy standard has been soundly rejected because it endorses the application of personal politics and preferences when judges decide cases. It encourages judges to usurp the functions held by the executive and legislative branches of Government. A judge or Justice must unequivocally reject that standard. It does not comport with the proper role of a judge or an appropriate judicial method. We all know that is not what our great American tradition envisioned for the role of the judiciary.

I will be asking you about your judicial philosophy, whether you will allow biases and personal preferences to dictate your judicial method. You once wrote that it “is not necessarily wrong or invalid” for judges to “try to mold or steer the law in order to promote certain ethical values and achieve certain social ends.” You have also praised jurists who believe that the role of a judge is to “do what you think is right and let the law catch up,” and, again another quote, “bridge the gap between law and society.” To me, this kind of judicial philosophy endorses judicial activism, not judicial restraint and hopefully what you have said before is not how you would be in regard to these quotes when you get to the Supreme Court.

I yield back the balance of my time but ask permission to put a longer statement in the record.

Senator KOHL. [Presiding.] Without objection.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator KOHL. Senator Feingold.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. Ms. Kagan, welcome and congratulations on your nomination. Let me thank you in advance for the long hours you will spend with us this week.

Like others, let me start, of course, by offering my condolences to Justice Ruth Bader Ginsburg in the passing of her husband, Martin. Our thoughts and prayers are with her and her family today.

And, of course, we join the people of West Virginia in mourning the loss of their Senator and our colleague, Robert Byrd. Senator Byrd cared deeply about the Senate and the Constitution, and we cannot help but think of him as we begin this process today.

I want to thank Chairman Leahy and compliment him and his staff on your efforts to make this confirmation process so open and transparent. Nearly 200,000 pages of documents about the nominee have been made publicly available online. I am particularly pleased that you joined with the Ranking Member to request a complete and timely search of Presidential archives so that as much information about the nominee's past work as possible could be reviewed by the Committee and the public before these hearings. And I think that former President Clinton deserves our thanks as well for his agreement to release to the Committee a significant amount of material that he was entitled to block under the Presidential Records Act.

The Supreme Court plays a unique and central role in the life of our Nation. Those who sit as Justices have extraordinary power over some of the most important and most basic aspects of the lives of American citizens. The nine men and women who sit on the court have enormous responsibilities, and those of us on this Committee have a significant responsibility as well.

Ms. Kagan, I hope you will be forthcoming in your answers so we can have the open and honest discussion of issues that the country deserves.

In 2005, when we began our confirmation hearings for Chief Justice Roberts, the Court had not seen a new member for 11 years. Now we are beginning the fourth Supreme Court confirmation hearing in the last 5 years, and today for the first time we begin a hearing on a nomination that could result in three women sitting on the Supreme Court at one time. We have come a long way from the days when Justice Ginsburg was turned down for a prestigious clerkship because she was a woman and where Justice O'Connor graduated from Stanford Law School but no law firm would hire her as a lawyer, instead offering her a position as a secretary.

I hope this is just the beginning. Women are increasingly outnumbering men on law school campuses across the Nation, and I am pleased that the Court is beginning to reflect that fact.

I also hope that we will continue to see greater diversity on the Court in other ways, including representation from Midwestern and Western States. It is important that all Americans feel the Court represents their life experiences and their values, and I think one of the best ways to accomplish that is by selecting candidates for this position who reflect the full diversity of this great country. The Court that is now taking shape and that Elena Kagan will join if she is confirmed will shape the country for many years to come. It will address the most crucial legal issues affecting our National security and the freedoms of our citizens. It will decide what limits there are on how the people's elected representatives can solve the difficult economic and social problems that the coun-

try faces. It will confront questions of race that are as old as our Nation and as new as the changing demographics of the 21st century.

Because these questions that will come before the Court in the next few decades are so weighty, it is unfortunate that a growing segment of Americans seem to have lost trust in the Court and its Justices. Supreme Court cases by their nature can divide the country. Important cases with far-reaching consequences are often decided now by a 5–4 vote. So it is absolutely essential that the public have confidence that those decisions are not made on the basis of an ideological or partisan political agenda. The fairness, objectivity, and good faith of Justices should be beyond question.

So as Chairman Leahy suggested, when a decision like the one handed down earlier this year by a 5–4 vote in the *Citizens United* case uproots longstanding precedents and undermines our democratic system, the public's confidence in the Court cannot help but be shaken. I was very disappointed in that decision and in the Court for reaching out to change the landscape of election law in a drastic and wholly unnecessary way. By acting in such an extreme and unjustified manner, the Court badly damaged its own integrity. By elevating the rights of corporations over the rights of the people, the Court damaged our democracy.

Ms. Kagan, if you are confirmed, I hope you will keep this in mind. I hope you will tread carefully and consider the reputation of the Court as a whole when evaluating whether to overturn longstanding precedent in ways that will have such a dramatic impact on our political system. You have developed a reputation as someone who can reach out to those with whom you may not agree and work together, and I think that is a skill that will prove to be very useful and valuable if you are confirmed.

You also have an impressive education, you have worked at the highest levels of Government, and you have taught and written about the law. I have no doubt that you understand our system of Government and the roles of the three branches. But, most importantly, I hope you appreciate the impact that the law has on the lives of all Americans.

So it is my hope that your diverse experiences, your thoughtfulness and openness, and your talent for consensus building will allow you to see the long-term dangers to the Court and to the country of a decision like *Citizens United* and enable you, if confirmed, to convince your colleagues to avoid making similar mistakes in the future.

I also hope that you will have the wisdom and the courage that the Justice you have been nominated to replace, Justice John Paul Stevens, showed time and time again in drawing the line against an executive branch that sought powers that endangered the individual rights and freedoms that our Constitution guarantees.

Ms. Kagan, of course, judging is not easy. It is not just a matter of calling balls and strikes, because judges, and particularly Justices in the Supreme Court, are called upon to apply constitutional values that, as Justice Souter said recently, may well exist in tension with each other, not in harmony. In these hearings, you will have the opportunity to show the American people that you have the right combination of qualities and qualifications to make a good

Justice. I wish you well in that task, and I look forward to the conversation you will have not only with me but with my colleagues and with the country.

Thank you, Mr. Chairman.

Chairman LEAHY. [Presiding.] Thank you very much, Senator Feingold.

Senator Kyl.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. Congratulations, Solicitor General Kagan, and welcome to the Committee.

I would first note an agreement that I have with Senator Feingold. We do need more diversity on the Court. I note it has been 3 years now since an Arizonan has been on the Supreme Court.

Chairman LEAHY. I only confirm them. I do not pick them.

[Laughter.]

Senator KYL. Mr. Chairman, 1 year ago, we sat in this same room to consider the nomination of then-Judge Sotomayor. Although I could not ultimately support her nomination, I was pleased that she testified that the role of a judge is to put aside any biases or prejudices and to impartially apply the law to resolve disputes between parties.

Judge Sotomayor explicitly rejected the empathy standard that had been espoused by President Obama, the standard where legal process alone is deemed insufficient to decide the so-called hard cases, the standard where the critical ingredient is supplied by what is in the judge's heart.

Perhaps because his first nominee failed to defend the judicial philosophy that he was promoting, the President has repackaged it. Now he says that judges should have a keen understanding of how the law affects the daily lives of the American people and know that in a democracy powerful interests must not be allowed to drown out the voices of ordinary citizens. The clear implication is that, at least in some kind of cases, judges should abandon impartiality and instead engage in results-oriented judging. Indeed, his own press secretary has confirmed the President's results-oriented view.

Exactly what kinds of results is the President looking for from his judges? Perhaps he wants judges who will ignore the serious constitutional questions surrounding some of his domestic legislation. Or maybe he wants judges who will use the bench to advance progressive goals that have been stalled in the political process.

Whatever the President's motivation, his view of the role of judges is wrong. Judges are to apply the law impartially, not take on social causes or cut down powerful interests. While they may disagree with legislative solutions to problems, it is not their prerogative to fix inequities.

Part of our task is to determine whether Ms. Kagan shares President Obama's results-oriented philosophy of judging or is instead committed to impartiality. This may be a more difficult task with Ms. Kagan than with other Supreme Court nominees who have come before the Committee, most of whom have had substantial judicial records to evaluate.

For instance, Judge Sotomayor issued 15,000 opinions in a decade and a half of district and circuit court service. Ms. Kagan has never served on any bench.

Indeed, except for a brief 2-year stint in private practice and 1 year as Solicitor General, Ms. Kagan's entire career has been divided between academia and policy positions in the Clinton administration. Given this lack of experience practicing law, I was surprised that the American Bar Association awarded her a Well Qualified rating since the ABA's own criteria for a judicial nominee call for, among other things, at least 12 years' experience in the practice of law, and they mean actual practice of law, like former Justices Rehnquist and Powell.

Not only is Ms. Kagan's background unusual for a Supreme Court nominee, it is not clear how it demonstrates that she has, in the President's words, a keen understanding of how the law affects the daily lives of the American people. One recent article noted that Ms. Kagan's experience draws from a world whose signposts are distant from most Americans: Manhattan's Upper West Side, Princeton University, Harvard Law School, and the upper reaches of the Democratic legal establishment.

Her career in academia tells us relative little about her views on legal issues. In 14 years as a professor, she published only nine articles, two of which were book reviews, and her tenure in the academy was marred, in my view, by her decision to punish the military and would-be recruits for a policy, "Don't ask, don't tell," and the Solomon amendment that was enacted by Members of Congress and signed into law by President Clinton.

Despite this relatively thin paper trail, there are warning signs that she may be exactly the results oriented Justice President Obama is looking for. Consider, for example, the judges that Ms. Kagan says she most admires. Ms. Kagan has called Israeli Supreme Court Justice Aharon Barak her "judicial hero." Justice Barak is widely acknowledged as someone who took an activist approach to judging. One respected judge, Richard Posner, described Barak's tenure on the Israeli Supreme Court as "creating a degree of judicial power undreamed of even by our most aggressive Supreme Court Justices."

Ms. Kagan identified Thurgood Marshall as another of her legal heroes. Justice Marshall is a historic figure in many respects, and it is not surprising that as one of his clerks, she held him in the highest regard. Justice Marshall's judicial philosophy, however, is not what I would consider to be mainstream. As he once explained, "You do what you think is right and let the law catch up." He might be the epitome of a results-oriented judge. And, again, Ms. Kagan appears to enthusiastically embrace Justice Marshall's judicial philosophy, calling it, among other things, "a thing of glory."

In 2003, Ms. Kagan wrote a tribute to Justice Marshall in which she said that, in his view, "It was the role of the courts in interpreting the Constitution to protect the people who went unprotected by every other organ of Government, to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission."

And later, when she was working in the Clinton administration, she encouraged a colleague working on a speech about Justice Mar-

shall to emphasize his “unshakable determination to protect the underdog, the people whom no one else will protect.” To me, this sounds a lot like what President Obama is saying now.

And Ms. Kagan’s work as a Supreme Court clerk for Justice Marshall contains evidence that she shares his vision of the Constitution. In many of her memos to Justice Marshall, Ms. Kagan made recommendations concerning the disposition of cases which appear to be based largely on her own liberal policy preferences.

For example, despite her view that one lower court’s decision was ludicrous and lacked a legal basis, Ms. Kagan nonetheless recommended that Justice Marshall vote to deny further review because to do otherwise, she wrote, “would likely create some very bad law” on abortion and/or prisoners’ rights.

This kind of naked political judgment appears frequently throughout Ms. Kagan’s work as a judicial clerk. In another case, Ms. Kagan said that the Supreme Court should take the case because it is even possible that the good guys might win on this issue. I am concerned about her characterization of one party as “the good guys.” Too often it sounds to me like Ms. Kagan shares the view of President Obama and Justice Marshall that the Supreme Court exists to advance the agenda of certain classes of litigants.

In another case, Ms. Kagan wrote that there is no good reason to place an exclusionary rule before this Court which will doubtlessly only do something horrible with it. And in another memo laced with political considerations, Ms. Kagan wrote, “I see no reason to let this Court get a crack at this question.” She was even more explicit in a handwritten note, after reviewing the Government’s response in another case, saying, “I continue to believe that the facts did not support the arrest, but I cannot see anything good coming out of review of this case by this Court.”

Ms. Kagan explains these recommendations as primarily channeling Justice Marshall, but the question is whether she really has any major differences with him and whether she sees anything wrong with taking the same approach. I see no evidence that that is the case.

In addition my general concern about whether Ms. Kagan could decide cases impartially and without bias for or against certain parties, a surprising number of things in her relatively thin body of work do raise substantive concerns about various issues such as federalism, free speech, national security, and others.

To take a last example, I am deeply troubled by her decision as Solicitor General to urge the Supreme Court to review and strike down an Arizona law designed to prevent employers from hiring illegal aliens. The Ninth Circuit unanimously upheld the law and the lower court decision because Federal immigration law explicitly allows States to sanction employers through their business licensing regimes. I think there are legitimate questions about whether the brief authorized by Ms. Kagan, which flies in the face of the plain language of the law and urges the Supreme Court to strike these enforcement provisions down, was motivated by political influence at the White House and within the Department of Justice. And I am convinced that without the urging of her office, the Court would not have granted cert in the case today.

Mr. Chairman, in conclusion, there is ample reason for members of this Committee to carefully scrutinize this nominee, scrutiny which she invited in her now famous Chicago Law Review article in 1995. Because she has no judicial record on which we can determine whether she is a results-oriented nominee or would approach each case as a neutral arbiter, I believe the burden is on the nominee to show that her record demonstrates that she can be a fair and impartial Justice rather than one who would have an outcome-based approach.

I look forward to her testimony.

Chairman LEAHY. Senator Specter.

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

Senator SPECTER. Thank you, Mr. Chairman.

Solicitor General Kagan, I join my colleagues in welcoming you here this morning. With the passing of Senator Byrd earlier today, I was reminded of our hearings for Judge Bork and Senator Byrd's participation in those hearings and a candid shot of him taken one Saturday when we had an hour Saturday morning session with Judge Bork, and his picture appeared on the front page of the Sunday New York Times, and he will be with us in these hearings and much of our thinking on the interpretation of the Constitution.

This hearing presents a unique opportunity perhaps to have questions answered which have not been answered in the past. The article which you authored for the Chicago Law Review back in 1995 is openly and specifically critical of Justice Ginsburg and Justice Breyer who, as you characterize it, "stonewalled." You criticized the Judiciary Committee, and I think properly so, as "lacking seriousness and substance" in our approach to the hearings. And you used the phrase that the confirmation process "takes on an air of vacuity and farce." You quote Senator Biden, then-Chairman, and myself expressing concerns that 1 day the Committee would "rear up on its hind legs and reject a nominee who refused to answer questions for that reason alone." So this is a unique hearing in that respect.

The Court, regrettably, I think, has become an ideological battleground, and the activism is on both sides. As a prosecutor in the 1960s, I watched the Constitution change virtually daily: search and seizure map, 1961; right to counsel, *Gideon v. Wainwright*, 1963; *Miranda* 1966. Activism.

We have the Supreme Court now having adopted a test of determining constitutionality since 1996 on congruence and proportionality, an impossible standard except as Justice Scalia described it as a "flabby test which enables judicial legislation." We have had nominees who sat where you sit not too long ago who said they would not "jolt the system," "modesty," and then a grave jolt to the system; assure this panel that the legislative finding of facts is not a judicial function, and then turn that on its head in *Citizens United* on a record that is a hundred thousand pages long and finding that there is no basis for a 100-year-old precedent, which was overturned. Certainly a jolt to the system.

When Senator Biden was considering the nomination of Chief Justice Roberts, he said that he was qualified, but would vote

against him because of, as then-Senator Obama said, “overarching political philosophy.”

Well, the Presidents make their selections based on ideology. I think that is a blunt fact of life, and the deference that I had considered in my earlier days in the Senate, I have come to the conclusion that Senators have the same standing to make a determination on ideology.

It has become accepted that there should not be transgression into the area of judicial independence on how a case would be decided. There is an interesting case captioned *Minnesota v. White*, a Justice Scalia opinion in 2002, which struck down a requirement of the Minnesota Bar Association which prohibited judges from saying how they would decide cases. The Supreme Court said that was an infringement on First Amendment rights of freedom of speech.

Now, that does not say that a judge should answer the question, but it does say that a bar association rule prohibiting answering the question is invalid, which leaves the judge, at least so far as that standard is concerned, with the latitude to answer the question. So that even on the ultimate question of how a case will be decided, that in your law review article you come very close to that when you talk about answering substantive legal issues, really right on the line of how you would decide a case.

But if we are precluded from asking how decisions would be—what decision would be made on grounds of judicial independence and the precedent on that, I do think it is fair for us to ask whether the Supreme Court would take a case. The Congress has the authority to direct the Supreme Court on cases which must be heard—flag burning case, McCain-Feingold, and many, many others—so that the Court’s discretion is limited there if there is a Congressional direction.

I think it is fair from that proposition to ask nominees whether they would take cases. I have spoken at length on the floor about what I consider the inappropriate decline in the number of cases considered. A hundred years ago, a little more, in 1886, the Supreme Court decided 146 cases, 146 opinions. A little more than 20 years ago, 1987, 146 opinions. Last year, last term, 78 arguments, 75 opinions. A lot of circuit splits, important cases, are not taken up by the Supreme Court. The Supreme Court declined to hear the conflict which, arguably, is the most serious clash between Congress’s Article I powers under the Foreign Intelligence Surveillance Act, which sets the exclusive means for getting a warrant, listening to a wiretap, probable cause, and the President’s warrantless wiretap program justified under Article II. A Detroit Federal judge said it was unconstitutional. The Sixth Circuit ducked it, with a standing decision 2–1, with admittedly the dissenting opinion much stronger, application for cert denied. And this is something I discussed with you in our meeting, for which I thank you. I sent you a series of letters on issues which I intend to ask you about, and that was one of them.

I was concerned about your decisions as Solicitor General on the case involved the Holocaust victims suing an Italian insurance company, and the Second Circuit bows to the executive position, saying, well, that ought to be decided between Italy and the United

States on how that is to be handled. I think that is wrong, but at least the Supreme Court ought to decide it.

I am not going to ask you how you would decide the case, but would you consider it. A case involving the survivors of victims of 9/11 has not been heard. A petition for cert from the Second Circuit, the Second Circuit said, well, the sovereign immunities case does not apply because Saudi Arabia has not been declared a terrorist state. That has really got nothing to do with the Act, congressional intent. Torts are not covered by sovereign immunity. You disagreed with the Second Circuit but said the acts occurred outside of the country, a distinction that I do not understand if the consequence is that the Towers and 3,000 Americans are killed. Certainly the Sovereign Immunities Act ought to make Saudi Arabia subject to suit. But I would not ask you how you would decide the case, but if you would take it up.

Another issue which will not be resolved today, and perhaps never, is how to see to it that the nominees who make statements here on congressional power and on stare decisis follow up on it. And maybe the closest approach is the idea of televising. In our meeting you said you would favor televising the Court. Not exactly the same, but Brandeis talked about sunlight and publicity being the best disinfectant. Well, it is not a disinfectant we are looking for here, but to hold nominees who answer questions here to follow through when they are on the Court.

Thank you.

Chairman LEAHY. Thank you very much.

Senator Graham.

**STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR
FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman.

Congratulations. I think it will be a good couple of days. I hope you somewhat enjoy it, and I think you will.

Like everyone else, I would like to acknowledge the passing of Senator Byrd. He was a worthy ally and a very good opponent when it came to the Senate. My association with Senator Byrd, during the Gang of 14, I learned a lot about the Constitution from him, and as all of our colleagues will remember, just a few years ago we had a real conflict in the Senate about filibustering judicial nominees. And it was Senator Byrd and a few other Senators who came up with the extraordinary circumstances test that would say that filibusters should only be used in extraordinary circumstances because elections have consequences. And Senator Byrd was one of the chief authors of the language defining what an extraordinary circumstance was. So I just want to acknowledge his passing. It is going to be a loss to the Senate.

And the thing that we all need to remember about Senator Byrd is that all of us are choosing to judge him by his complete career, and history will judge him by his complete career, not one moment in time, and that is probably a good example for all of us to follow when it comes to each other and to nominees.

Now, you are the best example I can think of why hearings should be probative and meaningful. You come with no judicial record, but you are not the first person to come before the Com-

mittee without having been a judge. But it does, I think, require us and you to provide us a little insight as to what kind of judge you would be. You have had very little private practice, 1 year as Solicitor General, and a lot of my colleagues on this side have talked about some of the positions you have taken that I think are a bit disturbing, but I would like to acknowledge some of the things you have done as Solicitor General that were, I thought, very good.

You opposed applying habeas rights to Bagram detainees. You supported the idea that a terrorist suspect could be charged with material support of terrorism under the statute, and that was consistent with the law of wars history. So there are things you have done as Solicitor General that I think merit praise, and I will certainly, from my point of view, give you a chance to discuss those.

As Dean of Harvard Law School, you did two things: you hired some conservatives, which is a good thing; and you opposed military recruitment, which I thought was inappropriate, but we will have a discussion about what all that really does mean. It is a good example of what you bring to this hearing, a little of this and a little of that.

Now, what do we know? We know you are very smart. You have a strong academic background. You have bipartisan support. The letter from Miguel Estrada is a humbling letter, and I am sure it will be mentioned throughout the hearings, but it says a lot about him. And it says a lot about you that he would write that letter. Ken Starr and Ted Olson have suggested to the Committee that you are a qualified nominee.

There is no doubt in my mind that you are a liberal person. That applies to most of the people on the other side, and I respect them and I respect you. I am a conservative person, and you would expect a conservative President to nominate a conservative person who did not work in the Clinton administration.

So the fact that you have embraced liberal causes and you have grown up in a liberal household is something we need to talk about, but that is just America. It is OK to be liberal. It is OK to be conservative. But when it comes time to be a judge, you have got to make sure you understand the limits that that position places on any agenda, liberal or conservative.

Your judicial hero is an interesting guy. You are going to have a lot of explaining to do to me about why you picked Judge Barak as your hero, because when I read his writings, it is a bit disturbing about his view of what a judge is supposed to do for society as a whole. But I am sure you will have good answers, and I look forward to that discussion.

On the war on terror, you could, in my view, if confirmed, provide the Court with some real-world experience about what this country is facing, about how the law needs to be drafted and crafted in such a way as to recognize the difference between fighting crime and fighting a war. So you, in my view, have a potential teaching opportunity, even though you have never been a judge, because you have represented this country as Solicitor General at a time of war.

The one thing I can say without certainty is I do not expect your nomination to change the balance of power. After this hearing is over, I hope the American people will understand that elections do

matter. What did I expect from President Obama? Just about what I am getting. And there are a lot of people who are surprised. Well, you should not have been if you were listening.

So I look forward to trying to better understand how you will be able to take political activism, association with liberal causes, and park it when it comes time to be a judge. That to me is your challenge. I think most people would consider you qualified because you have done a lot in your life worthy of praise. But it will be incumbent upon you to convince me and others, particularly your fellow citizens, that whatever activities you have engaged in politically and whatever advice you have given to President Clinton or Justice Marshall, that you understand that you will be your own person, that you will be standing in different shoes where it will be your decision to make, not trying to channel what they thought. And if at the end of the day you think more like Justice Marshall than Justice Rehnquist, so be it. The question is: Can you make sure that you are not channeling your political agenda, your political leanings when it comes time to render decisions?

At the end of the day, I think the qualification test will be met. Whether or not activism can be parked is up to you. And I look at this confirmation process as a way to recognize that elections have consequences and the Senate has an independent obligation on behalf of the people of this country to put you under scrutiny, firm and fair, respectful and sometimes contentious.

Good luck. Be as candid as possible, and it is OK to disagree with us up here.

Thank you.

Chairman LEAHY. Thank you, Senator.

Next, Senator Schumer.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman. And I, too, want to note the passing of our friend and leader Senator Byrd. Senator Byrd's fierce devotion to the Constitution hovers over this hearing, and nothing could be more appropriate on the sad day of his death than holding this hearing where the first branch of Government gives advice and consent to the second branch of Government as we fill a position on the third.

Welcome, Madam Solicitor General. There is only so much we can do to elaborate on your qualifications. Solicitor General Kagan's achievements as well as her record are by now well known to this Committee, and by the end of the week, they will be well known to the American people. Frankly, there are not many blanks left to fill in. Given how forthcoming General Kagan has already been, I would think that we could finish this hearing in one round of questioning.

Now, I am and I have always been a strong advocate for asking nominees searching questions, and I expect nominees to answer. I also believe that my colleagues on the other side of the dais have a right and a duty to ask tough, probative questions. But I also believe that the quality of answers matters more than the quantity, and we can expect very high quality from you, General Kagan.

Over the last several weeks, we on the Judiciary Committee have had the opportunity to get to know General Kagan, and she has been very forthcoming in every way. I am confident that the American people will learn, as we have, that you represent the best this country has to offer.

As we begin these hearings, I have three points I would like to make.

First, a California hearing, no matter who is sitting in the chair over there, has the potential to be like eating spaghetti with a spoon. It is a lot of work, and it is hard to feel satisfied at the end.

I believe that this will not be our experience this week with this nominee. General Kagan has set herself a high bar for providing material to this Committee already. During her previous confirmation hearing, for example, she explained clearly and plainly her views about national security and terrorism, her views about the Second Amendment, as well as her views about these very confirmation hearings, which, in the past, she herself has criticized for being exercises.

In her questionnaire for this committee, she explained in unprecedented detail her work in the Solicitor General's office, at Harvard Law School, and in the Clinton Administration.

She has also provided unprecedented supporting documentation. She gave us, from her time as Solicitor General, nearly 150 briefs by her office; from her time at Harvard, all of her previous academic work, and all of the letters, e-mails, and press releases that went out during her tenure as dean; from her work in the Clinton Administration, over 170,000 pages of documents, including 80,000 pages of e-mails, which is more than twice the material received in connection with the nominations of Chief Justice Roberts and Justice Alito.

In fact, we even have this nominee's senior thesis, her graduate thesis, nearly 70 articles she authored for the Daily Princetonian as a college student, almost 200 speeches, and another 200 interviews.

The only thing, as far as I can tell, that we do not have is her kindergarten report card. But I respectfully submit to my colleagues that if they cannot thoroughly evaluate General Kagan on the record we have, there is no record nor nominee who could satisfy them.

So we already have a clear idea of her record and what this hearing will be like, which brings me to my second point, which is why this hearing is so crucially important.

We need a Justice who can create moderate majorities on this immoderate Supreme Court. I am going to be blunt about this. We have a highly fractured Court, with an often rarified way of approaching the law. The rightward shift of the Court under Chief Justice Roberts is palpable.

In decision after decision, special interests are winning out over ordinary citizens. In decision after decision, this Court bends the law to suit an ideology. Judicial activism now has a new guise—judicial activism to pull the country to the right.

These rulings have real world consequences, make no mistake about it. They affect the remedies of women, who, for years, earned less money than men in the same job. They undermine the rules

that Congress and agencies can put in place to keep the water that we drink and the air that we breathe safe for our children, and they rent the very fabric of our democratic system.

I am concerned that we will soon find ourselves back in the *Lochner* era of activist judging. In 1905, squarely in the age of the robber barons, a very right-wing majority of Justices held, in the *Lochner* case, that the people of New York State could not pass laws that limited the work week to 60 hours. The Court held this because business had the freedom under the Constitution to contract however they saw fit, even if the public safety was at stake.

I fear that the recent decision in *Citizens United* is a step backwards toward *Lochner*, backwards to the era of conservative Supreme Court activism that most egregiously undermined even the most basic regulation of safety and of welfare. In allowing corporations to spend unlimited sums to influence elections, *Citizens United* showed just how much the current conservative bloc on the Court, in its zeal to bend the Constitution to an ideology, has lost sight of the practical consequences of some of its decisions.

As Justice Stevens wrote in his dissent, "The Court's opinion is a rejection of the common sense of the American people."

It does not end with *Citizens United*. There is case after case after case which we could demonstrate and in these cases, it is the American people who continue to bear the brunt of these types of rulings.

But there is hope, which brings me to my third point. Solicitor General Kagan brings both moderation and pragmatism to a Court that is sorely in need of both. Her down-to-earth views and her exceptional leadership skills mean this: Elena Kagan has great potential to moderate a Court that is veering out of the mainstream and bringing it back to the 21st century.

She is the right person at the right time. We have seen several examples of Elena Kagan's moderation and pragmatism already. The one that I like best is a practical one, of course.

While serving as the first dean of Harvard Law School, a difficult enough task by itself, she was able to repair a deeply and ideologically divided faculty. Because of Dean Kagan's acumen and great good sense, she broke a hiring logjam, often between the right and the left, and Harvard was able to hire 43 new professors during her tenure, including notable conservatives like Jack Goldsmith and John Manning.

She diversified the faculty, advanced academic scholarship, improved the quality of the school, and improved the tone of the school, as well.

Dean Kagan routinely received warm receptions and large ovations from the Federalist Society, the conservative legal association that gave rise to many of the judicial nominees of President Bush. They knew her views. They knew that her views were largely different from theirs, as Senator Graham has mentioned. But they respected her pragmatism and her moderation.

Time after time after time, pragmatism and moderation have worked together to hold Elena's views of the law and the world. She managed to find a middle ground in the military recruiting controversy, a situation that has already been discussed.

But let us note that during Dean Kagan's tenure, military recruiting at the law school remained steady or improved, while she, at the same time, voiced her disagreement with an opinion. Her actions are not the actions of an ideologue.

So let me say one final word about General Kagan's voluminous record as she worked as a lawyer for President Clinton and then as a policy adviser. All of a sudden, these are being held as strikes against her. Nothing about her previous jobs should be viewed as undermining her moderate credentials or calling her ability to understand the role of Supreme Court justice.

It is a fact that a Presidential nominee with a political job on a resume is far from unprecedented. Chief Justice Rehnquist served in President Nixon's Office of Legal Counsel. Justice Thomas served in a Republican Department of Education and the EEOC before his appointment. And like General Kagan, 38 justices never served as judges before serving on the High Court, fully a third of all justices who have served.

What General Kagan does bring to the table is unprecedented practical experience. At Harvard, she ran the equivalent of a large business, a budget of \$160 million, 500 employees. She had a master interrelations with thousands of students and hundreds of faculty, all of whom came from diverse backgrounds and viewpoints.

General Kagan is simply a terrific antidote to the lack of practical, real word understanding of the Court. She is brilliant, she is thoughtful, and I think she is straight out of central casting for this job.

I look forward to hearing more from you, Solicitor, this week.

Chairman LEAHY. Thank you very much.

Senator Cornyn.

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM
THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman.

Solicitor General Kagan, welcome to these hearings and congratulations to you and your family and friends.

An e-mail with a quote came across my in-box this morning that I thought of as I heard the statements being made on both sides here: "Liberty is not a cruise ship full of pampered passengers. Liberty is a man of war and we're all the crew."

I do not know why I thought of that, given the nature of these hearing so far, but, of course, we will be talking about the different roles we each play on that crew.

In the last 5 years, this committee has met four times to consider the nomination of a new Supreme Court Justice. Given our recent hearings, I think it is vital to recall the core principles that should guide the committee in carrying out our responsibilities.

There are two visions of the role of judges in America, I believe, including the Supreme Court. I will call them the traditional vision and the activist vision. We have heard those terms thrown around a lot. I will tell you what I mean by them and we will see if you and I can agree.

In the traditional vision, the courts enforce a written Constitution. They enforce the constitutional guarantees that the Framers wrote into the text of the Constitution.

Under this traditional view, a court, including the Supreme Court, has a limited, some have called it a modest role, albeit very important. No court of law under this view has the authority to invent new rights just because the judge happens to think that it is a good idea.

That is important, because the powers to make new laws are reserved to the people, not to judges, not even the Justices of the Supreme Court of the United States.

When the Supreme Court creates new rights, the Justices, in effect, take away the power of the people to govern themselves through their elected representatives. That, in my view, is not how our democracy is supposed to work.

Of course, that does not mean that the meaning of the Constitution remains fixed. Indeed, the Framers thought of this in Article 5. The Constitution tells us there are two different ways to change the Constitution. First, Congress can propose amendments that all the states can approve or a requisite number can approve; second, the Congress can call for a constitutional convention to propose amendments; either way, preserving the ultimate power of the people to control their Constitution, not the courts.

That, as I said, is what I would call the traditional view.

We can contrast that traditional vision with the activist vision. Under the activist vision, the Supreme Court is free to change the Constitution when they see a problem they wish to solve.

According to this view, the Constitution is sometimes called a living document. It is a living document because the judges change it when they want to, without requiring the consent of the people.

This activist vision takes the power of the people to make the law and change the law and gives that power to a judiciary that is unelected and that imposes its will on the rest of us.

This stands in stark contrast to the Founders' vision, perhaps best expressed in Federalist No. 78, that the judiciary would be the, quote, "least dangerous branch," closed quote, to the political rights in the Constitution, because, in Hamilton's memorable words, "The judiciary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment."

Unfortunately, some members of the Supreme Court today seem to embrace the activist role. We saw it just last month in the case of *Graham v. Florida*, a 5–4 decision overturning the judgment of the Florida legislature that allowed the possibility of a life sentence for robberies.

Three justices, Justices Stevens, Ginsberg, and Sotomayor, explained that their interpretation of the Constitution could change year-to-year and, quote, "will never stop," closed quote, changing.

Sometimes, judicial activists create new rights and sometimes they actively undermine the Constitution in the process.

For example, we can see the different approaches to constitutional interpretation just today in the Court's decision in *McDonald v. City of Chicago*. The five justices who voted to apply the Second Amendment to the Chicago gun ordinance relied on history and precedent. On the other hand, the four justices who voted not to apply the Second Amendment instead relied heavily on public pol-

icy arguments, the kind that you would find debated in the halls of Congress.

The question raised by every Supreme Court nomination, I believe, is whether the nominee believes in the traditional role or the activist vision. Does a nominee believe that the Court should make policy like Congress, even though they are not accountable to the people for their actions via elections?

Will the nominee enforce the written Constitution and not invent new rights, or will the nominee see it as his or her job to change the Constitution to align it with their policy preferences?

Solicitor General Kagan, as you have heard and as you know, because you have never been a judge, what we know about you begins and largely ends with your impressive resume, although one that does not have judicial experience.

We know that you were a law clerk for two Federal judges, a significant professional accomplishment in and of itself, and we know you served in the Clinton Administration as an adviser on many hot-button political issues, including abortion, gun rights, and affirmative action.

We also know, as has already been discussed to some extent, that you have talked about your judicial heroes. One, of course, is Justice Thurgood Marshall, for whom you served as a law clerk. Thurgood Marshall was, of course, a famous lawyer for, among other things, having won the landmark civil rights case, *Brown v. Board of Education*.

But it is his judicial philosophy that concerns me, and this has already been mentioned. It is clear that he considered himself a judicial activist and was unapologetic about it. As we have already heard, he described his judicial philosophy as, quote, "Do what you think is right and let the law catch up," closed quote.

Solicitor General Kagan, we know the President has the right to nominate anyone he chooses. It is noteworthy, however, that among his nominees, many of whom I have supported, President Obama has chosen several nominees that I cannot support because they are clearly outside the judicial mainstream.

One pending nominee bent the rules to keep a confessed serial killer from the death penalty. Another pending nominee has argued that there is a constitutional right to welfare payments. A third nominee has argued that Federal judges should internationalize our law, matching it to views abroad.

These are not mainstream positions and, in my view, they are disqualifying positions.

One challenge of this hearing is that even nominees that have expressly rejected the activist view before this committee, let us call it a confirmation conversion, have changed their tune after confirmation. Last year, Justice Sotomayor came before the Committee and pledged allegiance to the traditional view.

She testified that judges cannot rely on what is in their heart. They do not determine the law. The job of a judge is to apply the law.

But in her first term on the Court, just finished today, Justice Sotomayor has voted with the liberal bloc of the Court, which unabashedly embraces the activist vision, about 90 percent of the time.

You, as you recall, wrote in your 1995 law review article that the critical inquiry of judicial confirmation hearings must be the perspective the nominee would add and the direction in which she would move the institution.

I agree with that. It is important in these hearings to find out whether you would move the Court in a traditional or an activist direction. The Constitution's protections, such as federalism, the Takings Clause, and the Second Amendment right to keep and bear arms, are just a few areas of obvious inquiry.

Solicitor General, I must say that the burden is on you. I hope you can persuade us of the path you would take if you are confirmed to the Supreme Court.

Again, I welcome you to the Senate and look forward to your testimony.

Thank you.

Chairman LEAHY. Thank you very much.

Senator Durbin.

**STATEMENT OF HON. RICHARD DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you a lot, Mr. Chairman.

General Kagan, welcome to you, your family, friends, and congratulations on your nomination.

This is not your first hearing on a Supreme Court justice nominee. If my notes are correct, some 17 years ago, you were sitting at the Senate Judiciary Committee hearing on Ruth Bader Ginsburg's nomination to serve on the Supreme Court. Your capacity was as a staff attorney for the chairman of the committee, Joe Biden. So you have seen this exercise as a staffer and now in this revered position as the nominee of the President of the United States.

At that hearing on Justice Ginsburg, my former colleague and friend, Paul Simon, set forth a standard for assessing Supreme Court nominations, which I have mentioned from time to time. He said to Justice Ginsburg, "You face a much harsher judge . . . than this committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

It is a simple calculus, it was for Senator Simon and it is for me, as well. I used the standard and asked the same question of Justices Alito, Roberts and Sotomayor.

I think it is an important question. The nine men and women on the Supreme Court serve for a lifetime and they have a significant impact on the lives of every American.

In our most celebrated Supreme Court decisions, we have seen an expansion of freedom, *Brown v. Board of Education*, *Loving v. Virginia*, *Griswold v. Connecticut*; and, in the most infamous decisions, restrictions on our freedom, *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu*.

Now, of course, we are in a new generation and a new time, and many questions are going to be raised. I think we have heard repeatedly from the other side of the aisle their loyalty to the concept of traditionalism, their opposition to judicial activism.

I have two words for them: *Citizens United*. Earlier this year, in the *Citizens United* case, a 5–4 majority of the Court demanded to hear arguments on an issue that was not posed by the parties in the case, reversed its own precedents, ignored the will of Congress, and ruled that corporations and special interests can spend unlimited amounts of money to affect elections.

This decision has the power to drown out the voices of average Americans. Justice John Paul Stevens wrote, in the *Citizens United* dissent, and I quote, “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”

If that is not judicial activism, what is? And it was espoused and sponsored by men who had stood before us under oath and swore they would never engage in judicial activism. That is the reality.

There is something that has occurred today which has come as somewhat of a surprise to me. On at least three or four occasions, I have been disappointed by my Republican colleagues warning us that you just might follow in the tradition of Justice Thurgood Marshall. Well, Ms. Kagan, you deserve to be judged on your own merits, not on the basis of the strength and weakness or philosophy of any judge for whom you clerked.

But before I leave this subject, let me say, for the record, America is a better nation because of the tenacity, integrity, and values of Thurgood Marshall. Some may dismiss Justice Marshall’s pioneering work on civil rights as an example of empathy; that somehow, as a black man who had been a victim of discrimination, his feelings became part of his passionate life’s work; and I say, thank God.

The results which Justice Marshall dedicated his life to broke down barriers of racial discrimination that had haunted America for generations. For those who would disparage his life work on the Court and as a solicitor general and arguing before the Court, the record is pretty clear. Thurgood Marshall argued 32 cases before the Supreme Court of the United States and won 29 of them, earning more victories in the Supreme Court than almost any other individual.

And I might also add, his most famous case, *Brown v. Board of Education*, if that is an activist mind at work, we should be grateful as a nation that he argued before this Supreme Court, based on discrimination in this society, and changed America for the better.

And I know that my good friend, Judge Abner Mikva’s name has been mentioned, as well, and I will just say, briefly, his political views are not veiled. They are well known, when he served in Congress and since.

But my colleagues will find universal acclaim for Abner Mikva’s record as a thoughtful, fair judge of the highest level of integrity and intelligence, and we share a high regard for this extraordinary American and the kind words you have had to say about him.

There will be questions raised, as well, about modesty and humility in your role, if you are confirmed, and I believe you will be, to serve on the Supreme Court. I think a study of judicial ideology conducted recently by the seventh circuit Judge Richard Posner in my home State of Illinois is worth noting.

Judge Posner, who is no liberal himself, ranked the 43 justices who have served on the Supreme Court since 1937 from the most liberal to the most conservative. He concluded that four of the five most conservative justices since 1937 are on the Court at this moment: Clarence Thomas, Anthony Scalia, John Roberts, and Sam Alito.

Our Supreme Court is badly in need of a person with your skill and your knowledge and your background, who can reach across the ideological aisle in pursuit of expanding our freedom.

The Court needs a person who has an ability to build consensus and find common ground. Elena Kagan, you are such a person. As the Solicitor General of the United States, you have defended bipartisan laws like McCain-Feingold campaign finance, and you have definitely balanced competing interests within the Federal Government.

As dean of the Harvard Law School, your efforts to reach out to conservative faculty and students are well documented. Professor Charles Fried, who served as President Reagan's Solicitor General and who now teaches at Harvard, praised you for "recruiting excellent teachers from across the ideological spectrum" and for your effort to "make students with every point of view feel as if they were part of an intellectual and professional enterprise."

Professor Fried told the story about your speech to the Federalist Society, in which you opened by saying, "I love the Federalist Society, but you are not my people."

Well, they took your statement out of context and made tee shirts that they wore around the campus, saying, "I love the Federalist Society," with your name, Elena Kagan, below that. But it is an indication of a friendship and an effort to reach out even to those whose opinion you might not share.

Earlier in your career, you worked as a counselor to President Clinton, working with Republicans to find bipartisan solutions on tough issues, like tobacco regulation, religious liberty, and community policing.

In the 170,000 pages of documents from your White House service that were turned over to this committee, there is ample evidence of your efforts to bridge the gaps, the political gaps that haunt us in America.

In closing, I would like to recognize the justice whom you would replace. Justice John Paul Stevens, a native of Chicago, a town I am honored to represent, has been one of the wisest and most accomplished jurists of our time. The third longest serving justice in the history of the United States, Justice Stevens' judicial philosophy may be hard to label, but his integrity is rock solid.

A lifetime in the law and the courage to speak his mind made him a national treasure on our highest court.

General Kagan, I believe that you can follow in that tradition. I look forward to your testimony.

Thank you.

Chairman LEAHY. Senator Durbin, thank you very much.

Senator Coburn, you are next.

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator COBURN. Thank you, Mr. Chairman.

Welcome, and welcome to your family; look forward to our time together this week.

The purpose of these hearings, for me, is not to examine or evaluate your professional qualifications. I think those are obvious. But for me, it is to determine whether or not you have an appropriate judicial philosophy.

You and I discussed the fact that I gave a speech about a week ago on the floor that kind of lined up with what you said in 1995, the very fact that we have a relatively new phenomenon. For the vast majority of this country's history, we did not have these hearings.

As a matter of fact, we looked at the record. We had individual meetings with nominees and they were voted on, and we did not have this dance back and forth, and, much as you described, the board hearings were what you thought were fantastic. And I think that the quote was, "The Bork hearings were great. The Bork hearings were educational. The Bork hearings were the best thing that ever happened to constitutional democracy."

I am not sure I would go that far. But you and I are kindred spirits when it comes to whether or not the American people ought to know you and know what you think and know what you believe. And to do less than that, as far as this Committee is concerned, we have done a disservice.

All the back-and-forth you have heard about activist, not activist, everything else, the fact is we know elections have consequences. There is a group in America, though, that believes in strict constructionism.

We actually believe the founders had preeminent wisdom, that they were very rarely wrong, and that the modern idea that we can mold the Constitution to what we want it to be rather than what that vision was is something that is antithetical to a ton of people throughout this country.

So I really am going to want to know a lot about specific issues and as we talk about it, the question I would ask you to ponder is, should the American people really know what you believe before we install you for lifetime tenure on the Supreme Court.

What obligation do we have to make sure they know what your thinking is? Whether liberal or conservative, the fact is they ought to know Elena Kagan by the time of these hearings. And the only way they will know that—and you asked me for advice when we finished and my advice to you is to be absolutely, completely honest with this committee.

And it is really not for the committee, because as our country is divided today, we are polarized. We are polarized regionally. We are polarized politically. What we have to have in whoever comes to the Court is a confidence in their heart that they are going to do what is best in the long term for this country based on what that document says.

So my hope is that with your stellar academics and your stellar intellect, that your patriotism will be just as stellar; that, in fact, you will set a new course, to set a new precedent for this Com-

mittee so that, once again, the American people can find out what a justice is all about.

It is obvious. This is my fourth Supreme Court hearing. It is obvious that what we have heard in the previous hearings are not predictive of the decisions of the nominees that came before the hearing, and that is schizophrenic.

Why should we have this dance if we are not going to find out real answers about real issues, about what you really believe?

So my hope is that you will really do something great for the Senate and great for the country and set a new standard, and where you really answer questions. We are not asking you to violate judicial canons, but really give us answers so the American people can rest assured that when you go on the Court, if you do, that they know Justice Kagan and they know what—and they believe what she said, because the real measure is not what you say here.

The real measure of the Supreme Court justices that we put on there is whether or not they have gained or lost the confidence of the vast majority of Americans in this country.

My hope is, if you are a justice, that the vast majority, not a small majority, but the vast majority will learn to trust your judgment as you embrace the Constitution.

Mr. Chairman, I have a full statement I would like for the record, and I yield back.

[The prepared statement of Senator Coburn appears as a submission for the record.]

Chairman LEAHY. Thank you. It will be placed in the record.

I have just talked with Senator Sessions about this. What I will do is I want to yield to Senator Cardin. When Senator Cardin finishes his opening statement—no pressure on you here, Senator Cardin. When you finish your opening statement, we will take a 10-minute break.

Senator Cardin.

STATEMENT OF HON. BEN CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Thank you, Chairman Leahy.

Solicitor General Kagan, welcome back to the Judiciary Committee. Last year, I had the privilege of chairing your confirmation hearing for the position of Solicitor General. And while we had a spirited debate, I think we can agree we did not have quite as much media attention at last year's hearing.

Why is that? As I prepared for this week's hearing, I have been thinking about the role of the Supreme Court and the Constitution in our lives. Many people may say, to paraphrase our Vice President, "Why is this such a big deal? Why should I care? Does the Supreme Court really impact my life or my family?"

If you have children, if you work for a living, if you are a woman, if you vote, if you care about the air we breathe or the water we drink, you need to pay close attention to the confirmation hearing and the work of the Supreme Court.

The Constitution has a very tangible impact on all our lives. It is the foundation of the rule of law that is supposed to protect us

from the abuses of power, abuses of government, abuses of big business.

We, the people of the United States, we, the people, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.

The authors of the Constitution understood the timeless idea of justice was paramount. As we gather this week to consider your nomination to be the 112th person and only fourth woman to serve on the highest court, my goal is to ensure that you have a clear understanding of how profound an impact your future decisions may have on the lives of everyday Americans.

Based on our conversations, I trust you will put the interests of the American people and justice for the American people first above popular opinion or politics.

I also will do all I can to ensure that the American people, whether you are watching the hearing at home, at work or at school, gain a better understanding of how the Supreme Court, which has a duty to uphold the Constitution, really does affect your lives.

Principles outlined in the Constitution are not some abstract historical theory. At its heart, our Constitution and the rule of law is about people—we, the people.

Let us start with families and children. I, along with millions of American school children, were denied a full educational opportunity in our schools, because I was forced to attend segregated public schools.

The Supreme Court, in *Brown v. Board of Education*, rejected the notion of separate but equal, and helped move our Nation forward toward a more perfect union.

It was a young attorney from Baltimore, Thurgood Marshall, who argued that case before the Supreme Court. He later became the first African-American associate justice and throughout his distinguished career, he was aided by energized law clerks, including our nominee, Elena Kagan.

If you believe that you have a right to fall in love and get married to whomever you wish, you are mostly correct, but only because the Supreme Court intervened on the side of the American people, when it ruled in *Loving v. Virginia* that interracial couples could marry.

Indeed, prior to that decision, parents of the current President of the United States, some members of the U.S. Senate, and some Members of the Supreme Court, could not have married in some states.

If you believe that what you do in your home, in your bedroom, is your business and no one else's, especially not government's, you are correct, but only because of the Supreme Court decisions like *Griswold v. Connecticut* and *Lawrence v. Texas*, which reinforced our individual rights to privacy, keeping government out of the private consensual activities of adults.

The Supreme Court was on the side of the American people when it ruled in *Roe v. Wade* that the constitutional right to privacy ex-

ists. The Court ruling was not taking sides in the debate on abortion. It was stating that there are certain matters in which government should not interfere into the privacy of families.

These landmark decisions and others continue the forward progression of protections for the American people, against the abuses of power, particularly by an overreaching government.

Such was the case when the Supreme Court ruled in *Gideon v. Wainwright* that the constitutional right to counsel in a criminal proceeding was guaranteed, regardless of the wealth of the defendant.

The Supreme Court gave the words "equal justice under law" real meaning. Perhaps this decision was to be expected, since the oath of office declared by every Federal judge makes it clear that he or she will administer justice without respect to persons and do equal right to the poor and to the rich.

I believe that our next associate justice and the whole Supreme Court should be guided by legal precedent and the best traditions of the Supreme Court in advancing constitutional rights for individuals against abuses of power, whether by government or business, even as our world continues to change and evolve.

Justice Thurgood Marshall said, in a 1987 speech, "I do not believe the meaning of the Constitution was forever fixed at the Philadelphia Convention. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, a momentous social transformation to attain the system of constitutional government and its respect for the individual freedoms and human rights we hold as fundamental today."

Some changes have not been for the better. I have been troubled by the increasing number of 5-4 decisions over the last 5 years in which a divided Supreme Court reversed decades of progress and precedent with rulings that side with powerful corporate interests rather than protecting individual rights.

This trend was clearly shown in *Citizens United*, where the Supreme Court reversed precedent and overruled Congressional intent, giving corporate special interests even more power and influence in elections.

In the *Ledbetter* case, the majority of the Supreme Court protected employers over workers in gender discrimination, again reversing the clear intent of Congress.

In another 5-4 split decision, *Gross v. FBL Financial*, the Court made it easier for corporate America to discriminate against aging baby-boomer workers. If you work for a living, if you are a woman, if you are worried that corporations may buy a louder voice in elections than hardworking everyday Americans, you need to keep an eye on the judicial legislating being practiced by this Supreme Court.

Are you a consumer? Do you buy products for your family? If so, the Supreme Court, in *Leegin*, yet another 5-4 split case, should be of concern to you. Here, the Court ignored longstanding precedent to protect big business to perpetuate price fixing. It was a ruling that put consumers at risk.

Rapanos, another 5-4 decision, was a step backwards, this time for the environment, by reducing protection from wetlands under the Clean Water Act.

If you are like the rest of us that wonder if BP will be held fully accountable for the economic and environmental devastation brought on by the ongoing oil spill in the Gulf of Mexico, you will be equally alarmed by the Supreme Court decision in *Exxon v. Baker*, which imposed limits on damages that can be recovered in environmental disasters.

Time and time again, by the narrowest of margins, this activist Court has sided with big business over Main Street America, wiping away protections set in place by years of legal precedent and Congressional actions.

As Justice Stevens stated in *Citizens United*, I know Senator Durbin quoted this, I want to get the line that comes afterwards, this is Justice Stevens, "Essentially, five justices were unhappy with the limited nature of the case before us. So they changed the case to give themselves an opportunity to change the law. There were principled, narrow paths that a Court that was serious about judicial restraint could have taken."

I join him in wondering just how and why those who profess to oppose judicial activism have voiced their support for these Supreme Court decisions in which justices have overturned long-standing precedent and substituted their own legislative voices for Congress, blurring the line between the legislative and judicial branches of government.

Justice Stevens followed in the best tradition of the Supreme Court in advancing individual constitutional rights. Like Justice Stevens, Elena Kagan is a known consensus-builder. She also is an unquestioned legal scholar, a proven leader, and a dedicated public servant.

As someone who has worked my whole career to expand access to justice for all, I am particularly impressed by her record at Harvard of greatly expanding the number of law school clinics which provide essential pro bono work for individuals who otherwise could not afford legal representation.

I welcome the American public to these hearings, as we open a window to the Supreme Court and shine a light on the critical role the Constitution and the rule of law plays in our lives.

I come to these hearings not solely as a U.S. Senator, a legislator and a lawyer, but as a husband, father, and grandfather. Every ruling made by the Supreme Court that continues to uphold constitutional protections that keep my granddaughters safe and secure is a victory.

Every Supreme Court ruling that opens the door to abuses of power of the government or big business by overturning long-standing precedent or reversing Congressional intent puts all of our children and grandchildren at greater risk.

I will do all I can within my power to protect my family and every American family from such risks.

Solicitor General Kagan, I welcome you to these confirmation hearings and I look forward to your testimony and responses to our questions.

Chairman LEAHY. Thank you very much, Senator.

Solicitor General, you have been very patient sitting there, as has everybody else. Trust me, tomorrow, you will be given a chance

to speak a great deal and you will later this afternoon with your opening statement.

We will stand in recess for 10 minutes.

[Recess 2:40 p.m. to 2:55 p.m.]

Chairman LEAHY. I welcome you all back. I should note that I do want to thank Senators. One, they have been very clear in stating their positions, whether I agree or disagree with the particular position. But everybody has worked hard to keep within the time agreement, and we are actually slightly ahead of schedule.

Solicitor General Kagan, I must tell you, that is a rare moment in the U.S. Senate that we are ahead of schedule on anything. So I compliment you for doing that.

I am going to yield to Senator Whitehouse.

Senator WHITEHOUSE. Mr. Chairman, does this mean that the remaining Senators get extra time?

Chairman LEAHY. No. He is trying, though. Nice try.

**STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR
FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Mr. Chairman, I join my colleagues in condolence on this day of sorrow for the Senate and the Supreme Court alike, and, also, in their appreciation for the long and distinguished service of Mr. Justice Stevens.

I welcome you, Solicitor General Kagan. You come before the Committee today with a remarkable record of achievement in the law. You have been a great student and scholar of the law, a skilled practitioner, and a dedicated public servant.

I enjoyed meeting with you in my office and look forward to our discussions as the week proceeds.

I think it is fair to say that some of my Republican colleagues are not so favorably disposed to your nomination. We have already heard a lot about their concerns.

But let us not lose the big picture here. You are the Solicitor General of the United States, the lawyer for the United States before the Supreme Court, and the former dean of Harvard Law School, a school to which I suspect everyone of us on this Committee would be proud to have our children attend.

Your nomination to the Supreme Court has to be among the least surprising ever made. And I do not want to take any suspense out of these proceedings, but things are looking good for your confirmation.

So given this, I would like to talk for a few minutes about the institution to which you have been nominated, our Supreme Court.

Alexander Hamilton explained, "The judiciary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment."

In other words, to fulfill its role in our constitutional system, the Supreme Court must act in a manner that demonstrates its adherence to the demands of the law, not merely amenability to political preferences.

Important institutional traditions help the Court fulfill that duty. The Court can facilitate democratic processes, but to do so, it must

respect the other institutions of government. It can bolster the rule of law, but only by exercising proper judicial restraint and respecting precedent.

It can uphold our Constitution, but it must not decide constitutional questions unnecessarily. The Court can exercise discretion wisely, but to do so, it must balance competing constitutional values, not just apply a favored ideology. And the Court can bring true justice, but only if it approaches each case without predisposition or bias.

Unfortunately, the conservative wing of the current Supreme Court has departed from those great institutional traditions. Precedents, whether of old or recent vintage, have been discarded at a startling rate. Statutes passed by Congress have been tossed aside with little hesitation, and constitutional questions of enormous import have been taken up hastily and needlessly.

From the five-man conservative wing, we have witnessed the discovery of an individual right to bear arms in the *Heller* decision, a right that previously had gone unnoticed by the Court for 220 years, and, today, its extension to all our States and municipalities.

We have seen the first prohibition on a woman's right to choose upheld, with no exception to protect the health of the mother. This Court even has chosen to inject itself into the day-to-day business of the lower courts, issuing an extraordinary ruling prohibiting the online streaming of the gay marriage trial in San Francisco. Each decision, 5–4.

Even more striking is the record of corporate interests before this Supreme Court. The *Ledbetter* case allowed an employer to get away with wage discrimination, as long as it hid it successfully from the employee. The *Gross* case made it far harder for a victim of age discrimination to prove his or her case. The *Iqbal* case erected new pleading hurdles protecting defendants, likely corporations, from injured plaintiffs. Only last week, the *Rent-A-Center* decision concluded that an employee who challenges as unconscionable an arbitration demand must have that challenge decided by the arbitrator.

And the *Citizens United* decision, yet another 5–4 decision, created a constitutional right for corporations to spend unlimited money in American elections, opening our democratic system to a massive new threat of corruption and corporate control.

There is an unmistakable pattern. For all the talk of umpires and balls and strikes, at the Supreme Court, the strike zone for corporations gets better every day.

This tide of decisions running against the accountability of big corporations degrades the core constitutional principle. The founding fathers provided, as an essential element of our balanced American system of government, the institution of the jury. The founders put the jury three times into the Constitution and the Bill of Rights. It is there for a reason, as the founding fathers knew. They were tough, smart politicians.

When the forces of society are arrayed against you, when lobbyists have the legislature tied in knots, when the Governor's mansion is in the pockets of special interests, when the owners of the local paper have marshaled popular opinion against you, one last sanctuary still remains—the jury.

Against that tide of corporate influence and wealth stands the jury box, its hard, square corners resolute. That was why de Tocqueville called the jury an institution of government and not "and a mode of the sovereignty of the people." "Not for Nothing" was the chapter in which he discusses the jury, entitled "On What Tempers the Tyranny of the Majority."

Now, powerful corporations do not like the jury. They do not like the fact that they, too, must stand before a group of ordinary citizens without the advantage of all the influence that money can buy.

They would love a world in which their every contact with government was lubricated by corporate money. But to tamper with a jury is a crime. So they have long been on a campaign to smear the jury, the runaway jury, as their PR folks have coached them to call it.

Sadly, the Supreme Court seems to be buying what corporations are selling. The *Exxon v. Baker* decision, which arose from the terrible Exxon Valdez spill, rejected a jury's award of \$5 billion in punitive damages, just 1 year's profits for Exxon, and reduced the award by 90 percent. Anything more than the compensatory damage award, the Court reasoned, would make punitive damages too unpredictable for corporations.

The judgment of the jury and the wisdom of the founding fathers were, for the Court, lesser values than providing corporations predictability.

Well, what of the unpredictability for Alaska of Exxon's drunken captain running his ship aground? And one cannot help but wonder now what additional precautions BP might have taken in the Gulf if that corporation did not know that the Supreme Court had its back on predictability.

I mention these concerns to you, Solicitor General Kagan, because if confirmed, you will make decisions that affect every aspect of Americans' lives. If confirmed, I hope and trust that you will adhere to the best institutional traditions of the Supreme Court and act with a clear understanding of the proper role of all the institutions of government provided for us by our founding fathers.

It is a great Constitution we have inherited, and you will be a great justice if you interpret our Constitution in the light of its founding purpose rather than according to the preferences of today's most powerful interests.

I wish you well. I look forward to our week together. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Whitehouse.
Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR
FROM THE STATE OF MINNESOTA**

Senator KLOBUCHAR. Thank you, Mr. Chairman.

Like my colleagues, I want to acknowledge the tremendous loss of Senator Byrd. Many in here, since we are in the Judiciary Committee, did know his love and respect for the Constitution.

I did want to acknowledge his coal miner roots and that he never forgot where he came from. I was reminded of this at his 90th

birthday party, when Senator Kennedy stood and told the story of when he was campaigning for his brother for President in West Virginia. His bus stalled out on a highway and Senator Kennedy himself called the West Virginia Highway Patrol and he said, "Ma'am, our bus is broke down on the highway." She said, "Where are you, sir?" He said, "We are on the Robert C. Byrd Highway." And she said, "Which one?"

We all know where he came from.

Welcome, Solicitor General Kagan. We have heard a lot today about your work experience, as we should. But when I think about your broad range of legal work and the practical real world experience you have had, I am reminded of the famous speech that President Teddy Roosevelt gave 100 years ago this year.

To paraphrase President Roosevelt, "It's not the critic who counts. The credit belongs to the one who is actually in the arena, who strives to do the deeds, who spends himself in a worthy cause, who, at the best, knows, in the end, the triumph of high achievement, and his place shall never be with those cold and timid souls who neither know victory nor defeat."

Solicitor General Kagan, there are always a lot of critics on the sidelines, but you have actually been in the arena as a manager, as a teacher, as a an adviser, as a consensus-builder, and as a lawyer.

In every job you have had, you have worked very hard and you have done very well. That is why you are before us today being considered, in the words of Teddy Roosevelt, "for this high achievement."

Your work on the front lines tells me that you have practical experience thinking about the impact of laws and policies on the lives of ordinary Americans. When you are involved in considering the nitty-gritty details of different policies, when you are actually in the game as a decisionmaker, you have to figure out when to compromise and when to hold firm.

You have to know exactly what the consequences of your recommendations will be. You have to think about the lives that will be impacted.

You were the first woman dean of Harvard Law School. There, you were widely credited with bringing together a faculty that was rife with division. Whether you were helping recruit talented professors to Harvard from across the political spectrum, as noted by Senator Graham, or later when you were working with Senators from both parties on anti-tobacco legislation, you forged coalitions and found resolution between seemingly intractable parties.

It strikes me that it takes a pretty extraordinary person, who, after working in the Clinton Administration, can still get a standing ovation from the conservative Federalist Society, who inspires a group of 600 law students to show up for a rally wearing "I Love Elena" tee shirts; who is widely credited with calming the factionalism that had previously roiled your law school.

In several different jobs now, you have successfully managed lawyers and, worse yet, law professors, a group that can certainly be described as fearless in the face of supervision.

In sum, you have had a lot of practical experience reaching out to people who hold very different beliefs, and that is increasingly important on a very divided Supreme Court.

That must be, by the way, why you have all the previous solicitor generals from the past 25 years, under both Democratic and Republican administrations, supporting you for this job.

You also spent years teaching students as a law professor. You understand how law school allows students to dig deep into the details of a case and see the shades of gray. I think those of us in Congress could do well to recall the spirit of law school more frequently, to remember a time when it was our job to think through both sides of an argument and to give credence to the legitimate points of the other side.

I believe that in government today, people need to engage rather than retreat to the opposite sides of the boxing ring.

This brings me to a story about my fellow Minnesotan, Justice Harry Blackmun. His oldest daughter gave him a copy of Scott Turow's classic book, "One L," for his 70th birthday. As you know, it is a book about the first year of law school.

After reading the book, Justice Blackmun wrote a note to Scott Turow. He wrote, "Surely, there is a way to teach law, strict and demanding though it may be, with some glimpse of its humaneness and basic good. You so properly point out that there is room for flexibility in different answers and that not all is black or white. If I ever learned anything on the bench," Justice Blackmun said, "it is that."

It seems to me, General Kagan, that in all the jobs you have had, you have carried the spirit of law school with you, the spirit of constant engagement and good faith efforts to reconcile different views. We would welcome such traits on our Supreme Court.

I also see in you someone like your former boss, Thurgood Marshall, someone who thinks that the law is more than just an academic exercise. I, for one, would like to see someone who thinks very deeply about the consequences that legal choices and legal decisions have on real people.

For me, I would welcome a justice who, in the *Lilly Ledbetter* employment discrimination case, would raise, like Justice Ginsburg did, some real world points, like what was Lilly supposed to do to file her complaint on time; run around and ask male employees what their salaries were, sneak into their desks to see their paychecks.

I would also welcome a justice who, in the *Exxon Valdez* case, as pointed out by my colleague, Senator Whitehouse, would have thought, as Justice Stevens did, about the real word impacts of slashing the damages that the jury had awarded to the 32,000 fishermen whose livelihoods were tragically impacted by the Exxon Valdez oil spill in 1989.

While I do not know what you would have done in these cases, your practical experience leads me to believe you may have at least considered such things.

Now, even with the variety of legal experiences that you have had, questions have been raised as to whether it is appropriate to nominate someone to the Supreme Court who has never been a judge before.

As you know, more than one-third of all Supreme Court justices throughout history did not have prior judicial experience, including Justices Rehnquist and Frankfurter and Brandeis.

In an acknowledgment of the importance of your real world experience, Justice Scalia said recently that he was, quote, “happy to see this latest nominee is not a Federal judge and not a judge at all.”

I think your practical experience will be helpful should you be confirmed to the Supreme Court, and I look forward to asking you more about that.

As a former prosecutor, I am particularly interested in your approach to criminal law cases. When I was the Hennepin County Attorney, I saw firsthand how the law can impact the lives of real people. Of course, criminal justice cases that reach the Supreme Court involve complicated tradeoffs between competing values—safety, privacy and liberty. And I would like to know more about how you expect to evaluate these issues.

I often get concerned that pragmatic experiences are missing in judicial decisionmaking, such as when I looked at last year’s Supreme Court decision in the *Melendez-Diaz* case, where a majority broadly interpreted the confrontation clause to include crime lab workers, creating potentially unwieldy and unnecessary requirements for prosecutors. I want to ask you about that.

As I consider your nomination, I also want to reflect on how far we have come. Senator Feingold mentioned the obstacles that Sandra Day O’Connor and that Justice Ginsburg faced when they were coming up through the legal ranks. And I know you are well aware of the strides that women have made.

In a 2005 speech, quoting Justice Ginsburg, you described a 19–11 student resolution at the University of Pennsylvania Law School. This resolution would have introduced a \$0.25 per week penalty on all students without mustaches.

The women who came before you to be considered by this Committee helped blaze a trail and although your record stands on its own, you are also, to borrow a line from Isaac Newton, “standing on the shoulders of giants.”

In the course of more than two centuries, 111 justices have served on the Supreme Court. Only three have been women. If you are confirmed, you would be the fourth and, for the first time in its history, three women would take their places on the bench when arguments are heard in the fall.

Last year, at the confirmation hearings for Justice Sotomayor, I said I was looking for three things in a Supreme Court justice—good judgment, humility, and the ability to apply the law without fear or favor.

I would like to add one additional consideration to the three standards I mentioned last year. I would like to see a Supreme Court justice who is able to go into the back room where the justices meet and where no ordinary citizens are present and bring some real world perspective to the room.

I would like to see someone who would not expect the victim in an employment discrimination case to go rifling through her male coworkers’ desks to see what their pay stubs say. I would like to see someone who would not expect prosecutors to bring a crime lab

analyst to every trial, even when the crime lab's findings are not disputed.

This will be my focus at the hearing. I am hopeful that your background and experiences, to use the words of Teddy Roosevelt, "the experiences of someone who has actually been in the arena" will help you be that person.

I am hopeful that you will use your great skills and abilities to bring that common sense perspective to the Court, and remember that the cases that you hear involve real people with real problems looking for real remedies.

Thank you very much.

Chairman LEAHY. Thank you very much, Senator Klobuchar.
Senator Kaufman.

**STATEMENT OF HON. EDWARD KAUFMAN, A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator KAUFMAN. Thank you, Mr. Chairman.

Welcome, Solicitor General Kagan, and welcome, also, to your family and friends, and I want to congratulate you on your nomination.

We are now beginning the end of an extraordinarily important process. Short of voting to go to war, a Senator's constitutional obligation to advise and consent on Supreme Court nominees is probably his or her most important responsibility.

Supreme justices serve for life. Once the Senate confirms a nominee, she is likely to affect the law and the lives of Americans much longer than the Senators who confirmed her.

As Senators, I believe we have an obligation not to base our decision on empty political slogans or on charges of guilt by association or on any litmus test. Instead, we should focus on your record and your answers to our questions, which will allow us to determine whether you have the qualities necessary to serve all Americans and the rule of law on our Nation's highest court.

Over the years, as chief of staff to then Senator Biden, teaching at the Duke Law School, and as a Senator myself, I have thought a lot about the qualities I believe a Supreme Court nominee should have; a first-rate intellect, significant experience, unquestioned integrity, absolute commitment to the rule of law, unwavering dedication to being fair and open-minded, and the ability to appreciate the impact of court decisions on the lives of ordinary people.

Last year, when Justice Souter announced his retirement and, again, when Justice Stevens announced his retirement this April, I suggested that the Court would benefit from a broader range of experience among its members.

My concern was not just the relative lack of women or racial or ethnic minorities on Federal courts, although that deficit remains glaring. I was noting the fact that the current justices all share very similar professional backgrounds.

Every one of them served as a Federal circuit court judge before being appointed to the Supreme Court. Not one of them has ever run for political office, like Sandra Day O'Connor, Earl Warren, Hugo Black.

General Kagan, I am genuinely heartened by what you would bring to the Court based on your experience working in all three

branches of government and the skills you developed running a complex institution like the Harvard Law School, and, yes, the prospect that you are being the fourth woman to serve on our Nation's highest court.

Some pundits and some Senators have suggested that your lack of judicial experience is somehow a liability. I could not disagree more. While prior judicial experience can be valuable, the Court should have a broader range of perspectives than just gleaned from the appellate branch.

General Kagan, you bring valuable nonjudicial experience and a freshness of perspective that is lacking on the current Court. As has been said over and over again, but I think it is worth repeating, in the history of the Supreme Court, more than one-third of the justices have had no prior judicial experience before being nominated and a nominee's lack of judicial experience has certainly been no barrier to success.

Woodrow Wilson nominated Louis Brandeis in 1916. Many objected on the ground that he had never served on the bench. Over his 23-year career, however, Justice Brandeis proved to be one of the Court's greatest members. His opinions exemplified judicial restraint. His approach still resonates in our judicial thinking more than 70 years after his retirement.

Felix Frankfurter, William Douglas, Robert Jackson, Byron White, Lewis Powell, Harlan Fiske Stone, Earl Warren, and William Rehnquist all became justices without ever previously being judges, and they certainly led distinguished careers on the Supreme Court.

As Justice Frankfurter, someone who would know, wrote in *Judicial Experience* in 1957, and I quote, "One is entitled to say, without qualification, that the correlation between prior judicial experience and fitness for the function of the Supreme Court is zero," unquote.

We have all now had the opportunity to review your extensive record as a lawyer, a policy adviser, and an administrator. Throughout your career, you have consistently demonstrated the all too rare combination of first-rate intellect and intensely pragmatic approach to identifying and solving problems.

Last summer, during then Judge Sotomayor's confirmation hearings, I focused on the current Court's handling of business cases, as a number of folks have talked about today. I am convinced, by education, experience and inclination, that the integrity of our capital markets, U.S. capital markets, along with our democratic traditions, is what makes America great.

Too often, however, today's Supreme Court seems to disregard settled law and Congressional policy choices in order to promote business interests at the expense of the people's interest. With its preempting state consumer protection in *Medtronic*, striking down punitive damage awards in *Exxon*, restricting the access to the courts in *Twombly*, or overturning 96 years of pro-consumer antitrust law in *Leegin*, this Court gives me the impression that in business cases, the working majority is business oriented to a fault.

The *Exxon* case demonstrates how this pro-business orientation can effect the lives of ordinary people. In that case, four of the eight justices who participated voted to bar all punitive damages

in maritime cases against employers, like Exxon, for their employees' reckless behavior.

Justice Alito did not participate in the case. So the Court split 4-4 on this point. But had he participated and voted with the conservatives on the Court, then today, individuals harmed by oil spills like Exxon Valdez would be subject to a flat ban on punitive damages in maritime accidents.

As we consider the current disaster in the Gulf, the prospect is worth contemplating.

As has been said several times, but, again, worth repeating, the Court's decision last fall in the *Citizens United* case, which several of my colleagues have mentioned, is the latest example of the Court's pro-corporate bent. The majority opinion in that case should put the nail in the coffin of the claims that judicial activism is a sin committed by judges of only one political ideology.

What makes the *Citizens United* decision particularly troubling is that it is at odds with what some of the Court's most recently confirmed members said during their confirmation hearings.

We heard a great deal, a great deal, about their deep respect for existing precedent. Now, however, the respect seems to vanish whenever it interferes with the desired pro-business outcome.

As I have said before, charges of judicial activism are often unhelpful, empty epithets divorced from a real assessment of judicial temperament. But that does not mean the term "judicial activism" is necessarily meaningless.

If we want to take the term seriously, it might mean a failure to defer to the elected branches of government; it might mean disregard of longstanding precedent; it might mean deciding cases based on personal policy preferences rather than the law; or, it might mean manipulating a case to get at issues not squarely presented by the parties.

Now, by any of these definitions, the decision in *Citizens United* was a highly activist decision. First, the Court summarily overturned years of settled precedent and statutory law that had limited the influence of corporate electioneering.

Second, the Court took it upon itself to order that the case be reargued on broad constitutional grounds, which neither party in the case had asked it to do. In effect, the justices wrote their own question of the case in order to obtain the desired result.

I share the fear expressed by Justice Stevens in his dissent that the Court's focus on results—on results—rather than the law in this and other cases will do damage to the Court as an institution.

General Kagan, I plan to spend the bulk of my time asking you about the Court's business cases based on my concern about its apparent bias. One of the aspirations of the American judicial system is that it render justice equally to ordinary citizens and to the most powerful.

We need justices on the Supreme Court who not only understand that aspiration, but are also committed to making it a reality. For Americans to have faith in the rule of law, we need one justice system in this country, not two.

Very soon, those of us up here will be done talking, thank goodness, and you will have a chance to testify and then to answer our questions. I look forward to your testimony.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. And just before we go to Senator Franken, just so you understand what the schedule is, Solicitor General and others, once Senator Franken finishes, we are going to just stay here in the room. It is going to take about a minute to rearrange the tables, as the two Senators who are going to introduce you will. And then you get a chance to speak.

Senator Franken.

**STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM
THE STATE OF MINNESOTA**

Senator FRANKEN. Thank you, Mr. Chairman.

As the Chairman just pointed out, General Kagan, I am last, and that is because I am most junior. But Senator Byrd was always kind to me, even though he was a giant of this institution. And I was moved that he always came in when we needed him, even during the deep snows of late December.

I would have to serve until I am 118 years old to serve as long as Senator Byrd. I very much doubt that will happen or that I will have a legacy as permanent as his. I would also like to extend my condolences to Justice Ginsburg and her family and she is in our thoughts and prayers.

Every Senator who has spoken before me has sworn to support and defend the Constitution of the United States, and so have I. There are few things that we do that are more important to fulfilling that oath than making sure that the justices of the Supreme Court are brilliant, humane, and just individuals.

But these hearings are also a learning experience for the people of Minnesota and for every American. Before I joined the U.S. Senate, I watched every televised confirmation hearing—not the whole thing, of course, but at least part. And I think part of my job is to continue that learning experience for the American people.

Now, last year, I used my time during these hearings to highlight what I think is one of the most serious threats to our Constitution and to the rights and guarantees of the American people: the activism of the Roberts Court.

I noted that for years, conservatives running for the Senate have made it almost an article of faith that they will not vote for activist judges who make law from the bench. And when asked to name a model justice, they would often cite Justice Thomas, who I noted has voted to overturn more Federal laws than Justice Stevens and Justice Breyer combined.

In recent campaign cycles, you would also hear the name of Justice Roberts. Well, I think we have established very convincingly, we did during the Sotomayor hearing, that there is such a thing as judicial activism; there is such a thing as legislating from the bench; and, it is practiced repeatedly by the Roberts Court and it has cut in only one direction—in favor of powerful corporate interests and against the rights of individual Americans.

In the next few days, I want to continue this conversation, because I think things have only gotten worse. So I want to say one thing to the people of Minnesota who are watching on TV or listening. With few exceptions, whether—and I'm echoing Senator Cardin here—whether you're a worker, a pensioner, a small busi-

ness owner, a woman, a voter, or a person who drinks water, your rights are harder to defend today than they were 5 years ago.

My State has been victim to the third-largest Ponzi scheme in history, and yet in 2008, in a case called *Stoneridge*, the Roberts Court made it harder for investors to get their money back from people who defrauded them.

The Twin Cities have more older workers per capita than almost any other city in the Nation, and yet in 2009, in a case called *Gross*, the Roberts Court made it easier for corporations to fire older Americans and get away with it.

Minnesota has more wetlands than all but three states, yet in a case called *Rapanos*, the Court cut countless streams and wetlands out of the Clean Water Act, even though they had been covered for up to 30 years.

Minnesota banned all corporate spending in state and local elections in 1988, and yet in January, in *Citizens United*, the Roberts Court nullified our state laws and turned back a century of federal law by allowing corporations to spend as much money as they want, whenever they want, in our elections—and not just federal elections, Duluth elections, Bemidji elections, Minnesota elections. There is a pattern here. Each of these decisions was won with five votes and in each of these decisions that bare majority used its power to help big business.

There is another pattern here. In each of those decisions, in every one, Justice John Paul Stevens led the dissent. Now, Justice Stevens is no firebrand liberal. He was appointed to the Seventh Circuit by Richard Nixon. He was elevated to the Supreme Court by Gerald Ford. By all accounts, he was considered a moderate. And yet he didn't hesitate to tell corporations that they aren't a part of "we the people" by whom and for whom our Constitution was established, and he didn't flinch when he told the President that the executive is bound to comply with the rule of law. General Kagan, you've got big, big shoes to fill.

But before I turn it over to you, I want to talk a bit more about one of the decisions I mentioned. I want to talk more about *Citizens United*. Now, you've heard a lot about this decision already today, but I want to come at it from a slightly different angle. There is no doubt that the Roberts Court's disregard for a century of federal law, the decades of Supreme Court's own rulings, is wrong and shocking. It has torn a gaping hole in our election laws.

So of course I'm worried about how *Citizens United* is going to change our elections, but I am more worried about how this decision is going to affect our communities and our ability to run those communities without a permission slip from big business.

Let me give you two examples of what I'm talking about. In the early 1960s, car companies knew that they could avoid a large number of fatalities by installing seatbelts in every vehicle, but they didn't want to. They said safety doesn't sell. But Congress didn't listen to the car companies. So in 1966, Congress passed a law requiring that all passenger cars have seatbelts. Since then, the fatality rate from car accidents has dropped by 71 percent.

Here is another story. Around the same time that we passed the seatbelt law, people started to realize that leaded gasoline that cars ran on was poisoning our air. But oil companies didn't want to take

the lead out of gasoline because altering their refineries was going to be, in the words of the *Wall Street Journal*, “a multi-billion dollar headache.” But in 1970, Congress passed the Clean Air Act anyway, and thanks in part to that law, by 1995 the percentage of children with elevated levels of lead in their blood had dropped by 84 percent.

Along with the Clean Water Act of 1972, the Clean Air Act of 1970 and the Motor Vehicle Act, are the three pillars of the modern consumer safety and environmental laws. Here is something else they have in common: they were all passed around 60 days before an election.

Do you think those laws would have stood a chance if Standard Oil and GM could have spent millions of dollars advertising against vulnerable Congressmen, by name, in the last months before their elections? I don’t. So here’s my point, General Kagan. *Citizens United* isn’t just about election law, it isn’t just about campaign finance law. It’s about seatbelts, it’s about clean air and clean water, it’s about energy policy and the rights of workers and investors, it’s about health care. It’s about our ability to pass laws that protect the American people, even if it hurts the corporate bottom line.

As Justice Stevens said, it’s about our need to prevent corporations from undermining self-government. But I think you know that. General Kagan, you’ve shown remarkable skill as a lawyer for our government, remarkable candor as one of its critics—say, for example, about Supreme Court confirmation hearings. I like that and I want to see that legal skill in action. I want to see if you might continue the work of Justice Stevens.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Franken. I appreciate your statement.

I would ask the staff if we could set up the table because I noticed Chairman Kerry and Senator Brown are here. Everybody just stay where you are. I appreciate both Senators being here. I know everybody’s had to rearrange their own schedule. We’ve been locked in this room, but I’m told that there’s been a number of thunderstorms in the area. Senator Brown, I think you were flying back from Massachusetts. That could not have been very much fun.

The first witness is Senator John Kerry. He’s a senior U.S. Senator from Massachusetts. He’s Chairman of the Senate Foreign Relations Committee. I’ve had the privilege of serving with him ever since he came to the Senate. He’s a decorated Vietnam veteran. From his groundbreaking work on the Iran Contra scandal to his leadership in global efforts to combat AIDS, Senator Kerry has distinguished himself as one of our Nation’s most respected voices on national security and international affairs, and chairs the prestige Foreign Relations Committee.

So Senator Kerry—Chairman Kerry—we’re pleased to have you before our Committee today. Please go ahead, sir.

PRESENTATION OF ELENA KAGAN, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES BY HON. JOHN KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Thank you very much, Chairman Leahy, for those kind words of introduction, Ranking Member Sessions, and to all my colleagues on the important Judiciary Committee at this important moment.

Members of the Committee, Mr. Chairman, 16 years ago I had the privilege to introduce Steven Briar to this Committee. With the loss today of Senator Byrd, I am particularly reminded of Senator Kennedy sitting beside me that day. As you all know better than anybody, Senator Kennedy served on this Committee for 46 years and I know the pride he would feel seeing Elena Kagan nominated for the Supreme Court of the United States.

When Ted introduced then-Judge Briar, he quoted Oliver Wendell Holmes, that "every calling is great when greatly pursued." Those words applied to Steven Briar, and I can share with you my complete and total confidence that they apply equally to Solicitor General Elena Kagan.

Massachusetts is proud, Mr. Chairman, of Elena Kagan's accomplishments. We believe that through these hearings, as each of you get to know her as we do, she will earn broad bipartisan support, just as she did when she was nominated as Solicitor General.

By now, every one of us has heard many times repeated, and you know well, the high points of her record: a trail-blazing pace culminating in her selection as the first woman to serve as the dean of Harvard Law School, and the first woman to serve as Solicitor General.

If confirmed, she will make history once again. In an America where women comprise more than half the population, she will join Justices Ginsburg and Sotomayer, and, for the first time in our history, a full third of the U.S. Supreme Court will be women.

But there is much more than distinguishes Elena. Her life has really been characterized by her passion for public service and her awareness of what it means to be a good public citizen. A close friend from her days clerking for Justice Marshall remembers Elena interviewing at a big law firm in New York, meeting with a young partner who, with no family to support, was pulling in close to a million dollars a year.

So Elena asked him, "What do you do with all that money?" He replied, "I buy art." Elena just shook her head, in the conviction that there really were better ways to expend her life's work, and she continued to pursue efforts to more directly impact the lives of those around her.

Her skills and intellect very quickly came to the attention of the Clinton White House, which is when I first got to know her. I had been asked by the Chairman of the Commerce Committee, Senator Hollings, our old friend, to help break through a stalemate on a bipartisan tobacco bill. It was a difficult issue for both caucuses. Elena became the administration's point person.

When we started out, no one gave us any hope of being close to, or getting close to passage. But Elena camped out in the vice president's office off the Senate floor, shuttling back and forth to the

White House. She worked day and night equally with both sides of the aisle, working every angle, thinking through every single approach. On the eve of the Commerce Committee's mark-up, things appeared to be falling apart, something we're all too familiar with here.

But Elena simply wasn't going to let that happen. That was an unacceptable outcome. She got together with the Republican Senators and staff and she listened carefully. She helped all of us to meet the last-minute objections. It was classic Elena. She saw a path forward when most people saw nothing but deadlock, and it led to a 19:1 vote to pass the bill out of committee, a mark of bipartisanship and consensus building that few believed was possible.

That is what I believe Elena Kagan will bring to the court. She was tough and tenacious in argument when necessary, but she also knew when it was necessary to strike a compromise. She had a knack for knowing how to win people over, an ability to make people see the wisdom of an argument.

I remember lots of late nights in a very quiet Capitol Building, walking off the Senate floor to meet with my staff and Elena. Invariably, Elena would be the one to have a new idea, a fresh approach. It was a tutorial in consensus building from someone for whom it was pure instinct and it won Elena the respect of Republicans and Democrats alike.

No doubt, her hands-on experience working the governance process is actually, in this day and age and in this moment of the court, probably an enormous asset. Frankly, I think it's a critical component of what makes her a terrific choice, someone who really understands how laws are created and the real-world effects of their implementation. It's a reminder of why some of the greatest justices in our history were not judges before they sat on the court. Among those are names like Frankfurter and Brandeis.

I might add that she brought the same pragmatic knack for consensus building to her stewardship at Harvard Law School. There, she found what was affectionately acknowledged—I emphasize "affectionately acknowledged"—as a dysfunctional and divided campus and she transformed it again to a cohesive institution, winning praise from students and faculty across the ideological spectrum.

Elizabeth Warren, Elena's colleague at Harvard and chair of the Congressional panel currently overseeing our economic relief effort, says, simply, "she changed morale around here".

Charles Fried, the former Solicitor General under President Reagan and renowned conservative and constitutional expert says of her prospects as a justice on the Supreme Court: "I think Elena would be terrific because, frankly, the court is stuck. The great thing about Elena is, there's a freshness about her that promises some possibility of getting away from the formulas that are wheeled out today on both sides. I have no reservations about her whatsoever."

John Manning, the first hire under Kagan's deanship, a conservative and an expert on textualism and separation of powers, says, "I think one of the things you see in Kagan as dean was that she tried to hire folks with different approaches to law and different ideological perspectives. She was equally as strong in her praise for Scalia as she was in her praise for Breyer. She celebrated both. It's

a good predictor of how she'll be as a judge. She would be fair and impartial, the sort of judge who would carefully consider briefing an argument in every case, the sort of judge I would want if I didn't know which side of the case I was arguing."

And so in closing, my colleagues, I'm glad that in these next days you're going to get a chance to know Elena, as so many of us have in Massachusetts, the way she thinks, her approach to the law, an extremely capable public servant, well grounded in the Constitution, and I assure you, deeply committed to the values that we all share as Americans.

I will always remember what Justice Potter Stewart said about what makes a first-rate judge. He said, "The mark of a good judge is a judge whose opinion you can read and have no idea if the judge was a man or a woman, a Republican or Democrat, Christian or Jew, you just know he or she was a good judge." I believe that Elena Kagan will meet that standard and I have every confidence that she'll be an outstanding justice of the Supreme Court in every sense of the word.

So, thank you, Mr. Chairman, for the privilege of introducing this superb nominee.

Chairman LEAHY. Thank you very much.

Also, we have Senator Scott Brown. Senator Brown was elected this January to fill the seat of one of this body's most beloved members, Senator Ted Kennedy, who was actually the longest-serving of either party on the Senate Judiciary Committee in the history of the Senate.

Senator Brown serves on the Senate Committee on Armed Services, the Committee on Veterans Affairs, and the Homeland Security and Governmental Affairs Committee. Prior to his election to the U.S. Senate, Senator Brown served in the Massachusetts State Senate, where he advocated for children's and victims' rights and worked to promote environmental and good government initiatives.

He is a 30-year member of the Massachusetts Army National Guard. Do I have that correct, 30-year? He was awarded the Army Commendation Medal for meritorious service in homeland security following the terrorist attacks of September 11th, 2001. I know, from my conversation I had with you at the end of last week, that you had to move a number of things around to get here this afternoon. I want you to know the Committee appreciates that.

Please go ahead, Senator Brown.

PRESENTATION OF ELENA KAGAN, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES BY HON. SCOTT BROWN, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator BROWN. Well, thank you, Mr. Chairman. The thanks is to you for accommodating Senator Kerry and me in adjusting your schedules. It means a lot to sit next to Senator Kerry and make the presentation to you and to Ranking Member Sessions and the members of the Committee, and I am pleased to join you in upholding a longstanding tradition of introducing Elena Kagan of Massachusetts to the Committee.

First, though, I would like to express my heartfelt condolences to Senator Byrd's family for the loss that they've suffered during this

difficult time. Although I only served briefly with Senator Byrd, I was well aware of his deep and longstanding commitment to the Senate and what it stood for. He represented the people of West Virginia with great class and dignity. I also am saddened to hear of the passing of Martin Ginsburg, the husband of Justice Ruth Bader Ginsburg, and I offer my condolences to Justice Ginsburg and her family.

I wish to congratulate Ms. Kagan on her nomination. It's an honor to introduce her today. I had the pleasure of meeting her last month and found her to be an impressive and pleasant individual. I indicated then, and I look forward to attending this Committee's hearings to learn more about her record, her philosophy, and her qualifications.

As an attorney myself, I recognize an impressive legal resume when I see one, and there's no doubt that Ms. Kagan has gone far since graduating from Harvard Law School magna cum laude in 1986. Following her law school days in Cambridge, Ms. Kagan clerked for appellate court judge and U.S. Supreme Court Justice Thurgood Marshall.

Then she entered private legal practice at a prestigious Washington, DC law firm before joining the faculty of the University of Chicago School, where she earned tenure in 1995. From 1995 to 1999, she served with the Clinton administration first as an associate White House counsel, and then in positions with the Domestic Policy Council.

In 1999, she returned to Massachusetts to join the faculty of Harvard Law School—you heard Senator Kerry mention some of her accolades there—where she would become, later, dean and Charles Hamilton Houston Professor of Law.

While at Harvard, her article, "Presidential Administration", was named the year's top scholarly article by the American Bar Association's Section on Administrative Law and Regulatory Practice.

President Obama nominated Ms. Kagan to be Solicitor General on January 5, 2009, and I'm very proud that our Nation's first female Solicitor General has such deep roots in Massachusetts. If confirmed, she would be the third woman on the Supreme Court and only the first in the history of our court.

As Solicitor General, she frequently represents the United States before the Supreme Court and she's argued several high-profile cases before the court, and was recently victorious in the *Holder v. Humanitarian Law Project* case which held that Congress's prohibition of material support and resources to foreign terrorist organizations is constitutional.

She's undoubtedly a brilliant woman who has served her country in a variety of capacities and has made significant contributions to Massachusetts, and I certainly thank her for that. This Committee, as you know, Mr. Chairman and members of the Committee, is about to embark on one of the most serious duties that the Senate is constitutionally tasked with, something that I am honored to play a small part in: vetting the qualifications, temperament, and philosophy of a lifetime appointment, something that is very, very serious and very important.

I look forward to Ms. Kagan's responses to the Committee's questions. I know that I have some of my own, and I'm quite sure my

colleagues here today do as well. Our constitutional duty of advice and consent is imperative and should not be taken lightly, and I plan not to take it lightly as well.

In closing, I look forward to a thorough and fair examination of Ms. Kagan's record. I want to thank you, Mr. Chairman and Ranking Member Sessions and members of the Committee, for adjusting your schedules to allow Senator Kerry and me to come before you.

Thank you.

Chairman LEAHY. Thank you very much. As I said, you're the ones that adjusted yours. I thank you both for being here and I appreciate that.

The staff will reset the table and we can invite Ms. Kagan back to the table.

I would note that we actually come now to really the beginning of what is for all Senators one of the most important and most cherished part of our duties, the advice and consent. I stated at the beginning of this hearing, there's only one person who can nominate somebody to the Supreme Court and that person is going to affect 300 million Americans, but only 100 of us get to vote. That process will begin now.

Solicitor General, please stand and raise your right hand.

[Whereupon, the witness was duly sworn.]

Chairman LEAHY. Thank you. Please be seated.

Solicitor General Kagan, I know you have an opening statement. I will—now the floor is yours.

STATEMENT OF ELENA KAGAN, SOLICITOR GENERAL OF THE UNITED STATES

Solicitor General KAGAN. Thank you very much, Mr. Chairman, Senator Sessions, and members of the Committee. I'd like to thank Senators Kerry and Brown for those generous introductions. I also want to thank the President again for nominating me to this position. I'm honored and humbled by his confidence.

Let me also thank all the members of the Committee, as well as many other Senators, for meeting with me in these last several weeks. I've discovered that they call these courtesy visits for a reason: each of you has been unfailingly gracious and considerate.

I know that we gather here on a day of sorrow for all of you, for this body, and for our Nation with the passing of Senator Byrd. I did not know him personally as all of you did, but I certainly knew of his great love for this institution, his faithful service to the people of his State, and his abiding reverence for our Constitution, a copy of which he carried with him every day, a moving reminder to each of us who serves in government of the ideals we must seek to fulfill. All of you and all of Senator Byrd's family and friends are in my thoughts and prayers at this time.

I would like to begin by thanking my family, friends and students who are here with me today. I thank them for all the supports they've given me during this process and throughout my life; it's really wonderful to have so many of them behind me.

I said, when the President nominated me, that the two people missing were my parents, and I feel that deeply again today. My father was as generous and public-spirited a person as I've ever

known, and my mother set the standard for determination, courage, and commitment to learning.

My parents lived the American dream. They grew up in immigrant communities. My mother didn't speak a word of English until she went to school, but she became a legendary teacher, and my father a valued lawyer. They taught me and my two brothers, both high school teachers, that this is the greatest of all countries because of the freedoms and opportunities it offers its people. I know that they would have felt that today and I pray that they would have been proud of what they did in raising me and my brothers.

To be nominated to the Supreme Court is the honor of a lifetime. I'm only sorry that, if confirmed, I won't have the privilege of serving there with Justice John Paul Stevens. His integrity, humility, and independence, his deep devotion to the court and his profound commitment to the rule of law, all these qualities are models for everyone who wears, or hopes to wear, a judge's robe.

If given this honor, I hope I will approach each case with his trademark care and consideration. That means listening to each party with a mind as open as his to learning and persuasion, and striving as conscientiously as he has to render impartial justice.

I owe a debt of gratitude to two other living justices. Sandra Day O'Connor and Ruth Bader Ginsburg paved the way for me and so many other women in my generation. Their pioneering lives have created boundless possibilities for women in the law. I thank them for their inspiration, and also for the personal kindnesses they have shown me.

My heart goes out to Justice Ginsburg and her family today. Everyone who ever met Marty Ginsburg was enriched by his incredible warmth and humor and generosity, and I'm deeply saddened by his passing.

Mr. Chairman, the law school I had the good fortune to lead has a kind of motto spoken each year at graduation. We tell the new graduates that they are "ready to enter a profession devoted to those wise restraints that make us free." That phrase has always captured, for me, the way law and the rule of law matters. What the rule of law does is nothing less than to secure for each of us what our Constitution calls the "blessings of liberty," those rights and freedoms, that promise of equality that have defined this Nation since its founding. What the Supreme Court does is to safeguard the rule of law through a commitment to even-handedness, principle, and restraint.

My first real exposure to the court came almost a quarter century ago when I began my clerkship with Justice Thurgood Marshall. Justice Marshall revered the court, and for simple reason: in his life, in his great struggle for racial justice, the Supreme Court stood as the part of government that was most open to every American and that most often fulfilled our Constitution's promise of treating all persons with equal respect, equal care, and equal attention.

The idea is engraved on the very face of the Supreme Court building: "Equal Justice Under Law." It means that everyone who comes before the court, regardless of wealth, or power, or station, receives the same process and the same protections. What this

commands of judges is evenhandedness and impartiality. What it promises is nothing less than a fair shake for every American.

I've seen that promise up close during my tenure as Solicitor General. In that job, I serve as our government's chief lawyer before the Supreme Court, arguing cases on issues ranging from campaign finance, to criminal law, to national security. And I do mean argue. In no other place I know is the strength of a person's position so tested, and the quality of a person's analysis so deeply probed. No matter who the lawyer or who the client, the court relentlessly hones in on the merits of every claim and its support in law and precedent.

And because this is so, I always come away from my arguments at the court with a renewed appreciation of the commitment of each justice to reason and principle, a commitment that defines what it means to live in a Nation under law.

For these reasons, the Supreme Court is a wondrous institution. But the time I spent in the other branches of government remind me that it must also be a modest one, properly deferential to the decisions of the American people and their elected representatives. What I most took away from those experiences was simple admiration for the democratic process. That process is often messy and frustrating, but the people of this country have great wisdom and their representatives work hard to protect their interests.

The Supreme Court, of course, has the responsibility of ensuring that our government never oversteps its proper bounds or violates the rights of individuals, but the court must also recognize the limits on itself and respect the choices made by the American people.

I am grateful beyond measure for the time I spent in public service, but the joy of my life has been to teach thousands of students about the law and to have had the sense to realize that they had much to teach me. I've led a school whose faculty and students examine and discuss and debate every aspect of our law and legal system, and what I've learned most is that no one has a monopoly on truth or wisdom.

I've learned that we make progress by listening to each other across every apparent political or ideological divide. I've learned that we come closest to getting things right when we approach every person and every issue with an open mind. I've learned the value of a habit Justice Stevens wrote about more than 50 years ago, of understanding before disagreeing.

I will make no pledges this week other than this one: that if confirmed, I will remember and abide by all these lessons. I will listen hard to every party before the court and to each of my colleagues. I will work hard and I will do my best to consider every case impartially, modestly, with commitment to principle and in accordance with law. That is what I owe to the legacy I share with so many Americans.

My grandparents came to this country in search of a freer and better life for themselves and their families. They wanted to escape bigotry and oppression, to worship as they pleased, and work as hard as they were able. They found in this country, and they passed on to their children and their children's children, the blessings of liberty.

Those blessings are rooted in this country's Constitution and its historic commitment to the rule of law. I know that to sit on our Nation's highest court is to be a trustee of that inheritance, and if I have the honor to be confirmed, I will do all I can to help preserve it for future generations.

Thank you, Mr. Chairman. Thank you, members of the Committee.

Chairman LEAHY. Well, thank you, Solicitor General Kagan. I thank all the members of both sides of the aisle who have stayed and have been so attentive.

We will come back here at 9 a.m. tomorrow. We stand in recess.
[Whereupon, at 4:05 p.m. the Committee was recessed.]

THE NOMINATION OF ELENA KAGAN TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JUNE 29, 2010

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

The Committee met, pursuant to notice, at 9 a.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Specter, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning everyone. Today Justice John Paul Stevens' resignation from the Supreme Court takes effect. I appreciated your recognition of his service to the country in your opening statement Solicitor General Kagan.

He was the first person, the first Supreme Court nomination I was able to vote on as a very young and very junior member of the U.S. Senate. But you spoke eloquently about the rule of law, securing the blessings of liberty, about the Constitution, and about your respect for all three branches of our democratic Government. And I appreciate your pledge to consider every case impartially, modestly, with commitment to principle, and in accordance with law.

So this morning we begin our questioning. Senator Sessions and I talked about this. Each Senator, Republicans and Democrats, will have a 30-minute round, and we will alternate back and forth. So I will begin the first round.

Solicitor General Kagan—and you can start the clock. Solicitor General Kagan, you spoke yesterday about your parents, children of immigrants, the first in their families to attend college. I was struck when you said that your mother did not learn English until she was ready to go to school, and I can—that was the same with my mother and my wife.

Before we get to questions about the important role that the Supreme Court plays in American lives, do you want to share with us some additional thoughts about the values your parents taught you that put you on the path to teaching and law and public service? Because that may give us a better idea of who you are.

Ms. KAGAN. Gosh, Chairman Leahy, thank you for giving me that opportunity. That is a wonderful opportunity.

My parents, of course, were—they were loving, wonderful parents, but they were also people who worked hard for their communities, and I think that is what I most took away from them, is the value of serving the communities that you live in and serving other people. And I guess I got a little bit from each side. My father, I said, was a lawyer. He was a lawyer for ordinary people. He was the kind of lawyer who, if you needed a will drawn up, he would draw up your will, and if you had problems on your taxes, he would help you with that. And then one of the things that he did quite a lot of was he helped tenants in New York City. The neighborhood we lived in was in the process of some change as I was growing up, and many people were sort of being forced out of their homes. And he made it really part of his legal work to ensure that either they could stay in their homes, or at least if they did need to move to another neighborhood, they could take something with them to establish a good life there.

And he was also a person who spent an enormous amount of time thinking about that neighborhood. He was involved in lots of community boards and citizen groups of various kinds, thinking about environmental projects and land use projects. He really treated that neighborhood of New York City as just—you know, he just so much cared about the welfare of it and poured his heart and soul into trying to improve it.

And I think what I learned from him was just the value of public service, was just the value of doing what you can in your neighborhood or in your Nation or wherever you can find that opportunity to help other people and to serve the Nation. So that is what I most took away from my father.

My mother was—I said yesterday she was a kind of legendary teacher. She died only a couple of years ago, and my brothers and I, we expected a small funeral. We expected not very many people to attend. I do not have a large family. And instead, just tons and tons of people showed up, and we could not figure out who they all were. And it turned out that these people, who were then middle-aged, you know, 30-year-olds, 40-year-olds, whatever, they had had my mother as a sixth grade teacher decades ago, and they were people who just wanted to come and pay their respects because—they kept on coming up to me and my brothers and saying, “At the age of 12, your mother taught me that I could do anything.” And she was really demanding. She was a really tough teacher. You know, it was not—you did not slide by in Mrs. Kagan’s class. But she got the most out of people, and she changed people’s lives because of that.

And if I look at my own career in this kind of strange way, not planned but in the sort of strange way, I think, you know, part of my life is my father and part of my life is my mother, that part of my life has been in public service. I have been really blessed with the opportunities I have had to work in Government and to serve this Nation. And then part of my life is teaching, which I take enormous pleasure and joy from. I am looking over your right shoulder—your left shoulder, right on my side, and there is a stu-

dent of mine right there. And maybe there are some other students that are around the room. And it is a kind of great thing.

Chairman LEAHY. We are doing our best to make Jeremy blush. [Laughter.]

Chairman LEAHY. But, you know, these things that I—I mean, each one of us, I think, can speak about what our parents, what they brought to us, and it seems to me they gave you some pretty strong values. So that speaks about who you are as a person, and now we go to some of your legal abilities, and some have criticized your background or your legal arguments. They have even gone to what did you write on college papers.

The Chairman of the Republican National Committee criticized you last month for agreeing with Justice Thurgood Marshall's observation that our Constitution, as originally drafted, was imperfect. The criticism surprised me because everything you read about the Founders, they knew that they would lay down something that would not cover every foreseeable thing. I mean, how could they possibly foresee what the country is today? They wrote in broad terms. They could not foresee every challenge.

So what is your response to this criticism of you that was made because you agreed with Justice Marshall? How would you describe the way the Constitution has been amended since it was originally drafted?

Ms. KAGAN. Well, Chairman Leahy, the Framers were incredibly wise men, and if we always remember that, we will do pretty well, because part of their wisdom was that they wrote a Constitution for the ages. And this was very much in their mind. This was part of their consciousness. You know, even that phrase that I quoted yesterday from the Preamble of the Constitution, I said the Constitution was "to secure blessings of liberty." I did not quote the next part of that phrase. It said "blessings of liberty for themselves and their posterity." So they were looking toward the future. They were looking generations and generations and generations ahead and knowing that they were writing a Constitution for all that period of time, and that circumstances and that the world would change, just as it had changed in their own lives very dramatically. So they knew all about change.

And they wrote a Constitution, I think, that has all kinds of provisions in it, so there are some that are very specific provisions. It just says what you are supposed to do and how things are supposed to work. So it says to be a Senator, you have to be 30 years old, and that just means you have to be 30 years old. And it does not matter if people mature earlier, and it does not matter if people's life spans change. You just have to be 30 years old because that is what they wrote and that is what they meant and that is what we should do.

But there are a range of other kinds of provisions in the Constitution of a much more general kind, and those provisions were meant to be interpreted over time, to be applied to new situations and new factual contexts. So the Fourth Amendment is a great example of this. It says, "There shall be no unreasonable searches and seizures." Well, what is unreasonable? That is a question.

The Framers could have given like a whole primer on police practices, you know, which searches were reasonable and which

searches were not reasonable and lots of different rules for saying that. But they did not do that. And I think that they did not do that because of this incredible wisdom that they had that they knew that the world was going to change and that—you know, they did not live with bomb-sniffing dogs and with heat-detecting devices.

Chairman LEAHY. And computers and—

Ms. KAGAN. And companies and all these questions that judges, courts, everybody is struggling with—police—in the Fourth Amendment context.

And I think that they laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.

Chairman LEAHY. And we also have made changes, and the Bill of Rights, my own State of Vermont did not join the Union until they saw that the Bill of Rights was going to be ratified. We did the 19th Amendment, the expansion of votes for women; the 26th Amendment allowing 18-year-olds to vote. We have seen some major changes over the years.

Yesterday I talked about how the Supreme Court interprets *Plessy v. Ferguson*. It was overruled by *Brown v. Board of Education*, the same Constitution. But people realized how changes are in society. I cannot imagine anybody saying we should go back to *Plessy v. Ferguson* because that was decided first.

I do recall you being a special counsel with Senator Biden on this Committee during a Supreme Court confirmation hearing. I was here. I was a little bit further down the row at the time. But you wrote a law review article and book review after in which you argued that these proceedings should be occasions to engage in a meaningful discussion of legal issues.

Now, you set the standard. You probably reread those words—

Ms. KAGAN. Many times.

[Laughter.]

Chairman LEAHY. I will bet. I will bet. As have it, and I guarantee you, as have every single member of this Committee.

Ms. KAGAN. And you know what? They have been read to me many times, too.

[Laughter.]

Chairman LEAHY. And probably will again.

How are you going to live up to that standard?

Ms. KAGAN. Senator Leahy, before I answer that question, may I say a little bit more about what you started with about constitutional changes?

Chairman LEAHY. Sure.

Ms. KAGAN. Just to show my commitment to being open. All right?

Chairman LEAHY. Go ahead.

Ms. KAGAN. But you said something which just sort of triggered a thought in me, and I just wanted to—as you said, there are all these many changes that have happened to the Constitution, and I think it is important to realize that those changes do come in sort of two varieties. One is the formal amendment process, and I think

it was Senator Cornyn yesterday who talked about the formal amendment process, and that is tremendously important.

So, you know, when Thurgood Marshall said that this was a defective Constitution, you know, he was talking about the fact that this was a Constitution that counted slaves as three-fifths of a human being, that did not do anything about that original sin of our country. And the 14th amendment changed that. The 14th Amendment was an enormous break after the Civil War, and it created a different Constitution for America. So partly the changes come in that way.

But partly they come outside the formal amendment process as well, and what you said about *Plessy* and *Brown* is absolutely right, that if you look at the specific intent of the drafters of the 14th Amendment, they thought that the 14th Amendment was perfectly consistent with segregated schools. I mean, you just have to—you cannot really argue otherwise as a historical matter. But in *Brown*, the Court said otherwise, and, you know, step by step by step, decision by decision, in large part because of what Justice Marshall did, you know, we got to a place where the Court said it is inconsistent with the principle of equal protection of the laws that the drafters of the 14th Amendment laid down. It is inconsistent with that principle to have segregated schools. So that is a way in which change can happen as well.

Now, to go to your real question—and I apologize for that digression. I have looked at that book review many times and been pointed to it, and here is what I think: I still think that the basic points of that book review were right, and the basic points were that the Senate has a very significant role to play in picking Supreme Court Justices, that is important who serves on the Supreme Court, that everybody should treat it as important, and that the Senate should—has a constitutional responsibility and should take that constitutional responsibility seriously, and also that it should have the information it needs to take that responsibility seriously, and part of that is getting some sense, some feel of how a nominee approaches legal issues, the way they think about the law, and I guess that is my excuse for giving you a little bit more even than you wanted about constitutional change. But I would say that there are limits on that.

Now, some of the limits I talked about in that article itself. I mean, that article makes very clear that it would be inappropriate for a nominee to talk about how she will rule on pending cases or on cases beyond that that might come before the Court in the future. So the article was very clear about that line.

Now, when I came before this Committee in my SG hearing, Senator Hatch and I had some conversation because Senator Hatch said to me—and I am sorry he is not here. He said to me he thought that I had the balance a little bit off. He said, you know, in addition—he basically said it is not just that people can ask you about cases that come before the Court; they can ask you a range of questions that are a little bit more veiled than that, but they are really getting at the same thing. And if it is not right to say how you would rule on a case that is going to come before the Court, or that might, then it is also not right to ask those kinds of ques-

tions, which essentially ask you the same thing without doing so in so many words.

And I went back and forth a little bit with Senator Hatch, both in these hearings and on paper, and I basically said to Senator Hatch that he was right, that I thought that I did have the balance a little bit off and that I skewed it too much toward saying that answering is appropriate even when it would, you know, provide some kind of hints. And I think that that was wrong. I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases, because those cases themselves might again come before the Court.

Chairman LEAHY. Well, actually that would go into another area. You have been Solicitor General. You have argued a number of cases before the Supreme Court. The last person nominated directly to the Supreme Court not from a judgeship but from the administration was when Justice Rehnquist was working for the Nixon administration and went directly to the Supreme Court. And then, I was not in the Senate at that time, but I was there when he was being nominated for Chief Justice, and I asked him about his refusal to recuse himself from a case called *Laird v. Tatum*. The *Laird* case involved the Nixon administration's surveillance of Americans.

As the Justice Department's legal expert when he was working with the Justice Department for the Nixon administration, he testified before Congress about that case, but then after his confirmation, he was part of a five-Justice majority in the very case in which he had testified, and he voted to dismiss the complaint alleging unlawful surveillance of lawful citizens' political activity.

Now, I realize Supreme Court Justices have to make up their own mind. I went back and forth with Justice Scalia about some things about his relationship with a former Vice President and then ruling on cases involving him. I regularly ask questions of nominees, not just to the Supreme Court but for other courts, about potential recusals. Now, Senator Sessions and I sent you a questionnaire, and in that we had the question of recusal, and you answered it. It appears to me you take this very seriously.

Tell me about what principles are you going to use to make recusal decisions, if you can do it just briefly, but then tell us some of the cases where you anticipate you are going to have to recuse.

Ms. KAGAN. Senator Leahy, I think certainly as I said in that questionnaire answer that I would recuse myself from any case in which I have been counsel of record at any stage of the proceedings, in which I have signed any kind of brief. And I think that there are probably about ten cases—I have not counted them up particularly, but I think that there are probably about ten cases that are on the docket next year in which that is true, in which I have been counsel of record on a petition for certiorari or some other kind of pleading. So that is a flat rule.

In addition to that, I said to you on the questionnaire that I would recuse myself in any case in which I have played any kind of substantial role in the process. I think that that would include—I am going to be a little bit hesitant about this because one of the things I would want to do is talk to my colleagues up there and make sure that this is what they think is appropriate, too. But I

think that that would include any case in which I have officially formally approved something. So one of the things that the Solicitor General does is approve appeals or approve amicus briefs to be filed in lower courts or approve interventions.

Chairman LEAHY. I wish you would look seriously at that. I was really shocked by former Chief Justice Rehnquist's position on the *Laird* case. I thought that was almost an open-and-shut question for recusal. The reason I mention it, the Supreme Court also has to have the respect of the American people, and certainly people can expect the Supreme Court to rule on some cases where they may or may not agree with them. But so long as you have respect for the Court, then they will understand that. If they see Justices involved in cases in which they had a financial interest, which seems pretty clear-cut, or other direct interests and then they rule on them, you can imagine this erodes the credibility of the Court. And I am very concerned about that no matter whether it is a Republican President's nominee or a Democratic President's nominee.

Two years ago, in *District of Columbia v. Heller*, the Supreme Court held the Second Amendment guarantees to Americans the individual right to keep and bear arms. I am a gun owner, as are many people in Vermont, and I agreed with the *Heller* decision. And just yesterday in *McDonald v. the City of Chicago*, the Court decided the Second Amendment right established in *Heller* is a fundamental right that applies to the States as well as the Federal Government.

Now, that is not going to have any effect one way or the other in Vermont because we do not have gun laws in Vermont except during hunting season. We try to give the deer a fighting chance. But, otherwise, there are no rules.

Is there any doubt after the Court's decision in *Heller* and *McDonald* that the Second Amendment to the Constitution secures a fundamental right for an individual to own a firearm, use it for self-defense in their home?

Ms. KAGAN. There is no doubt, Senator Leahy. That is binding precedent entitled to all the respect of binding precedent in any case. So that is settled law.

Chairman LEAHY. As Solicitor General, did you have a role in the President's domestic or foreign policy agenda?

Ms. KAGAN. The Solicitor General does not typically take part in policy issues, and certainly—the only policy issues I think that I might have taken part in—and these are policy issues that would only overlap with litigation issues or some national security issues. But, otherwise, you know, the Solicitor General really is a legal officer.

Chairman LEAHY. And if you were, though, involved in the domestic or foreign policy agenda, would that not be something that you would want to consider and issue a recusal? I mean, you mentioned national security issues, for example.

Ms. KAGAN. Right. I think that anything that I substantially participated in as a Government official that is coming before the Court, I should take very seriously, as you say, the appropriateness of recusal.

Chairman LEAHY. Now, I know that when Chief Justice Roberts and Justice Alito were before this Committee for their nomination

hearings—they had worked for Republican Presidents—they assured Senators that as lawyers for a Presidential administration they were representing the views of the President. All my friends on this side of the aisle thought that was fine, and the reason I mention that is I was concerned that some were saying almost a different standard, because back a number of years ago you worked for the Clinton administration.

Would you agree with Chief Justice Roberts and Justice Alito that as a lawyer working for a Presidential administration the policies you worked to advance were the views and policies of the President for whom you worked?

Ms. KAGAN. Absolutely, Senator Leahy. I worked for President Bill Clinton, and we tried to implement his policy views and objectives.

Chairman LEAHY. Now, let me ask you this: We have heard talk about Harvard Law School and military recruiting when you were dean, and by enforcing the longstanding non-discrimination policy, you had provided military recruiters with access to students coordinated by the Harvard Law Veterans Association had been successfully used for years under your predecessor, Dean Clark, with the approval of military recruiters and the Department of Defense.

Did you ever bar recruiters for the U.S. military from access to students at Harvard Law School while you were dean?

Ms. KAGAN. Senator Leahy, military recruiters had access to Harvard students every single day I was dean.

Chairman LEAHY. Well, let me ask you this: When you were there, did the number of students recruited go down at all while you were dean?

Ms. KAGAN. I do not believe it did, Senator Leahy, so I am confident that the military had access to our students and our students had access to the military throughout my entire deanship, and that is incredibly important because the military should have the best and brightest people it can possibly have in its forces. And I think, you know, I said on many, many occasions that this was a great thing for our students to think about doing in their lives, that this is the most important and honorable way any person can serve his or her country.

Chairman LEAHY. It has always been my experience also that if somebody wants to join the military, they usually are pretty motivated to join the military. My youngest son joined the Marine Corps out of high school. There were not recruiters on the high school campus, but he was able to find where the recruiter was in downtown Burlington and walked over there and signed up. My wife and I were very proud of him for doing that. But here there has been this implication given—that is why I want you to clear this up—that somehow military recruiters could not recruit Harvard students. That was not the case. Is that correct?

Ms. KAGAN. That was not the case, Senator Leahy. The only question that ever came up, as you stated earlier, this was a balance for the law school because, on the one hand, we wanted to make absolutely sure that our students had access to the military at all times, but we did have a very longstanding—going back to the 1970s—anti-discrimination policy which said that no employer could use the Office of Career Services if that employer would not

sign a non-discrimination pledge that applied to many categories—race and gender and sexual orientation and actually veteran status as well. And the military could not sign that pledge.

Chairman LEAHY. Because of “Don’t ask, don’t tell”?

Ms. KAGAN. Because of the “Don’t ask, don’t tell” policy.

Chairman LEAHY. Which the Chairman of the Joint Chiefs of Staff now says should be repealed.

I read a speech you gave to graduates of West Point 3 years ago. You said that military service is the noblest of all professions, and those cadets serve their country in this most important of all ways. That does not sound very anti-military to me. Tell me why you said that, what you did at West Point.

Ms. KAGAN. Well, I said it because I believe it. I was so honored to be invited to West Point. They have a mandatory part of their curriculum that all students take a constitutional law course, and they invite a person each year to talk to the students about any legal subject. And it was really the greatest honor I think I have ever gotten to be asked to be that person. And I went up and I talked to the West Point students and faculty about something that I talked about yesterday, really, which was about the rule of law and about how it applied in the military context. And I was—I love that institution, the faculty and the students there. It was an incredible experience for me.

But, you know, in addition, I mean, I tried in every way I could to make clear to the veterans of the military at Harvard Law School and people who were going to go into the military how much I respected their service, how much I thought that they were doing the greatest thing that anybody could do for their country.

Chairman LEAHY. Well, I tend to agree. I know we felt that way, my wife and I felt that way about our son. We worried about him in the Marine Corps, but we were so proud of what he was doing.

In fact, speaking of Marines, I read a May 21 Washington Post op-ed from Robert Merrill. He is a captain in the U.S. Marine Corps. He is a 2008 Harvard Law graduate. He is serving as a legal adviser to a Marine infantry battalion in southern Afghanistan, and I have been to that part of Afghanistan with our troops. It is not an easy place to be. He writes, “If Elena Kagan is anti-military, she certainly didn’t show it. She treated the veterans at Harvard like VIPs. She was a fervent advocate of our veterans association.”

He also writes, “I received perhaps the most thoughtful thanks of all just before graduating from Harvard Law School. The supposedly anti-military Elena Kagan sent me a handwritten note thanking me for my military service and wishing me luck in my new life as a Judge Advocate.”

I want to thank you for doing that, too, and I will put in the record Captain Merrill’s op-ed.

[The op-ed appears as a submission for the record.]

Ms. KAGAN. Senator Leahy, this has been a sort of long process, this process, and sometimes an arduous one. I have only cried once during this process, and I cried when I woke up one morning and I read that op-end from Captain Merrill, that it meant just an enormous amount to me. He is a magnificent man doing great

things for our country, and his praise meant more to me than anybody's.

Chairman LEAHY. Well, I have not met him, but I was very touched by it.

Senator SESSIONS.

Senator SESSIONS. Thank you, Mr. Chairman, and I value our relationship, and we have disagreed over documents and a few things. But I believe you tried to handle this Committee in a fair way, and nobody has had more experience at it, and fundamentally I hope that we have, Dean Kagan, a good hearing. I hope that you can feel free to tell us precisely how you think so we can evaluate what you might be like on the bench. We can have brilliant and wonderful people, but if their approach to judging is such that I think allows them not to be faithful to the law, to not be able to honor that oath, which is to serve under the Constitution and laws of the United States, then we have got a problem. And I do not think that is judging. I think that becomes politics or law or something else. And so I would say that to you. I look forward to all of our members asking a number of questions to probe how you will approach your judgeship.

Let me ask you this—

Chairman LEAHY. Incidentally, thank you for those kind words.

Senator SESSIONS. Thank you, Mr. Chairman, and I meant that.

One thing before I get started, I would like to ask about your discussion of constitutional change earlier. You indicated that there is an amendment process in the Constitution. There are two ways to do so in the Constitution. Is there any other way than those two ways that the Constitution approved to change the Constitution?

Ms. KAGAN. Well, Senator Sessions, the Constitution is an enduring document. The Constitution is the Constitution. And the Constitution does not change except by the amendment process. But as I suggested to Chairman Leahy, the Constitution does over time, where courts are asked to think about how it applies to new sets of circumstances, to new problems, the things that the Framers never dreamed of. And in applying the Constitution case by case by case to new circumstances, to changes in the world, the constitutional law that we live under does develop over time.

Senator SESSIONS. Well, developing is one thing, and many of the provisions, as you noted, they are not specific, but they are pretty clear, I think, but not always specific. But you are not empowered to alter that document and change its meaning. You are empowered to apply its meaning faithfully in new circumstances. Wouldn't you agree?

Ms. KAGAN. I do agree with that, Senator Sessions. That is the point I was trying to make, however inartfully, that you take the Fourth Amendment and you say there is unreasonable searches and seizures, and that provision stays the same unless it is amended. That is the provision. And then the question is: What counts as an unreasonable search and seizure? And new cases come before the Court, and the Court tries to think about, to the extent that one can glean any meaning from the text itself, from the original intent, from the precedents, from the history, from the principles embedded in the precedent, and the Court sort of step by step by

step, one case at a time, figures out what the Fourth—how the Fourth Amendment applies.

Senator SESSIONS. Well, I do believe that there are some out there who think the Court really has an opportunity to update the Constitution and make it say what they would like it to say. I know we have seen a bit of a revival in the idea of the progressive legal movement that people in the early 20th century advocated views for changing America. They felt the Constitution often blocked them from doing that, and they were very aggressive in seeking ways to subvert or get around that Constitution.

Your former colleague at the University of Chicago, Richard Epstein, said, “Any constitutional doctrine that stood in the way of the comprehensive social or economic reforms”—he is referring to the progressives—“had to be rejected or circumvented.” And he noted that, “The progressive influence continues to exert itself”—he is talking about today—“long past the New Deal in modern Supreme Court decisions that address questions of federalism, economic liberties, and takings for public use.”

I believe that is a dangerous philosophy. I believe that is a philosophy not justified by any judge on the Court. And I am worried about the trends. I think the American people are.

Greg Craig, the former Chief Counsel to President Obama, who has known you for some time, I understand, said of you, “She is largely a progressive in the mold of Obama himself.”

Do you agree with that?

Ms. KAGAN. Well, Senator Sessions, I am not quite sure how I would characterize my politics. But one thing I do know is that my politics would be, must be, have to be completely separate from my judging. And I agree with you to the extent that you are saying, look, judging is about considering a case that comes before you, the parties that come before you, listening to the arguments they make, reading the briefs they file, and then considering how the law applies to their case—how the law applies to their case, not how your own personal views, not how your own political views might suggest, you know, anything about the case, but what the law says, whether it is the Constitution or whether it is a statute.

Now, sometimes that is a hard question, what the law says, and sometimes judges can disagree about that question. But the question is always what the law says. And if it is a constitutional question, it is what the text of the Constitution says, it is what the history says, the structure, precedent, but what the law says, not what a judge’s personal views—

Senator SESSIONS. Well, I agree, but the point I was just wanting to raise with you is that this idea, this concept of legal progressivism is afoot. I notice E.J. Dionne in yesterday’s Washington Post had an article, started off the second paragraph saying, “Democratic Senators are planning to put the right of citizens to challenge corporate power at the center of their critique of an activist conservative judging, offering a case that has not been fully aired since the great Progressive Era Justice Louis Brandeis.” And I think we do have this national discussion going on about a revival of progressivism.

Let me ask you about this: Vice President Biden’s Chief of Staff Ron Klain, who served as Chief Counsel of this Committee, a

skilled lawyer, was Chief of Staff to Vice President Gore, also, I believe, who has known you for a number of years, said this about you: "Elena Kagan is clearly a legal progressive. I think Elena is someone who comes from the progressive side of the spectrum. She clerked for Judge Mikva, clerked for Justice Marshall, worked in the Clinton administration, in the Obama administration. I do not think there is any mystery to the fact that she is. As I said, more progressive role than not."

Do you agree with that?

Ms. KAGAN. Senator Sessions, it is absolutely the case that I have served in two democratic administrations, and I think—

Senator SESSIONS. No, but I am asking, do you agree with the characterization that you are a legal progressive?

Ms. KAGAN. Senator Sessions, I honestly do not know what that label means. I have worked in two Democratic administrations. Senator Graham suggested yesterday—and I think he is right—that you can tell something about me and my political views from that. But as I suggested to you, my political views are one thing, and the way—

Senator SESSIONS. Well, I agree with you, exactly, that you should not be condemned for being a political believer and taking part in the process and having views. But I am asking about his firm statement that you are a legal progressive, which means something. I think he knew what he was talking about. He is a skilled lawyer. He has been in the midst of the great debates of this country about law and politics, just as you have. And so I ask you again, do you think that is a fair characterization of your views? Certainly you do not think he was attempting to embarrass you or hurt you in that process, do you?

Ms. KAGAN. I love my good friend Ron Klain, but I guess I think that people should be allowed to label themselves, and that is—you know, I do not know what that label means, and so I guess I am not going to characterize it one way or the other.

Senator SESSIONS. I would just say, having looked at your overall record, having considered those two people who know you very well, I would have to classify you as someone in the theme of the legal progressive.

Now, one of the things that we want to test, I guess, is your willingness to follow the law even if you might not agree with it. And Senator Leahy has asked you about Harvard and the military. Isn't it true, isn't it a fact that Harvard had full and equal access to the recruiting office, the Office of Career Services, when you became dean?

Ms. KAGAN. Senator Sessions, the military had full access to our students at all times, both before I became dean and during my—

Senator SESSIONS. That is not the question. I know that—

Chairman LEAHY. Let her answer the question.

Senator SESSIONS. All right. But, you know, it—go ahead.

Ms. KAGAN. So the history of this is Harvard did have this anti-discrimination principle, and for many, many years, my predecessor, who was Bob Clark, had set up a system to ensure military access, but also to allow Harvard to comply with its anti-discrimination policy, which prohibited the Office of Career Services from

providing assistance to employers that could not sign the anti-discrimination pledge. And the accommodation that Bob worked out was that the veterans organization would instead sponsor the military recruiters. So the only thing that was at issue was essentially the sponsoring organization, whether it was the Office of Career Services or instead the student veterans organization.

Senator SESSIONS. Please let me follow up on that. But on August 26th of 2002, Dean Clark, your immediate predecessor, acquiesced when Harvard's financing had been threatened by the Federal Government for failure to comply with the law, which requires not just access but equal access to the offices on campus. He replied in this fashion to the Government: "This year and in future years, the law school will welcome the military to recruit through the Office of Career Services." So that was the rule when you took office, was it not?

Ms. KAGAN. It was the rule when I took office, and it remained the rule after I took office. For many years, DOD, the Department of Defense, had been very—

Senator SESSIONS. Well, not for many years—how many—well, go ahead.

Ms. KAGAN. For a number of years, for a great number of years, the Department of Defense had been very accepting, had approved the accommodation that we had worked out.

You are quite right that in 2002 DOD came to the law school and said, "Although this accommodation has been acceptable to us so far, it is not acceptable any longer, and instead we want the official Office of Career Services assistance."

Senator SESSIONS. But before—and Harvard acquiesced and agreed to do so.

Ms. KAGAN. And Dean Clark agreed to do so, and that continued—

Senator SESSIONS. On a direct threat of cutting off of funds, and otherwise he indicated in his statement he would not have done so.

Now, when you became dean, you personally opposed the "Don't ask, don't tell" policy and felt strongly about it, did you not?

Ms. KAGAN. I do oppose the "Don't ask, don't tell" policy.

Senator SESSIONS. And you did then.

Ms. KAGAN. And I did then.

Senator SESSIONS. And in 2003, not long after you became President, you said, "I abhor the military's discrimination recruitment policy. I consider it a profound wrong, a moral injustice of the first order." And you said that within 6 months or so of becoming dean, and that was an e-mail you sent to the entire law school.

Ms. KAGAN. Senator Sessions, I have repeatedly said that I believe that the "Don't ask, don't tell" policy is unwise and unjust. I believed it then and I believe it now. And we were trying to do two things. We were trying to make sure that military recruiters had full and complete access to our students, but we were also trying to protect our own anti-discrimination policy and to protect the students whom it is—whom the policy is supposed to protect, which in this case were our gay and lesbian students. And we tried to do both of those things.

Senator SESSIONS. Well, you could not do both, as it became clear as time went on. In fact, there was a protest on campus the next

year, and you participated in that protest and spoke out saying, "I am very opposed to two Government policies that directly violate our policy of non-discrimination and directly impact our students. The first is 'Don't ask, don't tell': the second one is the Solomon amendment, which effectively forces educational institutions to make exceptions to their non-discrimination policy."

So you sent that out to the—you said that at that meeting. And in addition to that, a lawsuit was filed in a distant circuit, the Third Circuit, and you participated in a filing of a brief attacking the "Don't ask, don't tell" policy. Is that correct?

Ms. KAGAN. Senator Sessions, that is not quite correct. The lawsuit itself brought a constitutional challenge to the "Don't ask"—to the Solomon amendment. We did not participate in that challenge. What the brief that I filed did do was to argue, try to argue that Harvard's accommodation, which allowed—which, you know, welcomed the military on campus, but through our veterans organization, we tried to argue that that accommodation was consistent with the Solomon amendment, and that is what we argued to the Third Circuit.

Senator SESSIONS. Well, and they eventually—the Supreme Court did not agree with that. But after the Third Circuit ruled 2–1 questioning the constitutionality of the statute, you immediately, the very next day, changed the policy at Harvard and barred the military from the Office of Career Services, the equal access the Solomon amendment had required. Is that correct?

Ms. KAGAN. Senator Sessions, after the Third Circuit ruled the Solomon amendment unconstitutional—and the Third Circuit was the only appellate court to have issued a decision on that question and did rule the Solomon Amendment unconstitutional—I thought it appropriate at that point to go back to what had been the school's longstanding policy, which had been to welcome the military onto the campus but through the auspices of the veterans organization rather than through the auspices of our Office of Career Services.

Senator SESSIONS. Well, the veterans were not interested in taking on that burden, and that was not the equal access that the Solomon amendment, which I worked on to pass, required. Congress frankly was very frustrated at the law schools. We passed four or five versions of the Solomon amendment to get around every maneuver that occurred on the campuses.

Now, isn't it a fact that the mandate or the injunction, never issued by the Third Circuit, that the Third Circuit holding did not apply to Harvard at the time you stopped complying with the Solomon amendment? And isn't it a fact that you were acting in violation of Harvard's agreement and the law when you reversed policy?

Ms. KAGAN. Senator Sessions, we were never out of compliance with the law. Nobody ever suggested that Harvard should be sanctioned in any way. The only question was whether Harvard should continue—had continued to remain eligible for Federal funding. And after DOD came to us and after DOD told us that it wanted law schools to essentially ignore the Third Circuit decision, that it wanted—that it was going to take that decision to the Supreme Court and that it wanted law schools to continue to do what they

had been doing, we did change back. We did precisely what DOD asked us to do, and DOD never withheld—

Senator SESSIONS. Well, you did not, Ms. Kagan. You did not do what the DOD asked you to do. Just answer this—put your legal hat on for a second. The Third Circuit opinion never stayed the enforcement of the Solomon amendment at Harvard, did it? Did that law remain in effect?

Ms. KAGAN. Senator Sessions, the question was—

Senator SESSIONS. No, that is my question to you. Did the law remain in effect at all times at Harvard?

Ms. KAGAN. The Solomon amendment remained in effect, but we had always thought that we were acting in compliance with the Solomon amendment, and for many, many years, DOD agreed with us.

After the Third Circuit, I thought it was appropriate to go back to our old policy, which previously DOD had thought complied with the Solomon Amendment. When DOD came to us and said, no, the Third Circuit really has not changed matters because we are going to take this to the Supreme Court and we want law schools really to ignore what the Third Circuit said, DOD and we had some discussions, and we went back to doing it exactly the way DOD wanted to. In the interim—

Senator SESSIONS. Well, let us get more basic about it. The military—you stopped complying, and that season was lost before the military realized—frankly, you never conveyed that to them in a straight-up way like I think you should have. You just started giving them a run-around. The documents we have gotten from the Department of Defense say that the Air Force and the Army says they were blocked, they were stonewalled, they were getting the run-around from Harvard. By the time they realized that you had actually changed the policy, that recruiting season was over, and the law was never not in force.

I feel like you mishandled that. I am absolutely confident you did. But you continued to persist with this view that somehow there was a loophole in the statute that Harvard did not have to comply with after Congress had written a statute that would be very hard to get around. What did the Supreme Court do with your brief? How did they vote on your brief attacking the effectiveness of the Solomon amendment to assure equal access at Harvard?

Ms. KAGAN. Senator Sessions, if I might, you had suggested that the military lost a recruiting season, but, in fact, the veterans organization did a fabulous job of letting all our students know that the military recruiters were going to be at Harvard during that recruiting season, and military recruiting went up that year, not down.

Now, you are exactly right that the Supreme Court did reject our amicus brief. Again, we filed an amicus brief not attacking the constitutionality of the Solomon amendment, but instead saying that essentially the Harvard policy complied with the Solomon amendment. The Supreme Court rejected it 9–0, unanimously.

Senator SESSIONS. But even before that, the military said the law was still in effect, Harvard had no right to get around it, and they should comply even before the Supreme Court issued a ruling, and they had to contact the university's counsel and the president, Mr. Larry Summers, and Mr. Summers agreed that the military should

have full and equal access before even the Supreme Court ruled, but after you had denied equal access. Isn't that right?

Ms. KAGAN. Senator Sessions, we had gone back and done exactly what the Department of Defense had asked us to do prior to the time that the Supreme Court ruled. We had done it—

Senator SESSIONS. Wait a minute. You asked them—what they asked you to do after the Third Circuit ruled, you denied them access. They had to insist and demand that they have equal access because the law was still in effect. You did not agree to that. You had reversed that policy, and the president of the university overruled your decision. According to internal DOD documents, they say that President Summers agreed to reverse the policy, the dean remains opposed.

Ms. KAGAN. Senator Sessions, Larry Summers and I always worked cooperatively on this policy. I did not ever do anything that he did not know about, and he never did anything that I did not approve of. With respect to the decision that you are talking about, this was a joint decision that Larry and I made that because DOD thought that what we were doing was inappropriate, we should, in fact, reverse what we had done. You know, that period lasted for a period of a few months in my 6-year deanship, and long before the Supreme Court issued its ruling in the *FAIR v. Rumsfeld* case, we were doing exactly what DOD asked us to do.

Senator SESSIONS. So it is your testimony that the decision you made immediately after the Third Circuit opinion, you concluded was inappropriate, you and President Summers, and you reversed that policy later?

Ms. KAGAN. Senator Sessions, what I did after the Third Circuit decision was to say, look, the only appellate court to have considered this question has struck down the statute. We have always thought that our policy was in compliance with the statute. The appropriate thing for me to do, really the obligation that I owed to my school and its longstanding policy, was to go back to our old accommodation policy which allowed the military full access, but through the veterans organization. When DOD came to us and said that it thought that that was insufficient, that it wanted to essentially ignore the Third Circuit decision, because it was taking it up to the Supreme Court, when they came back to us, we went through a discussion of a couple of months and made a decision to do exactly what DOD wanted.

Senator SESSIONS. Well, you did what DOD wanted when they told the president and the counsel for the university they were going to lose some \$300 million if Dean Kagan's policy was not reversed. Isn't that a fact?

Ms. KAGAN. Senator Sessions, we did what DOD asked for because we have always, you know, tried to be in compliance with the Solomon amendment, thought that we were. When DOD—DOD had long held that we were. When DOD came back to us and said, "No, notwithstanding the Third Circuit decision, we maintain our insistence that you are out of compliance with the Solomon amendment," we said OK.

Senator SESSIONS. Well, in fact, you were punishing the military. The protest that you had, that you spoke to on campus, was at the very time in the next building or one or two buildings nearby, the

military were meeting there. Some of the military veterans, when they met with you the first time, expressed concern about an increasingly hostile atmosphere on the campus against the military. Didn't they express that to you?

Ms. KAGAN. Senator Sessions, I think, as I said to Senator Leahy, that I tried in every way I could throughout this process to make clear to all our students, not just to the veterans but to all our students, how much I valued their service and what an incredible contribution I thought that they made to the school. I—

Senator SESSIONS. I do not deny that you value the military. I really do not. But I do believe that the actions you took helped create a climate that was not healthy toward the military on campus.

But let me ask you this: You keep referring in your e-mails and all to the military policy. Isn't it a fact that the policy was not the military policy but a law passed by the Congress of the United States, those soldiers may have come back from Iraq or Afghanistan, they were appearing to recruit on your campus, were simply following the policy of the U.S. Congress effectuated by law, not their idea, and that you were taking steps to treat them in a second-class way, not give them the same equal access because you deeply opposed that policy. Why wouldn't you complain to Congress and not to the dutiful men and women who put their lives on the line for America every day?

Ms. KAGAN. Senator Sessions, you are, of course, right that the Solomon amendment is law passed by Congress, and we never suggested that any members of the military, you know, should be criticized in any way for this. Quite to the contrary, you know, I tried to make clear in everything I did how much I honored everybody who was associated with the military on the Harvard Law School campus. All that I was trying to do was to ensure that Harvard Law School could also comply with its anti-discrimination policy, a policy that was meant to protect all the students of our campus, including the gay and lesbian students who might very much want to serve in the military, who might very much want to do that most honorable kind of service that a person can do for her country.

Senator SESSIONS. Well, I would think that that is a legitimate concern, and people can disagree about that, and I respect your view on that. What I am having difficulty with is why you would take the steps of treating the military in a second-class way, to speak to rallies, to send out e-mails, to immediately without legal basis—because the Solomon Amendment was never at any time not in force as a matter of law—why you would do all those things simply to deny what Congress required, that they have equal access as anyone else?

Ms. KAGAN. Senator, the military at all times during my deanship had full and good access. Military recruiting did not go down. Indeed, in a couple of years, including the year that you are particularly referring to, it went up, and it went up because we ensured that students would know that the military recruiters were coming to our campus, because I talked about how important military service was, because our veterans organization and the veterans on campus did an absolutely terrific job, a terrific service to their fellow students in talking to them about the honor of military service.

Senator SESSIONS. Well, I would just say, while my time is running down, I am just a little taken aback by the tone of your remarks because it is unconnected to reality. I know what happened at Harvard. I know you were an outspoken leader against the military policy. I know you acted without legal authority to reverse Harvard's policy and deny the military equal access to campus until you were threatened by the U.S. Government of loss of Federal funds. This is what happened. It——

Chairman LEAHY. The Senator's time has expired, but——

Senator SESSIONS.—is surprising to me——

Chairman LEAHY.—you can respond to that if you want.

Senator SESSIONS.—that it did not happen in that way, and I think if you had any complaint, it should have been made to the U.S. Congress, not to those men and women who we send in harm's way to serve our Nation.

Chairman LEAHY. Especially because of the number of people, including the dean of West Point, who has praised you and said that you are absolutely not anti-military, I will let you respond, take time to respond to what Senator Sessions just said.

Ms. KAGAN. Well, thank you, Senator Leahy. You know, I respect and, indeed, I revere the military. My father was a veteran. One of the great privileges of my time at Harvard Law School was dealing with all these wonderful students that we had who had served in the military and students who wanted to go to the military. And I always tried to make sure that I conveyed my honor for the military, and I always tried to make sure that the military had excellent access to our students. And in the short period of time, Senator Sessions, that the military had that access through the veterans organization, military recruiting actually went up.

But I also felt a need to protect our—to defend our school's very longstanding anti-discrimination policy and to protect the men and women, the students who were meant to be protected by that policy: the gay and lesbian students who wanted to serve in the military and do that most honorable kind of service. And those are the two things that I tried to do, and I think, again, the military always had good access at Harvard Law School.

Chairman LEAHY. Senator Kohl——

Senator SESSIONS. Mr. Chairman, I would just——

Chairman LEAHY. Senator Kohl.

Senator KOHL. Thank you so much, Senator Leahy.

Ms. Kagan, you will testify this week for many hours regarding your philosophy, your approach to judging, as well as many specific legal issues. And yet one question that I suspect most of the American people are most curious about is the simplest but perhaps the most important one. Why do you want to be a Supreme Court Justice? Anyone in your position would be flattered and highly honored to be nominated to the Supreme Court because it is the pinnacle of the legal profession. But whatever this appointment means to you, what is most important to us is what it will mean for the American people.

So please tell us: Why do you want to serve on the Supreme Court? What issues motivate you the most? And what excites you about the job?

Ms. KAGAN. Senator Kohl, it is an opportunity to serve this country in a way that, you know, fits with whatever talents I might have. I believe deeply in the rule of law. The Supreme Court is the guardian of the rule of law. And to be on the Supreme Court and to have that significant and indeed awesome responsibility to safeguard the rule of law for our country is an honor that comes to very few people and is just an opportunity to serve. And, you know, that is—

Senator KOHL. Well, I appreciate that very much, but as we said, it is a tremendous honor clearly to serve and to safeguard the rule of law, and I am sure you feel you are capable of doing that. But what are the issues that bring you here today? What are the things you feel most passionate about? How are you going to make a difference as a Supreme Court Justice from any of the others who might be sitting here instead of you today?

Ms. KAGAN. Well, Senator Kohl, I do think that what motivates me primarily is the opportunity to safeguard the rules of law, whatever the issues that might come before the Court. And I think that that is the critical thing. If you do not have a rule of law, if you do not have an independent judiciary that enforces rights, that enforces the law, then no rights are going to be safe or protected. And I think that has to be first and foremost in every judge's mind, not in the way a legislator might care about some particular issue—I care about the environment or I care about the economy, or something like that. A judge cannot think that way. A judge is taking each case that comes before her and is thinking about how to do justice in that case and is thinking about how to protect the rule of law in that case, how to enforce the law, whether it is the Constitution or a statute.

Senator KOHL. I am sure that those things are true, but Thurgood Marshall cared passionately about civil rights; Justice Ginsburg had a passion for women's rights; your father had a passion for tenants' rights. I am sure you are a woman of passion. Where are your passions?

Ms. KAGAN. Senator Kohl, I think I will take this one case at a time if I am a judge, and I think I will try to evaluate every case fairly and impartially, try to do justice in that case. I think it would, you know, not be right for a judge to come in and say, oh, I have a passion for this and that, and so I am going to, you know, rule in a certain way with regard to that passion.

I am much more a person who I look at an issue before me, a case that might come before me, try to figure out what is right with respect to that issue, with respect to that case, and if you are a judge, of course, that means trying to figure out what is right on the law.

Senator KOHL. Many Americans following the Supreme Court and our hearings may feel like the Supreme Court is remote and has no impact on their day-to-day lives. So tell us how you are going to help the American people should you be confirmed? How are you going to make a difference in their lives?

Ms. KAGAN. Senator Kohl, I think a judge's job is just to decide each case, and it is hard to say exactly how a judge would make a difference in their lives because you just do not know which cases are going to come before you. It is not like a legislature where you

get to kind of craft an agenda and say this year we are going to do the following three things: we are going to work on energy legislation, or we are going to work on civil rights legislation.

You know, for a judge it is case by case by case. that is, I think, the right way for a judge to do a job, is one case at a time, thinking about the case fairly and objectively and impartially. And in the course of doing that, of course, people's lives change because law has an effect on people, and you hope very much that law improves people's lives and has a beneficial effect on our society. That is the entire purpose of law.

But this is not a job, I think, where somebody should come in with a particular substantive agenda and try to shape what they do to meet that agenda. It is a job where the principal responsibility is deciding each case, listening to the parties in that case fairly and objectively, and trying to make a good decision on the law.

Senator KOHL. Well, that is true, but it is also true, as you know, that the Supreme Court decides which cases to take up. There are thousands of cases that come before you—"you" collectively as Justices—to decide on which ones you will hear. So you are not just processing cases as they are placed before you. You and the other Justices decide which cases you are going to judge.

So let me ask you this question: Which ones will motivate you?

Ms. KAGAN. Senator Kohl, you are exactly right that the Supreme Court does decide which cases to hear. It is a highly discretionary docket. There are about 8,000 certiorari petitions every year, and only about 80 of them are now taken by the Supreme Court, so maybe one in a hundred.

But there are some pretty settled standards for deciding which cases to take. The first thing always is if there is a circuit split, because what the Supreme Court does, one of the principal roles of the Supreme Court is to apply uniformity across our country so that if one court says X and another court says Y and another says Z with respect to the same issue, the Supreme Court is the one that says we have to take this case so we can just set a clear rule, state what the law is so that everybody then can follow it across the country. So that is one reason why the Court typically grants cert on a case.

Another set of cases where the Court very typically, often, almost always grants certiorari is when a legislature—excuse me, when another court has invalidated an act of Congress, when a court has said that an act of Congress is unconstitutional. And there the Court almost always says, well, acts of Congress, that is a serious thing to invalidate an act of Congress. You know, for the most part we want to defer to the legislative branch, to the decisions of our elected branches. So that is such a serious thing that the Court is going to take that case.

And then I suppose that there is a third category of cases, which is just extremely important legal issues, you know, cases where there is not a conflict among the courts of appeals and there is no invalidation of an act of Congress, but the case presents some just strikingly significant legal issue that it is appropriate for the Supreme Court to consider and to issue a decision on. And I think, you know, in each year there is some number of those cases.

Senator KOHL. General Kagan, as many of us said yesterday, we appreciate the perspective that you would bring to the Court as someone who has not been a judge. As Senator Feinstein said, that is a refreshing quality. And we appreciate the many thousands of documents that you have made available to us from your work throughout your career. Yet they shed little light on your judicial philosophy or how you would analyze and evaluate problems as a judge. That is why these hearings are so important so that the American people can get a sense of what your judicial philosophy is.

At his confirmation hearings, Justice Alito said, "If you want to know what sort of a Justice I will be, look at what sort of a judge that I have been." And other nominees have said similarly.

Since we do not have a judicial record for you, how should we evaluate you so that we do have an idea as to what kind of a Justice you will be? What decisions or actions can you point to in your past and your career that demonstrate to us what kind of a Justice you will be?

Ms. KAGAN. Senator Kohl, I think you can look to my whole life for indications of what kind of a judge or Justice I would be. I think you can certainly look to my tenure as Solicitor General and the way I have tried to approach and handle that responsibility. I think you can look to my tenure at Harvard Law School and think about the various things I did there and the approach that I took. I think you can look to my scholarship, to my speeches, to my talks of various kinds. So I think it may not be quite so easy as with a person where you can just say, well, read this body of decisions. But I think I have had very much a life in the law, a very public life in the law. Senator Schumer referred yesterday to all my scholarship, to all my talks. And I think, you know, you can look to all those things.

I hope what they will show—and this is for the Committee to determine, but I hope what they will show is a person who listens to all sides, who is fair, who is temperate, who has made good and balanced decisions, whether it is as Solicitor General or whether it is as dean of Harvard Law School or in any other capacity.

Senator KOHL. Well, I think this is a good time to refer to your 1995 law review article in which you criticized Supreme Court—

Ms. KAGAN. It has been half an hour since I heard about that article.

[Laughter.]

Senator KOHL. Here we are. You said back then, "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."

However, more recently, in the meeting that we had, you indicated that you had reconsidered these views, and I think we are getting some indication of that here at the moment.

How do you feel about that reconsideration versus what you said back in 1995?

Ms. KAGAN. Well, Senator Kohl, I do think that much of what I wrote in 1995 was right, but that I in some measure got a bit of the balance off. So what I wrote in 1995 was that the Senate had

an important role to play, that the Senate should take that role very seriously, that the Senate should endeavor to think about what a nominee was—what kind of Justice a nominee would make, and that that was all appropriate. And I also said that I thought it was appropriate for nominees to be as forthcoming as they possibly could be. And I continue to believe that, and I am endeavoring and will endeavor to do so.

I did think, as I suggested earlier, that I got the balance a little bit off. I said then, even then in that 1995 actual, that it was inappropriate for a nominee to ever give any indication of how she would rule in a case that would come before the Court. And I think, too, it would be inappropriate to do so in a somewhat veiled manner by essentially grading past cases. But I do think it is very appropriate for you to question me about my judicial philosophy, on the kinds of sources I would look to in interpreting the Constitution or interpreting a statute, about my general approach to judicial decisionmaking, about the degree to which I would defer or not defer to acts of Congress and the States. I mean, all of those things I think ought to be a subject of debate.

Senator KOHL. Well, back in that 1995 article, you wrote that one of the most important inquiries for any nominee, as you are here today, is to “inquire as to the direction in which he or she would move the institution.” In what direction would you move the Court?

Ms. KAGAN. Senator Kohl, I do think that that is the kind of thing that—all I can say, Senator Kohl, is that I will try to decide each case that comes before me as fairly and objectively as I can. I cannot tell you I will move the Court in a particular way on a particular issue because I just do not know what cases—

Senator KOHL. You said in 1995, “It is a fair question to ask a nominee in what direction”—this is your quote—“would you move the Court.”

Ms. KAGAN. Well, it might be a fair question.

Senator KOHL. I am not going to get necessarily—

[Laughter.]

Senator KOHL. All right. Let us move on. Comparison to other judges. General Kagan, the basic purpose of this hearing is to learn what kind of a person you are and what kind of a justice you will be when you are confirmed. One way that we gain insight into your judicial philosophy is to learn which Justices you most identify with. Yesterday you spoke highly of Justice Stevens and said his qualities are those of a model judge. In addition to Justice Stevens, can you tell us the names of a few current Justices or Justices of the recent past with whom you most identify in terms of your judicial philosophy and theirs?

Ms. KAGAN. Well, I do very much admire Justice Stevens, and I wanted to say so as he left the Court because I think he has done this country long and honorable service, that he has been simply a marvelous Justice in his commitment to the rule of law and his commitment to principle.

That is not say that Justice Kagan—if I am so lucky as to ever be called that, “Justice Kagan”—would be Justice Stevens. It is just to say that I have great admiration for the contribution that Justice Stevens has made over many period of years, obviously, but

Justice Stevens' contribution to the Court is not calculable in years. It is this extraordinary commitment to the rule of law that was there in his first year and is there in his last.

I think it would be just a bad idea for me to talk about current Justices. I have expressed, you know, admiration for many of them.

Senator KOHL. My, oh my, oh my. All right. Let us move on.

[Laughter.]

Senator KOHL. General Kagan, to help us understand what kind of a Justice you would be if you are confirmed, I would like to briefly describe the philosophies of two Justices and ask you which comes closest to your view.

Justice Scalia considers himself to be an originalist who interprets the Constitution by looking solely at the text. He rejects the notion of a living Constitution and only gives the text of the Constitution "the meaning that it bore when it was adopted by the people in 1787."

In contrast, Justice Souter has criticized this purely textual approach as having "only a tenuous connection to reality." He believes that the plain text of the Constitution as written in 1787 does not resolve the conflict in many of today's tough cases; rather, Justice Souter believes judges must look at the words and seek "to understand their meaning for living people."

Which view of the constitutional interpretation comes closer to your view, and why?

Ms. KAGAN. Senator Kohl, I do not really think that this is an either/or choice. I think that there are some circumstances in which looking to the original intent is the determinative thing in a case, and other circumstances in which it is likely not to be. And I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing.

The judges always should look to the text. There is no question that if the text simply commands a result—Senators, you can only be a Senator if you are 30 years old—then the inquiry has to stop. But there are many, many provisions of the Constitution, of course, in which that is not the case. When that is not the case, when the text is subject to one or more interpretations, then often you look to the original intent and you consider that original intent carefully.

An example of that is in the *Heller* case, the gun case, where actually all nine Justices in that ruling looked to the original intent. They had different views of what the original intent was, but all nine of them thought it was important and appropriate to actually think about what the Framers had intended when they wrote that language, which of those two meanings the individual right or the collective right they had in mind.

But in other cases, the original intent is unlikely to solve the question, and that might be because the original intent is unknowable or it might be because we live in a world that is very different from the world in which the Framers lived.

In many circumstances, precedent is the most important thing. One good example of this is an interpretation of the First Amendment where the Court very rarely, actually, says, you know, what did the Framers think about this? The Framers actually had a

much more constricted view of free speech principles than anybody does in the current time. And when you read free speech decisions of the Court, they are packed with reference to prior cases rather than reference to some original history.

So I think it is a little bit case by case, provision by provision by provision, and I would look at this very practically and very pragmatically, that sometimes some approach—one approach is the relevant one and will give you the best answer on the law, and sometimes another.

Senator KOHL. I would like to talk about antitrust a little bit, General Kagan. As you know, it has now been 120 years since the passage of the Sherman Act, our Nation's landmark antitrust law. For more than a century, this measure has protected the principles that we hold most dear: competition, consumer choice, and giving all businesses a fair opportunity to succeed or fail in the free market. So those of us who are strong believers in our free market, capitalistic economic system should also support antitrust law, I believe.

In the words of the Supreme Court in 1972, antitrust law is a "comprehensive charter of economic liberty." Recently, however, we have seen many industries become increasingly concentrated and consumers having fewer choices.

In the last few years, we have seen a series of antitrust cases at the Supreme Court in which the Supreme Court majority has sided with the defendant and as a result made it more difficult for consumers and competitors to bring their antitrust cases. Many are concerned that the cumulative effect of these cases has harmed consumers because they are the ones who will suffer by paying the high prices that result from unchallenged anticompetitive practices. These cases include the *Leegin*, *Twombly*, and *Trinko* cases, among others.

Do you share this concern? Should we be worried that as a result of these cases we have reached a tipping point where the antitrust laws may not be protecting consumers as much as they were intended to do?

Ms. KAGAN. Senator Kohl, I know that several of those cases you mentioned are ones in which there is considerable debate. The *Leegin* case is a good example. The *Leegin* case is one in which the Court overturned a very long-term precedent, many, many decades precedent, maybe 100 years after the *Dr. Miles* precedent. And the Court did so really on the basis of new economic theory, new economic understandings, but there is some question, to be sure, as to how new economic understandings ought to be incorporated into antitrust law. There, the question was how one should look at vertical agreements rather than horizontal agreements, agreements between a manufacturer and a distributor, and the question of whether those agreements are per se uncompetitive or whether they should be subject to more of a rule-of-reason analysis. And I believe the Court had held that they were per se uncompetitive, non-competitive, and per se violative of the antitrust laws and changed that to a rule-of-reason analysis.

But I think on the one hand it is clear that antitrust law needs to take account of economic theory and economic understandings, but it needs to do so in a careful way and to make sure that it does

so in a way that is consistent with the purposes of the antitrust laws, which is to ensure competition, which is, as you say, to be a real charter of economic liberty.

Senator KOHL. Well, let us talk about the *Leegin* case. It was a 5–4 decision in which the Supreme Court in 2007 overturned what you correctly referred to as a 96-year-old precedent and held that a manufacturer setting retail prices no longer automatically violated antitrust law. This means as a practical matter a manufacturer is now free to set minimum retail prices for its products and prohibit discounting.

What do you think of this decision? Do you think it was appropriate for the Supreme Court by judicial fiat to overturn a nearly century-old decision on the meaning of the Sherman Act that businesses and consumers had come to rely on and which had never been altered by Congress?

Ms. KAGAN. Senator Kohl, I think that that decision does present the question that we just talked about, which is, you know, how sort of new economic theory ought to be incorporated into antitrust law, and especially to the extent that the Court has already ruled on a case, to the extent that the Court already has settled precedent in the area, it does raise the question of what it takes to reverse a precedent, a question on which there is a large body of law.

I am not going to grade the *Leegin* decision, but I do recognize very much the concern that some have said about it, which is this question of when you have precedent in the area, when the antitrust laws have been interpreted in one way over time, and new economic understandings, new economic theory might suggest a different approach, how one balances those two things. And I think that is a very important question for the Court going forward.

Senator KOHL. General Kagan, how do you feel about permitting cameras in the Supreme Court for oral arguments?

Ms. KAGAN. Well, Senator Kohl, this is actually something that I spoke about when I was nominated as solicitor general before I was ever nominated to this Court. So I have expressed a view on this question and I recognize that some members of the Court have a different view. And certainly when and if I get to the Court I will talk with them about that question. But I have said that I think it would be a terrific thing to have cameras in the courtroom.

And the reason I think is as when you see what happens there, it's an inspiring site. I guess I talked about this a little bit in my opening statement yesterday. I basically attend every Supreme Court argument. You know, once a month I argue before the Court and when I'm not arguing I'm sitting in the front row watching some member of my office or somebody else argue. And it's an incredible site because all of these—all nine Justices, they're so prepared, they're so smart, they're so thorough, they're so engaged, their questioning is rapid-fire. You're really seeing an institution of government at work, I think, in a really admirable way. And, of course, the issues are important ones. I mean, some of them will put you to sleep, you know, but—

[Laughter.]

Ms. KAGAN—[continuing]. But a lot of them, the American people should be really concerned about and should be interested in. And so I think it would be a great thing for the institution and more

important I think it would be a great thing for the American people.

Having said that, I mean, I have to say, I understand that some of the current justices have different views, have concerns about it, maybe that they think it would actually change the way the Supreme Court arguments do work. And I would, you know, very much want to talk with them about those views. And, on almost every issue I'm open to being persuaded that I'm wrong. But on this one, I have expressed a real view and it's the one I hold is that it would be a great thing for the Court and it would be a great thing for the American people.

Senator KOHL. All right. General Kagan, we all understand that you may be reluctant to comment on cases that will or are likely to come before you. I would like to ask you a question about a case that the Supreme Court will certainly never see again, the 2000 Presidential election contest between President Bush and Vice President Gore. Many commentators see the *Bush v. Gore* decision as an example of judicial improperly injecting itself into a political dispute. What is your view of that, of the *Bush v. Gore* decision and was the Supreme Court right to have gotten involved in the first place, General Kagan?

Ms. KAGAN. Senator Kohl, I think I might disagree that it's the kind of decision that will never come before the Court again. Of course, you're right that "it" will never come before the Court again. But the question of when the Court should get involved in election contests in disputed elections is, I think, one of some magnitude that might well come before the Court again. And if it did, you know, I would try to consider it in an appropriate way. And, you know, reading the briefs and listening to the arguments and talking with my colleagues. I think it is an important—an important question and a difficult question about how an election contest that at least arguably the political branches can't find a way to resolve themselves; what should happen and whether and when the Court should get involved. It's hard to think of a more important question in a Democratic system and it may be a tougher one.

Senator KOHL. Do you believe when these hearings are over this week, the American people should have a pretty good idea of what your judicial philosophy is?

Ms. KAGAN. I hope that they will, Senator Kohl. And as we go around the room and people talk to me about the way in which I would decide cases, the approach I would use, just the way you asked me about, you know, would I just look to the original intent, or would I look to a broad variety of sources and when and where, I hope that the American people will get a sense of how I would approach cases.

Senator KOHL. Thank you.

Senator Leahy. Senator, as I mentioned to some of the Senators up here, I'm going to yield to Senator Hatch for his round and Senator Feinstein for her round. We will then take a 10-minute break. We are trying to—if this works right, to break for lunch around one. We have a vote and I'm double-checking to make sure whether it is set for 2:15. If that's the case, we would vote at—several of us would vote at the desk and come back immediately so that we

could start about 2:20 after lunch. But after these two Senators ask their questions, we'll break for 10 minutes.

Senator HATCH. Well, thank you, Mr. Chairman. You are doing well. Relax as much as you can.

I am going to ask her a series of questions, some of which just ask for yes or no, to the extent that you can do that I would appreciate it. But, you can do whatever you want to do; how's that.

General Kagan, I want to begin by discussing freedom of speech in general and campaign finance reform in particular. As you know, the first word in the First Amendment is "Congress." Now, I know that the Supreme Court has said that the First Amendment also limits state government. But do you agree that America's founders were first concerned about setting explicit limits on the Federal Government in areas such as freedom of speech?

Ms. KAGAN. There's no question that the First Amendment limits what Congress and what other state actors, executive officials can do.

Senator HATCH. OK. The Supreme Court has said that the First Amendment protects some types of speech more strongly than others and even that it does not protect some types of speech at all. Do you agree that the Supreme Court has held repeatedly that political speech, especially during a campaign for a political office is at the core of the First Amendment and has the First Amendment's strongest protection?

Ms. KAGAN. Political speech is at the core of the First Amendment. I think that that has been said many times by the Court.

Senator HATCH. Yeah, I think one of the great examples, University San Francisco County Democratic Central Committee back in 1989 really came out very strongly on that.

When you worked in the Clinton Whitehouse, you wrote a memo in October 1996 in which you wrote this: "It is unfortunately true that almost any meaningful campaign finance reform proposal raises constitutional issues. This is a result of the Supreme Court's view which I believe to be mistaken in many cases that money is speech and that attempts to limit the influence of money in our political system therefore raise First Amendment problems."

Now, as I understand it, President Harry Truman argued as far back as 1947 that a ban on independent expenditures would be a "dangerous intrusion on free speech."

The notion that spending and speech are necessarily related is hardly new and hardly confined to the Supreme Court or even one political party. Do you recognize—excuse me, do you reject the idea that spending is speech?

Ms. KAGAN. Senator Hatch, the quote that you read I believe was not written by me in my voice. It was a set of talking points that I prepared for—I'm not sure if it was for the President—for President Clinton or if it was for the press office, but it was meant to reflect the administration's position at the time. The administration was trying very hard to Enact the McCain/Feingold Bill and those talking points were in service of that objective and so they weren't, you know, my personal constitutional or legal views or anything like that, but was just a set of talking points that I prepared for, I think it was the press office. It might have been for the president himself.

Senator HATCH. Well, you were listed as the creator.

Ms. KAGAN. I created a lot of talking points in my time.

[Laughter.]

Senator HATCH. OK. OK. I accept that.

I want to turn to the Supreme Court's decision in *Citizens United v. FEC* for a little bit. I've seen media reports that in a meeting with at least one of your colleagues on this Committee you said that you believed the *Citizens United* case was wrongly decided; is that true?

Ms. KAGAN. Senator Hatch, I argued the case. Of course, I walked up to the podium and I argued strenuously that the bill was constitutional.

Senator HATCH. But I'm asking about your belief.

Ms. KAGAN. And over the course—at least for me, when I prepare a case for argument, the first person I convince is myself. Sometimes I'm the last person I convince. But the first person I convince is myself and so, you know, I did believe, that we had a strong case to make. I tried to make it to the best of my ability.

Senator HATCH. OK. The statute being challenged in this case prohibited different types of for-profit corporations, non-profit corporations and labor unions from using their regular budget to fund speeches by candidates who are election issues within 30 to 60 days of a primary or a general election. They could form separate organizations called "PAC"s, political action committees, to do so, but they did not have the freedom to use their own money directly to speak about candidates or issues as they saw fit.

Now, I know there's a lot of loose rhetoric about the decision in this case allowing unlimited "spending on elections." I assume that is to conjure up images of campaign contributions or collusion. But just to clarify the facts, the statute in the *Citizens United* case involved what are called "independent expenditures" or money spent by corporations, non-profit groups, or unions completely on their own to express their political opinions. Now, this case had nothing to do with contributions to campaigns or spending that is coordinated or connected in any way with candidates or campaigns; isn't that true?

Ms. KAGAN. You're right, Senator Hatch, that this was an independent expenditure case rather than a contributions case.

Senator HATCH. Right. When President Obama announced your nomination he said that you believed that "in a democracy powerful interests must not be allowed to drown out the voices of ordinary citizens." Virtually all of the rhetoric surrounding this case is focused on large, for-profit corporations. But the law in question and, of course, this case affected much more than that. But you know in that case a non-profit organization sued to defend its freedom of speech rights. Do you agree that many people join or contribute to non-profit advocacy organizations because they support the positions and message of those groups and because those groups magnify the voice of their members and their contributors?

Ms. KAGAN. I do agree that civic organizations are very important in our society, Senator.

Senator HATCH. These aren't just civic organizations. I'm talking about unions and businesses and non-profits and profits and partnerships and S-corporations and a lot of others.

Ms. KAGAN. Yes. You're right that the statute that the government defended in the Citizens United case was a statute that applied to many different kinds of corporations.

Senator HATCH. That's right.

Ms. KAGAN. And one of the things that the government suggested to the Court in the course of its arguments was that one possibly appropriate way to think about the case might be to treat those different situations differently. But the statute itself applied to many different kinds of organizations.

Senator HATCH. OK. Now, President Obama called the Citizens United decision, "a victory for powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

Now, as I said the statute applied to for-profit corporations, non-profit corporations, and labor unions. Do you believe that—let's just take unions, do you believe that they are "powerful interests that drown out the voices of everyday Americans"?

Ms. KAGAN. Senator Hatch, what the government tried to argue in that case was that Congress had compiled a very extensive record about the effects of these independent expenditures by corporations generally and by unions generally on the political process. And that what the Congress had found was that these corporations and unions had a kind of access to Congressmen, had a kind of influence over Congressmen that changed outcomes, that was a corrupting influence on Congress. And that was what the many, many, many thousand-page record that was created before Congress enacted the McCain-Feingold Bill revealed and that's what we tried to argue to the Court.

Senator HATCH. I understand the argument. But the statute banning political speech that was challenged in Citizens United also applied to small S-chapter corporations that might have only one shareholder. There are more than four and a half million S-corporations or S-chapter corporations in America. We have 56,000 in my home state of Utah alone. These are small companies that want the legal protections that incorporating provides. These are family farmers, ranchers, mom and pop stores, and other small businesses. Before the Citizens United decision these small family businesses could be barred from using their regular budget for say a radio program or even a pamphlet opposing their Congressman for his vote on a bill if it was that close to an election.

Now, do you believe the Constitution gives the Federal Government this much power?

Ms. KAGAN. Senator Hatch, Congress determined that corporations and trade unions generally had this kind of corrupting impact on—

Senator HATCH. I'm talking about all of these four and a half million S—small corporations as well.

Ms. KAGAN. Senator Hatch, of course, in the Solicitor General's Office we defend statutes and Congress determined—

Senator HATCH. No, no, I understand that.

[Simultaneous conversation.]

Senator HATCH. Let me ask my questions the way I want to.

Senator Leahy. Then ask the question.

Senator HATCH. I will. I'm going to be fair. I intend to be. And you know that after 34 years.

[Laughter.]

Senator HATCH. Go ahead, keep going, did you have something else you wanted to add?

Ms. KAGAN. No, go ahead.

Senator HATCH. OK. We have to have a little back and forth every once in a while or this place would be boring as hell, I'll tell you.

[Laughter.]

Ms. KAGAN. And it gets the spotlight off me, you know, so I'm all for it. Go right ahead.

Senator HATCH. I can see that. And by the way, I've been informed that hell is not boring. So?

[Laughter.]

Senator HATCH.—I can imagine what I mean by that.

Ms. KAGAN. Just hot.

Senator HATCH. OK. I have the current volume, the current volume of the Code of Federal Regulations. Now, this is governing Federal campaign finance. It's 568 pages long, this code. This does not include another 1,278 pages of explanations and justifications for these regulations. Nor does it include another 1,771 Federal Election Commission advisory opinions, even more enforcement rulings and still more Federal statutes.

Now, let me ask you this, do you believe that the Constitution allows the Federal Government to require groups such as non-profit corporations and small S-chapter corporations to comb through all of this? This is just part of it. I have thousands of other pages of regulations—likely hire an election law attorney and jump through all the hoops of forming a political action Committee with all of its costs and limitations simply to express an opinion in a pamphlet or in a radio or a movie or just to criticize their elected officials? Do you really believe the constitution allows that type of requirement?

Ms. KAGAN. Well, Senator Hatch, I want to say, Senator Hatch you should be talking to Senator Feingold, but I won't do that.

Senator Hatch, Congress made a determination here. And the determination was that corporations and unions generally had this kind of corrupting influence on Congress when they engaged in?

[Simultaneous conversation.]

Senator HATCH. But you acknowledge that it covered all these other smaller groups and all these other groups that have—should have a right to speak as well?

Ms. KAGAN. The Solicitor General's Office, of course, defends statutes as they're written. And Congress made the determination broadly that corporations and trade unions had this corrupting influence on Congress. And in the Solicitor General's office we in the Solicitor General's office, as other Solicitor Generals offices have done, vigorously defended that statute as it was written.

Senator HATCH. I understand.

Ms. KAGAN. On the basis of the record that was made in Congress, this, I think it was in a 100,000-page record about the corrupting influence of independent expenditures made by corporations and unions. Now, the Court rejected that position. The Court

rejected that position in part because of what you started with. You said, "Political speech is of paramount First Amendment value" it's no doubt the case. And the Court applied a compelling interest standard and the Court rejected the position. But the position that we took was to defend the statute to apply broadly.

Senator HATCH. No, no, I have no problem with that because that was your job. But I'm getting into some of the comments by some of our colleagues, by the President and others about how wrong this case was. But I don't think it was wrong at all.

Your 1996 Law Review article about private speech and public purpose emphasized the need to examine the motive behind speech restrictions. Since you've already written about this, I would like to know whether you personally agree with the Supreme Court in the Citizens United decision that "speech restrictions based on the identity of one speaker are all too often simply a means to control content;" do you agree with that?

Ms. KAGAN. Senator Hatch, speaker-based restrictions do usually get strict scrutiny from the Supreme Court and for the reason that you suggest which is a concern about why it is that Congress is saying one speaker can speak and not another.

I had a very interesting colloquy with Justice Scalia at the Court on this question.

Senator HATCH. I understand.

Ms. KAGAN. Justice Scalia said to me, and it's a powerful argument, he said, "Well, you know, if you let Congress think about these things Congress is going to protect incumbents." That that might be a reason for Congress to say that certain groups can make independent expenditures and others not.

Senator HATCH. Well, one part of Congress would protect incumbents. The others would be trying to throw them out. I mean, that's what this system is.

[Laughter.]

Ms. KAGAN. But I said to Justice Scalia and I think it's true with respect to the McCain-Feingold Bill that all the empirical evidence actually suggests—I think my line was, "this is the most self-denying thing that Congress has ever done." Because all the empirical evidence suggests that these corporate and union expenditures actually do protect incumbents and notwithstanding that in the McCain-Feingold Bill Congress determined that it was necessary in order to prevent corruption to prevent those expenditures. But, you know, the Court said no.

Senator HATCH. Well, tell that to Blanch Lincoln how incumbents are protected.

In this case the speech in which Citizens United—I think about Blanch Lincoln, one of the nicer people around here, who had \$10 million spent against her by the unions just because they disagreed with her on one or two votes. I mean, you know, let me keep going now.

In this—and I'm enjoying our colloquy together.

Ms. KAGAN. Me too.

Senator HATCH. In this—I hope so. In this case, the speech in which Citizens United wanted to engage was in the form of a movie about a Presidential candidate, Hillary Clinton, at the time, the Deputy Solicitor General first argued the case. The Deputy Solic-

itor General from your office. He told several Justices that if a corporation of any size, a union, or even a non-profit group did not have a separate PAC, the Constitution allows to Congress to ban publishing, advertising, or selling, not only a traditional print book that criticized a political candidate, but an electronic book available on devices such as the Kindle. Even a 500-page book that had only a single mention of a candidate, not only print or electronic books, but also a newsletter, even a sign held up in Lafayette Park.

Now, isn't that what under that argument at that time your office admitted that at first oral argument that at the end of the day the Constitution allows Congress to ban them from engaging in any political speech in any of those forums?

Ms. KAGAN. Senator Hatch—

Senator HATCH. I'm not blaming you for the prior argument nor am I really blaming the person who was trying to defend this statute. I'm just saying that's what happened.

Ms. KAGAN. Senator Hatch, the statute which applies only to corporations and unions when they make independent expenditures, not to their PACs. The corporations and unions when they make independent expenditures within a certain period of an election the statute does not distinguish between movies and anything else.

Senator HATCH. Well, as you can see, I'm finding a certain amount of fault with that. And that's why the Citizens United case, I think, is a correct decision. The Court has been criticized, including just yesterday, in this hearing for not deciding the Citizens United case on narrower statutory grounds. But according to some media accounts such as the National Journal, it was your office's admission that the statute had much broader Constitutional implications that prompted the Court to ask for a second argument in this case.

Now, that's where you come in. You reargued the case last September, and I believe that it was Justice Ginsberg who asked whether you still believed that the Federal Government may ban publication of certain books at certain times? You said that the statute in question covered books, but that there might be some legal arguments against actually applying it to books. I certainly agree with you on that.

But didn't you argue that the Constitution allows the Federal Government to ban corporations, union, and non-profit groups from using their regular budget funds to publish pamphlets that say certain things about candidates close to an election. You did say that?

Ms. KAGAN. Senator Hatch, we were of course—I was defending the statute?

Senator HATCH. No, I understand.

Ms. KAGAN.—as it was written and the statute as it was written applies to pamphlets as well as to the movie in the case and we made a vigorous argument that the application of that statute to any kinds of classic electioneering materials, not books, because they aren't typically used to election year. But that the application of the statute to any kinds of classic electioneering materials was in fact constitutional and the Court should defer to Congress's view of the need—

Senator HATCH. I accept that. I accept that you made that argument and that you were arguing for statutory enactment by the Congress.

But as I mentioned, you said that the Federal Government could ban certain pamphlets at certain times because pamphlets are, as you put it, "pretty classic electioneering."

You said that pamphleteering is classic political activity with deep historical roots in America. Certainly some of the most influential pieces of political speech in our Nation's history have been pamphlets such as Thomas Payne's Common Sense.

Since in the Citizens United case you were defending amplification of that statute to a film, would you also consider films as classic electioneering?

Ms. KAGAN. Senator Hatch, I'm trying to remember what our brief said, but, yes, I think the way we argued the case?

Senator HATCH. You took that position.

Ms. KAGAN.—it applies to films as well.

Senator HATCH. OK.

Ms. KAGAN. Of course.

Senator HATCH. All right. A pamphlet is often defined at least in the dictionary as an unbound, printed work, usually with a paper cover or a short essay or treatise. In another First Amendment context involving the establishment clause, Justice Kennedy criticized the idea that application of the First Amendment depended on such things as the presence of a plastic reindeer or the relative placement of poinsettia. I believe he called that a "juris prudence of minutia". I thought it was an interesting comment myself.

Do you believe that the protection of the First Amendment should depend on such things as the stiffness of a cover, the presence of a binder, or the number of words on a page? Now, you can give an opinion on that since that case is decided.

Ms. KAGAN. Senator Hatch, what we did in the Citizens United case was to defend the statute as it was written which applied to all electioneering materials with the single exception of books which we told the Court were not the kind of classic electioneering materials that posed the concerns that Congress has found to be posed by all electioneering materials of a kind of classic kind. Books are different. Books, you know, nobody uses books in order to campaign.

Senator HATCH. That's not true. That's not true. And you did say that books are probably covered, but you didn't think they would—

Ms. KAGAN. I thought that I said the argument was that they were covered by the language of the statute, but that a good constitutional challenge, as applied constitutional challenge could be made to it because the purposes that Congress had in enacting the statute, which were purposes of preventing corruption, would not easily have applied to books. But would have applied to all the materials that people typically use—

Senator HATCH. I understand.

Ms. KAGAN.—in campaigns.

Senator HATCH. I understand. In 1998 when you served in the Clinton Administration the Federal Election Commission sued Steve Forbes and his company that publishes Forbes Magazine. I

have a copy of the Forbes Magazine right here and I think most people are familiar with it.

Steve Forbes had taken a leave from his position with the company to run for president but continued writing columns on various issues. The FEC used the same statute that you defended in the Citizens United case to say that these columns were illegal corporate contributions to Forbes' Presidential campaign. And I know that the FEC later decided to terminate the lawsuit. And I know that this Forbes lawsuit involved alleged campaign contributions rather than independent expenditures. But the same statute was involved and I use this as an example to show what can happen on the slippery slope of the Federal Government regulating who may say what and when about the government.

Now, the *Forbes* case involved a magazine. The case you argued involved a movie. Your office admitted that the statute could apply to books and newsletters. You admitted that it could apply to pamphlets.

Now, all of this involves the politic speech that is the very heart of the First Amendment, whether engaged in by for-profit corporations, nonprofit corporations, tiny S chapter corporations, or labor unions.

Do you really believe—now, this is your personal belief. Do you really believe—and I understand you represented the government. But do you really believe that the Constitution allows the Federal Government this much power to pick and choose who may say what, how and when about the government?

Ms. KAGAN. Senator, putting the *Citizens United* case to the side, I think that there are extremely important constitutional principles that prevents the government from picking and choosing among speakers, except in highly unusual circumstances, with hugely compelling interests.

Senator HATCH. Well, what is highly unusual about a book or a pamphlet or a movie?

Ms. KAGAN. Senator, as I said, putting *Citizens United* to the side, I argued that case. I argued it on behalf of the government, because Congress had passed a statute. We are——

Senator HATCH. But you do believe it was wrongly decided, too, do you not?

Ms. KAGAN. I'm sorry?

Senator HATCH. You did take the position it was wrongly decided.

Ms. KAGAN. I absolutely said, Senator Hatch, that when I stepped up to the podium as an advocate, I thought that the U.S. Government should prevail in that case and that the statute should be upheld.

I wanted to make a clear distinction between my views as an advocate and any views that I might have as a judge. I do think *Citizens United* is settled law going forward. There is no question that it's precedent, that it's entitled to all the weight that precedent usually gets.

I also want to make clear that in any of my cases as an advocate, and this is *Citizens United* or any of the other cases in which I have argued, I'm approaching the things—the cases as an advocate

from a perspective of, first, the U.S. Government interests and, also, it's a different kind of preparation process.

You don't look at both sides in the way you do as a judge.

Senator HATCH. I got that. I got that. I do not have any problem with that. All I am saying is that we have had arguments right here in this Committee that this is a terrible case that upset 70 years of precedent. And I have heard all these arguments and they are just inaccurate, and that is what we are establishing here.

When President Obama criticized the *Citizens United* decision in the State of the Union Address, with the Supreme Court justices sitting there, he said that it would allow foreign corporations to fund American elections. And others have said the same thing.

Do you agree that this case involved an American nonprofit organization, not a foreign corporation; that this case involved independent political speech, not campaign contributions; and, that the separate laws regarding political spending by foreign corporations and campaign contributions by anyone are still enforced today?

Ms. KAGAN. Senator Hatch, this case did, as you say—these parties were domestic, nonprofit—was a domestic, nonprofit corporation.

Senator HATCH. All right. Well, there was no foreign corporation involved. That is one of the points I am trying to establish. And it was a misstatement of the law. I am not here to beat up on President Obama. I just want to make this point. And yet, colleagues have just accepted that like that is true. It is not true.

In *First National Bank of Boston v. Bellotti*, the Supreme Court held, in 1978, more than 30 years ago, that, quote, "The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster," unquote.

Bellotti was decided just 2 years after the landmark case of *Buckley v. Valeo*. In *Bellotti*, the Court recognized that corporations have a First Amendment right to engage in political speech.

In that decision, Chief Justice Berger wrote an interesting concurrence in order to, as he put it, quote, "raise some questions likely to arise in the future," unquote.

These questions included that large corporations would have an unfair advantage in the political process. He had some amazing insight there, I think, because people are making just such arguments today.

That case also involved the First Amendment protection of the press that Berger noted how the government historically has tried to limit what may be said about it. He concluded, quote, "In short, the First Amendment does not belong to any definable category or persons or entities. It belongs to all who exercise its freedoms," unquote.

Do you agree with that?

Ms. KAGAN. I'm sorry, Senator Hatch.

Senator HATCH. Do you agree with Justice Berger's comment there?

Ms. KAGAN. Would you read that again? I'm worry.

Senator HATCH. Sure. I would be glad to. He said that, "In short, the First Amendment does not belong to any definable category or persons or entities. It belongs to all who exercise its freedoms."

Ms. KAGAN. Senator Hatch, the First Amendment protects all of us and grants all of us rights.

Senator HATCH. Right. And they are important rights. In *Citizens United*—see, I get a little tired of people on the left saying it was a terrible case, when, frankly—let me make this point.

In *Citizens United*, the Court listed at least 25 precedents dating back almost 75 years. Here is a list of them right here. Quoting generally, that the First Amendment protects corporate speech and, specifically, that it protects corporate political speech.

Now, I would like to put these cases in the record at this point.

Chairman LEAHY. Without objection.

[The information referred to appears as a submission for the record.]

Senator HATCH. On the other side of the precedential scale was a single 1990 decision in *Austin v. Michigan Chamber of Commerce*. As the Court said in *Citizens United*, no other case had held that Congress may prohibit independent expenditures for political speech based on the identity of the speaker.

In other words, *Austin* was the aberration, the exception, the break in the Court's consistent pattern of precedence. And many folks have—Mr. Chairman, I only need about 30 seconds more just to finish here.

Chairman LEAHY. Thirty seconds more.

Senator HATCH. Many folks have attacked the decision, saying it is a prime example of, quote, "conservative judicial activism," unquote, because it ignored precedent by overruling *Austin*.

But by overruling that one precedent, was not the Court really reaffirming a much larger group of previous decisions, including *Bellotti*, that, as we discussed, affirmed that corporations have a First Amendment right to engage in political speech, and that includes all these small corporations? That sounds like the Court is committed to precedent, not rejecting it.

I thank my Chairman for allowing me to make that last comment. But I get a little tired of people misstating what *Citizens United* is all about.

Ms. KAGAN. Senator Hatch, I think that the—

Senator HATCH. And I have appreciated your comments here today.

Ms. KAGAN. Senator Hatch, I think that there was a significant issue in the case about whether *Austin* was an anomaly, as you quoted, or whether it was consistent with prior precedent and consistent with subsequent precedent, as well. And, certainly, the government argued strenuously that *Austin* was not an anomaly, although the Court disagreed and held that it was.

Chairman LEAHY. Senator Feinstein is recognized. And then after that round of questioning, we will take a short break.

Senator FEINSTEIN.

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

I just want to clear up one thing before I go on. It is my understanding that you specifically told the Supreme Court that books

have never been banned under Federal campaign finance laws and likely could not be.

Here is a quote. "Nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem." Is that not correct?

Ms. KAGAN. Yes, that's exactly right, Senator Feinstein.

Senator FEINSTEIN. So it is clear to me that the campaign finance laws invalidated by the Supreme Court in *Citizens United* were intended to prevent corporations from spending limitless dollars to elected candidates to do their bidding, not to prevent authors from publishing their books.

Ms. KAGAN. We said that the act ought not to be applied. It had never been applied to books. We thought it never would be applied to books. And to the extent that anybody ever tried to apply it to books, what I argued in the Court is that there would be a good constitutional challenge to that, because the corrupting potential of books is different from the corrupting potential of the more typical kinds of independent expenditures.

Senator FEINSTEIN. Thank you very much. Now, I want to just have a little heart-to-heart talk with you, if I might. I come at the subject—

Ms. KAGAN. Just you and me.

Senator FEINSTEIN. Just you and me and nobody else.

[Laughter.]

Chairman LEAHY. Don't anybody in the room listen.

Senator FEINSTEIN. I come at the subject of guns probably differently than most of my colleagues. I think I've seen too much.

I wrote the assault weapons legislation. I found the body of Harvey Milk. I became mayor as a product of an assassination.

I have watched as innocent after innocent has been killed, the latest of which, in my State, is 2 weeks ago, a 6-year-old, in a Spiderman costume, eating an ice cream bar in the kitchen, was killed by a bullet coming through the room.

I can show you in Los Angeles where a woman ironing, was killed the same way. A youngster playing the piano, killed the same way, bullet right through the walls. He is a paraplegic today.

Now, you answered Senator Leahy's question that you believe that both *Heller* and *McDonald* are binding precedent and entitled to all respect to binding precedent in any case. "That is settled law," you said.

These were 5–4 closely decided decisions in both cases. California is not Vermont. California is a big state, with roiling cities. It is the gang capital of America. The State has tried to legislate in the arena.

As I understand *McDonald*, it is going to subject virtually every law that a State passes in this regard to a legal test. And that causes me concern, because States are different. Rural States have different problems than large metropolitan States do.

We probably have as many as 30 million people living in cities, where the issue of gangs is a huge question. So here is my question to you.

Why is a 5–4 decision in two quick cases, why does it throw out literally decades of precedent in the *Heller* case, in your mind? Why do these two cases become settled law?

Ms. KAGAN. Senator Feinstein, because the Court decided them as they did and once the Court has decided a case, it is binding precedent.

Now, there are various reasons for why you might overturn a precedent; if the precedent proves unworkable over time or if the doctrinal foundations of the precedent are eroded or if the factual circumstances that were critical to why the precedent—to the original decision, if those change.

But unless one can sort of point to one of those reasons for reversing a precedent, the operating presumption of our legal system is that a judge respects precedent, and I think that that's an enormously important principle of the legal system.

It defers to prior justices or prior judges who have decided something and that it's not enough, even if you think something is wrong, to say, "Oh, well, that decision was wrong, they got it wrong." The whole idea of precedent is that's not enough to say a precedent is wrong.

You assume that it's right and that it's valid going forward.

Senator FEINSTEIN. Let us go to the 1973 case of *Roe v. Wade*, the 1992 case of *Planned Parenthood v. Casey*, the 2000 case of *Stenberg v. Carhart*. In those cases, the Supreme Court clearly stated, and I quote, "Subject to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate and even prescribe abortion, except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother."

That is 30 years of case law. But in the 2007 case of *Carhart v. Gonzalez*, the Court issued a 5–4 decision upholding a statute that did not contain an exception to protect the health of the mother for the first time since *Roe* was passed in 1973.

So let me ask you, clearly. In a memo that you wrote in 1997, you advised President Clinton to support two amendments to a late stage abortion bill to ensure that the health of the mother would be protected.

Here is the question. Do you believe the Constitution requires that the health of the mother be protected in any statute restricting access to abortion?

Ms. KAGAN. Senator Feinstein, I do think that the continuing holding of *Roe* and *Doe v. Bolton* is that women's lives and women's health have to be protected in abortion regulation.

Now, the *Gonzalez* case said that with respect to a particular procedure, that the statute Congress passed, which passed a statute without a health exception and with only a life exception, was appropriate because of the large degree of medical uncertainty involved—

Senator FEINSTEIN. Because of the procedure.

Ms. KAGAN. Because of the procedure. But with respect to abortion generally, putting that procedure aside, I think that the continuing holdings of the Court are that the woman's life and that the woman's health must be protected in any abortion regulation.

Senator FEINSTEIN. Thank you very much. Let me move on to executive power, if I might. Some on the left have criticized your views on executive power, finding fault with your testimony during your 2009 confirmation hearing to be solicitor general, in which you

agreed with Senator Lindsey Graham that the law of armed conflict provides sufficient legal authority for the President to detain individuals suspected of terrorist ties without trial.

You also agreed that the courts have a role in determining whether a particular detention is lawful, and that substantive due process is required before an individual may be detained.

You agreed during the aforementioned hearing that an individual suspected of financing Al Qaeda in the Philippine was, quote, “part of the battlefield,” end quote, for the purpose of capture and detention.

Could you elaborate on the scope of the President’s authority to detain individuals under the law of armed conflict?

Ms. KAGAN. Senator Feinstein, the conversation that Senator Graham and I had, and I believe, in that same hearing, you asked a similar question, starts with the *Hamdi* case, where the Supreme Court said that the AUMF, the authorization for the use of military force, which is the statute that applies to our conflict with Iraq and Afghanistan, that the AUMF includes detention authority.

And *Hamdi* said that the law of war typically grants such authority in a wartime situation and interpreted the AUMF consistent with the law of war understanding.

Now, the question of exactly what the scope of that detention authority is has been and continues to be the subject of a number of cases. And in the role of Solicitor General, I’ve participated in some of those issues.

The Obama Administration has a definition of enemy belligerents that it believes are subject to detention under the AUMF and as approved by *Hamdi*, and the Solicitor General’s office has used that definition of an enemy belligerent, which is a person who is part of or substantially supports the Al Qaeda and Taliban forces.

That’s the definition that the Solicitor General’s office has advocated, as has the rest of the Justice Department.

Now, there are a number of uncertain questions in this area that almost surely will come before the Supreme Court, questions about whether the scope of the definition that the Obama Administration has been using is appropriate, whether it is too broad, whether it is too narrow; where the battlefield is; what counts as—do you have to be a member of a fighting force or is it sufficient that you support the fighting force, and, if so, what kind of support might give rise to detention.

So all of those questions are, I think, questions that might come before the Court in the future. The Obama Administration has taken views as to some of them, not all of them, in cases that have been litigated over the past couple of years.

But there are certainly quite a number of questions that will come before the Court about the exact scope of detention authority.

Senator FEINSTEIN. So if I understand you correctly, you would say that the executive’s power in this area is really limited by the specifics of the actual situation, if I understand what you are saying.

Ms. KAGAN. Well, Senator Feinstein—

Senator FEINSTEIN. And that the President does not have an overriding authority here.

Ms. KAGAN. Senator Feinstein, the way that the Solicitor General's office has argued these cases, and the entire Department of Justice has, is on the basis of statutory authority, is on the basis of the AUMF, the authority for the use of military force.

And we have actually never argued that Article 2 alone would provide such authority. And the question you raise really—the usual framework that people use when they think about this question is something called *Youngstown*, of course, Justice Jackson's opinion in *Youngstown*, and he sets forth three different zones.

He says, well, in one zone, the President can act in accordance with Congressional authority, and that is the easiest for a court to validate; to say, "Look, Congress and the President are acting together, the President is acting in specific accordance with what Congress has told the President to do. The courts should give real deference to that."

Senator FEINSTEIN. Let me stop you here, because it is the three-pronged test, and we have discussed this in almost every Supreme Court confirmation hearing now.

The concern is where there is not legislation or when, the third prong, when legislation may say the opposite. Can the President exceed that legislation and how strong is his authority? You say it is not the commander in chief authority, it is the AUMF authority that prevails.

Do I understand that correctly?

Ms. KAGAN. Yes. Essentially, what the Solicitor General's office and the Department of Justice have been arguing in these last 2 years is that we're in zone one, which is where the executive is acting with Congress' authorization, rather than in zone two, where the executive is acting and Congress hasn't said anything, or zone three, where the executive is acting as against Congress' statement to the contrary.

So those would present very different issues. Whether the President has authority to detain where Congress has not said anything or, still yet, whether the President has the authority to detain where Congress has specifically deprived him of that authority, that would be a very different question, indeed.

Senator FEINSTEIN. Let us talk about that for a moment, because that is something I had something to do with, and, that is, expanding the exclusivity portion of the Foreign Intelligence Surveillance Act to say that the executive authority may not exceed in statute the confines of this act.

Would you find that as binding?

Ms. KAGAN. Well, Senator Feinstein, I would have to take a look at the statute. But I would say that the circumstances in which the President can act as against specific Congressional legislation, where the President can act despite Congress, are few and far between, and I think that that's what Justice Jackson said in *Youngstown* and I think that that's what mostly the Court has agreed with, few and far between.

Now, are they nonexistent? Well, suppose Congress said something like "We're going to take away the President's pardon power," a power that's specifically committed to the President by Article 2, I think that that would be a hard case.

I think a court might say, "Well, notwithstanding that Congress tried to do that, Congress can't do that. The President has that power and it doesn't matter what Congress says about the matter."

But those are very few and far between. For the most part, the presumption is that the President, if told by Congress that he can't do something, can't do something.

Senator FEINSTEIN. Let me ask this. Does the President, in your view, have the authority to detain American citizens without criminal trial if they are suspected of conspiring to aid terrorists of participating in acts of terrorism?

Now, does your answer then depend on whether the individual was arrested in the United States or abroad?

Ms. KAGAN. Well, Senator Feinstein, this will, I think, very much be a case that may come before the Court, is the question of how detention authority, whether detention authority exists with respect to people who are apprehended in the United States.

The Court has not addressed that question so far. The Court has addressed, in *Hamdi*, only a person who was actually captured on the battlefield. The Court has left open the question of whether detention authority might exist for a person captured outside of the battlefield, but outside of the United States, and, also, has left open the question of whether detention authority, under the AUMF now I'm talking about, would exist as to a person captured in the United States.

There is a fourth circuit decision on that subject. It's the *Al-Marri* case, where the court was very closely divided, where a slim majority of the court stated that the court—that there was detention authority under the AUMF to detain a person in military custody captured in the United States.

That case was on its way to the Supreme Court, but never got there. It was mooted out because the person was transferred into civilian custody—excuse me—into the regular criminal justice system. So that case did not come before the Court in *Al-Marri*. But it's very much a live possibility.

Senator FEINSTEIN. Right. And we have just had a case by a district court judge in California, as of March 31st of this year, the *al-Haramain* case, and Senator Specter and I have discussed this.

It is my understanding that what the judge did there was find the terrorist surveillance program illegal and essentially say that the plaintiff was entitled to damages from the government.

So I guess the question might be whether that case goes up to the Supreme Court or not. But clearly, the judge here dealt with something that was outside of the scope of law, which was the terrorist surveillance program, and made a finding that it was, in fact, illegal.

Ms. KAGAN. I believe that that is what the judge said in that case, and that case is still pending, of course, and might come before the Court.

I think that the appropriate analysis to use with respect to that case or many others in this area would be the *Youngstown* analysis, which makes very important what Congress has done. Where Congress authorizes the President, it's one thing; where Congress has said nothing, still another; where Congress has specifically barred the activity in question, you're talking about a much, much

higher bar for the President to jump over in order for the action to be found constitutional.

Senator FEINSTEIN. Thank you very much. If I might, let me go on to an environmental issue in the commerce clause. And as we all know, the commerce clause is used to legislate many different matters.

I think the *Lopez* decision struck all of us very hard. That was a decision where the Court held that it was a violation of the commerce clause to restrict guns within so many feet of a school.

In 1972, the Congress passed the Clean Water Act “to restore and maintain the chemical, physical and biological integrity of the nation’s waters.” That’s a quote.

The act prohibited the discharge of any pollutant into navigable waters without a permit issued by the Army Corps of Engineers or the EPA. And for over 30 years, the courts and Congress gave these entities broad discretion to regulate water supply.

In a 5–4 ruling in 2006, the Court reversed course and said that the Army Corps had exceeded statutory authority in limiting pollutants in certain wetlands.

In California, these decisions have left seasonal streams unprotected by the Clean Water Act, opening them up to development, prone to flooding that were formerly protected areas.

Further, the ambiguity left by the Court’s decision has left EPA and the Army Corps with little clarity on the bounds of their jurisdiction under the act, leading to agency expenditures on establishing and defending their jurisdiction rather than on enforcement.

Here is the question. When do you believe it is appropriate for a court to overturn the reasoned decision of a Federal agency that action is needed pursuant to a statute?

Ms. KAGAN. Senator Feinstein, I don’t know the case that you mention at all. I think the typical approach of a court, obviously, when it interprets a statute, and this is very important, is to figure out what Congress meant when it enacted that statute.

The court acts outside its proper boundary in trying to impose its own meaning on a statute or to improve on the meaning that Congress gave to the statute. Instead, the legislative power is Congress’ and what the court is supposed to do is to figure out what Congress meant.

Now, sometimes that’s not so easy, because sometimes language is imprecise, new circumstances develop, it’s unclear how Congress intended for a statute to apply, or sometimes Congress has even—just they make a mistake, they’re careless, whatever. Sometimes you do that, right?

So sometimes there’s some lack of clarity, some ambiguity in a statute, and, there, the appropriate course, the course that the court has chosen, and I’ve written about this in my scholarly work, is to give deference to the agency.

And the idea of the law in this area, it’s called the Chevron Doctrine, the idea of the law is that Congress, in enacting a statute and in giving authority to the agency to implement that statute, has impliedly delegated power to the agency to clarify any ambiguities that might arise in that statute; and, that it’s more appropriate for an agency to clarify those ambiguities than it is for a

court to do so, and that's why Chevron says the courts are to give deference to the agency.

I have written about this a good deal. My field is administrative law and I've written about the Chevron Doctrine. It's an important doctrine, for the reason I just said, that when there are ambiguities in a statute, when it's unclear how a statute should apply to a particular kind of administrative action, one possibility is that the court gets to decide that. The other possibility is that the administrative agency gets to decide that.

The court says, in Chevron, it's better for the agency to do so, because the agency has more competence in the area, it has more expertise in the area, because the agency has some political accountability which courts do not have, and, also, because we think that Congress would have made that choice; that Congress would have wanted the entity with political accountability and with expertise to make the decision rather than the courts.

In that sense, Chevron is actually a great example of courts saying that the court's own role should be limited. It should be limited there. It's with respect to an administrative agency that really has expertise and that has political accountability.

Senator FEINSTEIN. Thank you. That is very helpful. Let me ask a quick question in my remaining time on standing. With many environmental statutes, such as the Clean Water Act, the Endangered Species Act, the Clean Air Act, Congress has included provisions permitting citizens or citizen groups to bring lawsuits to redress violations of the law.

When regulatory agencies fail to do their jobs, for any reason, be it incompetence, corruption, political interference, or lack of resources, citizen suits provide a means for private citizens to step forward and ensure that our Nation's environmental protections are not ignored.

In a series of cases, it has been argued, however, that citizens do not have constitutional standing to bring these cases, because they cannot prove that they have been personally and concretely harmed by global warming, the pollution of waterways, or the depletion of species.

So here is the question. Do you believe it is possible for citizens to demonstrate that environmental harms have injured them for constitutional purposes?

Ms. KAGAN. Senator Feinstein, the answer is yes, depending on—much depending on what Congress does. So let me step back for a minute.

Article 3 has what's called a case or controversy requirement, and this is a very important aspect of the judicial system. It's really one of the things that keep judges judging and not doing anything else, which is that they can only decide concrete cases or controversies.

They can't make pronouncements on issues, legal or otherwise. They can't issue advisory opinions. They can only decide cases or controversies. And one important aspect of what it means to be a case or controversy is that a person has standing to bring that case.

And there are usually considered to be three requirements for that standing. First, a person has to have suffered an injury; sec-

ond, the person has to show that that injury was caused by the action that she is complaining about; and, third, the person has to show that the relief that the person is seeking from the court will actually redress the injury.

And all of those are important. They are all actually constitutional requirements. Now, that injury can be of many different kinds. It can be economic injury, but it can also be a kind of injury that you get when the environment is degraded and you can't use the parks in the way you would have wanted to use the parks.

Senator FEINSTEIN. Like asthma in Los Angeles from ozone.

Ms. KAGAN. The injury can be of a kind like that, certainly. Now, the Court has said that people have to be able to show that that person specifically has been injured, and there's some sort of specificity and concreteness requirement that the Court has used in the standing question.

But the Court has also made clear that Congress can define, within broad limits, a set of people who Congress believes is injured by a particular practice, such that they can bring suit.

So the standing question is one that I think is not entirely, but to a great extent, within Congress' control; that Congress can say, "Look, there are some set of people" and it gets to define those people as it wants who are injured by some kind of action and who should have an entitlement to go to court to redress that action.

Senator FEINSTEIN. In legislation, in other words.

Ms. KAGAN. That's right. That Congress does that in legislation and if Congress does do that in legislation, within broad limits, as I say, but if Congress does, the Court should respect that and should hold that such a suit complies with Article 3.

Senator FEINSTEIN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Feinstein.

We will take a short break, about 10 minutes, and then come back. Again, I appreciate Senators on both sides staying within their allotted time.

We will have one change. Normally, we would go to Senator Grassley, but because of a conflict in scheduling, you are going to switch and we will go to Senator Kyl when we come back in. That is with the concurrence of both the Senators.

We stand in recess.

[Recess 11:40 a.m. to 11:56 a.m.]

Chairman LEAHY. Senator Kyl, and then we will go to Senator Feingold. Then we will break for lunch and come back. Emerging Senators will be next in line after they have to vote at the desk in that 2:15 vote and come back here. That is what I intend to do, and I will then recognize whoever is next in line.

Senator Kyl.

Senator KYL. Thank you.

Solicitor General Kagan, you can see how important my colleagues think my questions are here.

Ms. KAGAN. Or how important my answers.

Senator KYL. When we met, I tried to give you an idea of the questions that I would ask, and I think I can pretty much follow what I laid out to you. So let me do that. I also think most of my

questions can be answered pretty succinctly, and I would appreciate if you could do that.

So let me start by asking you the standard for judges in approaching cases that we talked about, starting with the President's idea. I will remind you. He has used a couple of different analogies. One was to a 26-mile marathon and said that in hard cases, adherence to precedent and rules of construction and interpretation will only get you through the first 25 miles.

And he has said that while the law is sufficient to decide 95 percent of cases, in the last 5 percent, legal process alone will not lead you to the rule of decision. He says the critical ingredient in those cases is supplied by what is in the judge's heart or the depth and breadth of the judge's empathy.

My first question is, do you agree with him that the law only takes you the first 25 miles of the marathon and that the last mile has to be decided by what is in the judge's heart?

Ms. KAGAN. Senator Kyl, I think it's law all the way down. When a case come before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause.

The question is, and this is true of constitutional law and it's true of statutory law, the question is what the law requires.

Now, there are cases in which it is difficult to determine what the law requires. Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult and people can disagree about how the constitutional text or precedent—how they apply to a case.

But it's law all the way down, regardless.

Senator KYL. In the time of sentencing, a trial court might be able to invoke some empathy, but I cannot think of any other situation where, at least off the top of my head, it would be appropriate. Can you?

Ms. KAGAN. Senator Kyl, I don't know what was in the—I don't want to speak for the President. I don't know what the President was speaking about specifically.

I do think that in approaching any case, the judge is required really, not only permitted, but required to think very hard about what each party is saying, to try to see that case from each party's eyes; in some sense, to think about the case in the best light for each party, and then to weigh those against each other.

So I think that the judge is required to give consideration to each party, to try to figure out what the case looks like from that party's point of view, and that's an important thing for a judge to do.

But at the end of the day, what the judge does is to apply the law. And as I said, it might be hard sometimes to figure out what the law requires in any given case, but it's all the way down.

Senator KYL. Statutory, Constitution, the law precedent.

Ms. KAGAN. That's correct.

Senator KYL. Now, when the President announced the retirement of Justice Stevens, he said judges—this is a slightly different formulation. So the next question has to do with the second way that he formulated it.

He said, "Judges should have a keen understanding of how the law affects the daily lives of the American people and know that

in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens,” was the way he put it.

Now, the media outlets have summarized this and called it the “fight for the little guy sensibility.” I am not sure that is exactly the way the President would put it. But you heard some of my colleagues here yesterday lament the alleged activism of the current Court in supposedly always ruling for the corporate interests or the interests of big business.

Do you agree with the President and my colleagues that judges should take into account whether a particular party is a big guy or a little guy when approaching a question of law or that one side is powerful or that one side is a corporation?

Ms. KAGAN. Here is what I think. I think that courts have to be level playing fields and that everybody has to have an opportunity to go before the court, to state his case, and to get equal justice. And one of the glorious things about courts is that they do provide that level playing field in all circumstances, in all cases.

And even when that level playing field is not provided by other branches of government, even when there is some imbalance with respect to how parties come to Congress or the President or the State Houses, the obligation of courts is to provide that level playing field; to make sure that every single person gets the opportunity to come before the court, gets the opportunity to make his best case, and gets a fair shake.

Senator KYL. Now, may I just—when you say level, to ensure a level playing field, you are not saying that if the parties come to court with positions that are unequal—that is to say, one party’s position is better than the other party’s position—that the court’s obligation is to try to somehow make those two positions the same.

Ms. KAGAN. No, no, no. I mean, it’s just a matter of everybody is entitled to have his claim heard. Everybody is entitled to fair consideration. It doesn’t matter whether you’re an individual or you’re a corporation or you’re the government.

I mean, one of the really remarkable things about watching, actually, a Supreme Court argument is sometimes I go up there and I’m arguing for the government, very sort of—I mean, you would think it’s kind of a favored position to be arguing for the government, and it turns out it’s not.

It turns out that the justices give you, as the government’s representative, just as hard a time, maybe a harder time, than they give everybody else, and that’s the way it should be. Whether you’re the government, whether you’re a corporation, whether you’re a person, no matter what kind of person you are, no matter what your wealth, no matter what your power, that you get equal treatment from the Court.

And what I meant by equal treatment is just that the Court takes your claim seriously, takes your case seriously, listens to you as hard as it listens to anybody else, and then makes the right decision on the law.

Senator KYL. During his confirmation hearing, Chief Justice Roberts said, “If the Constitution says”—this was in response to a question, by the way. And he said, “If the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win,

well, then, the big guy is going to win, because my obligation is to the Constitution. That's the oath."

Do you agree with Chief Justice Roberts?

Ms. KAGAN. I do, Senator Kyl.

Senator KYL. Now, one of the things that I brought up in my opening statement was, obviously, your clerkship for Justice Marshall and my belief that Justice Marshall's views are more along the line of viewpoint that President Obama expressed. And you wrote about this in more than one way.

Let me just cite one thing you wrote about Justice Marshall's view, and I am quoting now. You said, "In Justice Marshall's view, constitutional interpretation demanded above all else that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts in interpreting the Constitution to protect the people who went unprotected by every other organ of government, to safeguard the interests of people who had no other champion. The court existed primarily to fulfill this mission," you wrote about Justice Marshall.

In fact, you also wrote that, "If he had his way, cases involving the disadvantaged would have been the only cases the Supreme Court heard."

What is unclear to me is whether you agree with Justice Marshall's view of the role of the court in constitutional interpretation.

Ms. KAGAN. Senator Kyl, the last statement you read, the statement about it would be the only case, I think that that was a kind of jokey statement. So I would put that aside.

I think what I was saying in that piece is consistent with what I've said to you. I think Justice Marshall's whole life—and this is why I said he revered the Supreme Court. Justice Marshall's whole life was seeing the courts take seriously claims that were not taken seriously anywhere else.

So in his struggle for racial justice, he could go to the State Houses or he could go to Congress or the President and those claims generally were ignored.

Senator KYL. Let me just interrupt for a second. You wrote here that, "In constitutional interpretation"—so this is not just a factual matter between two parties. We are talking about interpreting the Constitution.

He says the courts should show a special solicitude.

Ms. KAGAN. I think that was my words.

Senator KYL. Yes, correct.

Ms. KAGAN. And I meant special as compared with the other branches of government. In other words, that it was the court's role to make sure that even when people have no place else to go, that they can come to the courts and the courts will hear their claims fairly, and that was what I was saying was a wonderful thing about courts, a miraculous thing about courts; that you can be ignored in every other part of the government and you can come to a court and a court will say, "It's our job to treat you with respect, with consideration, with the same kind of attention we give to everybody else."

Senator KYL. Well, let me just ask you, do you believe, then—and it is hard, I realize, though you certainly know—you knew Justice Marshall very well. You knew his reasoning—that he would

have agreed with Justice Roberts that if the big guy has the law on his side, the big guy wins; if the little guy does, then the little guy wins, and that is consistent with what Justice Marshall believed, or would he have expressed it more along the lines that some of my colleagues have here, that there is too much agreement with the corporate interests and big business, as one of my colleagues put it.

Ms. KAGAN. Senator Kyl, I guess two points. The first is I guess I don't want to spend a whole lot of time trying to figure out exactly what Justice Marshall would have said with respect to any question, because the most important thing—I love Justice Marshall. He did an enormous amount for me.

But if you confirm me to this position, you'll get Justice Kagan. You won't get Justice Marshall, and that's an important thing.

Senator KYL. Yes, and I totally agree with you. It is not what Justice Marshall believed that is important here. It is what you believe. Since you have written so glowingly about him, you called it, in fact, his vision of the Court, a thing of glory, I believe.

I am having a hard time figuring out whether, to the extent that you do and you have written glowingly about him, whether you would tend to judge in cases more actively or more with interest in protecting the rights of those who are disadvantaged, for example, or, as you have already expressed here, you would simply base it on the facts and the law and the Constitution.

Ms. KAGAN. The thing of glory, Senator Kyl, is that the courts are open to all people and will listen respectfully and with attention to all claims. And at that point, the decision is what the law requires.

There may be differences as to what the law does require, but it's what the law requires, and that's what matters.

I guess I would like to go back to—I'll just give you one case, just to make sure that—

Senator KYL. Well, can I just keep moving on? I know that the time—well, we do not have a lot of time, if I could, please.

Do you agree with the characterization by some of my colleagues that the current Court is too activist in supporting the position of corporations and big business?

Ms. KAGAN. Senator Kyl, I would not want to characterize the current Court in any way. I hope one day to join it.

Senator KYL. And they said you are not political. I appreciate it. Let me explore your judicial philosophy just a little bit more here, whether you agree with a comment that Justice Marshall said. He said, "You do what you think is right and then let the law catch up."

Do you agree that that is the right way to approach judging?

Ms. KAGAN. The way I would judge is the way I told you, that you make sure that you give very respectful consideration to every person and then determine what you think the Constitution or statute, if the case is a statutory case, requires.

Senator KYL. So you would not have phrased your philosophy as Justice Marshall phrased his.

Ms. KAGAN. I actually never heard Justice Marshall say that. I know another co-clerk, another clerk in a different year, wrote that she did. I will say, Justice Marshall was a man who spent many

decades of his life fighting for the eradication of Jim Crow segregation, and you can kind of see why he thought that you should work as hard as you can——

Senator KYL. He worked outside the box.

Ms. KAGAN—[continuing]. And eventually the law will catch up. And eventually the law did catch up in *Brown v. Board of Education*.

Senator KYL. That is why it did not seem to me to be out of character for him to have said that.

Is there anything that you have written—obviously, you have not rendered decisions—which would enable us to verify that this is your approach to judging? Can you think of anything you have written or if you would like to just supply this for the record, if it does not come to you immediately, that would verify what you have said for us here, that would help us to confirm that what you have expressed to us today is, in fact, a view that you have expressed about judging?

Ms. KAGAN. Well, I don't think I've written anything about judging in that way, but I think that you can look to my life, that you can look to the way I interact with people.

I mean, my deanship was a good example, but the way I acted as Solicitor General, as well, the kind of consideration that I've given to different arguments, the kind of fairness that I've shown in making decisions. I think that those would all be appropriate things to look to to try to get some understanding of this aspect of me.

Senator KYL. All right. Let me ask you about some of the bench memos. I talked to you a little bit about that when you were in my office, as well, and, obviously, we only have time to mention a few.

But what I was suggesting is that your advice to your boss seemed to be not just pragmatic, but almost political in advising him either to vote to take a case or not to take a case on cert.

For example, in *Lanzaro v. Monmouth County*, you wrote, and I quote, "Quite honestly, I think that although all of the lower court's decisions is well intended, parts of it are ludicrous." But you discouraged Justice Marshall from voting to review the decision, because you were afraid that the Court, and I am quoting now, "might create some very bad law on abortion and/or prisoners' rights."

Now, when deciding whether or not to take a case, should the focus not be on whether the appellant or the appellee has the facts and the law on their side rather than worrying about whether justices might, in your view, make bad law?

Ms. KAGAN. Senator Kyl, let me step back just a little bit and talk about what clerks did for Justice Marshall. We wrote—Justice Marshall was not in what's called the cert pool. We wrote probably thousands of memos over the course of the year about what cases the Court should take and what cases the Court should not take.

And when I was clerking for Justice Marshall, I was 27 years old and Justice Marshall was an 80-year-old icon, a lion of the law. He had firm views, he had strong views. He knew what he thought about a great many legal questions. He had been a judge for some fair amount of time.

And the role of the clerks was pretty much to channel Justice Marshall, to try to figure out whether Justice Marshall would want to take a case, whether Justice Marshall would think that the case was an appropriate one for the Court to take and set aside. And that's what I did and I think that that's what my co-clerks did, as well.

Senator KYL. Well, do you think you would approach certain decisions that way if you were on the Court?

Ms. KAGAN. I think that the most important factors in the cert petition process, which is, I think, one that I talked to Senator Kohl about maybe, are the ones I gave.

First, most importantly are the questions of circuit conflicts, that the court—it's a very important responsibility of the courts to make sure that our law is uniform and to resolve any conflicts that appear among the circuit courts.

Second is the Court should be available almost all the time where a judicial decision invalidates a Congressional statute; that Congress is entitled to that kind of respect, to have the Supreme Court hear the case before a Congressional statute is invalidated.

Third, for some set of extremely important national interests, extremely important for any number of reasons, it's a small category of cases, but it's an important one, and I think that those would be the considerations that I would primarily use and those would—that is the way I would make decisions.

Senator KYL. All right. Some of these bench memos suggest other basis for making decisions. For example, in *Cooper v. Kotarski*, in assessing whether the Court should take the case, you wrote, quote, "It's even possible that the good guys might win on this issue."

Now, that would not be a very good basis on which to suggest taking a case, would it? And who were the good guys?

Ms. KAGAN. As I took a look at that memo, Senator Kyl, that was just a reference to the people whom I thought Justice Marshall would favor on the law, and that's all the reference was meant to suggest; just the people whom I thought Justice Marshall would think had the better of the legal arguments.

Senator KYL. The reason I cited that one is there is a note—while you were at the White House, you were asked whether certain—or you asked a colleague, rather, whether certain organizations were on a list of organizations eligible for certain tax deductions, and you referred to two of them. One was the NRA, the other was the KKK, and you referred to them as, quote, "bad guy orgs," I presume an abbreviation for organizations.

So if you presented a case involving, for example, the NRA, would you consider the NRA to be a "bad guy org" deserving of defeat in the case?

Ms. KAGAN. Senator Kyl, I'm sure that that was not my reference. The notes that you're referring to are notes on a telephone call, basically me jotting down things that were said to me. And I don't remember that conversation at all, but just the way I write telephone notes is not to quote myself.

Senator KYL. So your belief is that you were quoting someone else when you wrote "bad guy orgs."

Ms. KAGAN. Or paraphrasing somebody else, but it was not—

Senator KYL—[continuing]. Those were not your—

Ms. KAGAN.—[continuing]. It was just telephone notes.

Senator KYL. And it was not your terminology, it was somebody else's.

Ms. KAGAN. As I said, or a paraphrase, but it was—the way I write telephone notes is just to write down what I'm hearing.

Senator KYL. You would not, in any event, put the NRA in the same category as the KKK, I gather.

Ms. KAGAN. It would be a ludicrous comparison.

Senator KYL. Thank you. In another case, in recommending the—this is *United States v. Kozminski*, in recommending the grant of cert, you noted that the Solicitor General was, quote, “for once on the side of the angels.”

Now, obviously, it is not whose side you are on that makes the difference.

Ms. KAGAN. I hope that is not my good friend, Charles Fried I'm referring to.

Senator KYL. Indeed, it is. It is and was. How do you define who is on the side of the angels?

Ms. KAGAN. I have not seen that memo, Senator Kyl, but I'm sure it was saying essentially the same thing, which was the Solicitor General had the better of the legal arguments, as Justice Marshall would understand the legal arguments.

Senator KYL. For once, you said.

Ms. KAGAN. I'm sorry, Charles.

Senator KYL. Well, in your time as SG, have you made any litigation decisions based on an assessment of which position was the side of the angels?

Ms. KAGAN. I have tried very hard, Senator Kyl, to take the cases and to make the decisions that are in the interests of my client, which is the U.S. Government.

Senator KYL. And it would not be appropriate, as a member of the Supreme Court, to decide cases based on that either.

Ms. KAGAN. Senator Kyl, a Supreme Court justice needs to decide cases on his or her best understanding of the law.

Senator KYL. Let me ask you, in the minutes that remain here, about one of the decisions that you made in connection with a request by the Court for the SG's opinion. The case is *Chamber of Commerce v. Candelaria*. This is an Arizona decision, you will recall, that involved a 2006 law that then Governor of Arizona Janet Napolitano had signed and which requires all employers doing business in Arizona to participate in the Federal Government's eVerify system that verifies Social Security status, and also provides that employers who knowingly employ illegal aliens can be stripped of their business licenses.

Several groups challenged the Arizona law, saying it was preempted by Federal immigration law, but the Federal district court in Arizona and a unanimous ninth circuit panel upheld the law.

The opponents of the law asked the Supreme Court to take the case and strike down the Arizona law. And last November, the Supreme Court asked you, as Solicitor General, for the government's views.

Ultimately, you decided to ask the Supreme Court to take the case and strike down the employer sanctions that are critical to making the Arizona law work.

You and I talked about this case and you are familiar with it, to discuss it.

Ms. KAGAN. Yes.

Senator KYL. You did not argue that the Court should take it because there was a split in the circuits.

Ms. KAGAN. That's correct, Senator.

Senator KYL. Or that there had been an unconstitutional application of the law in any way.

Ms. KAGAN. Senator Kyl, I think what we argued in the petition was that the Arizona statute or at last this part of it was preempted by Congress and, therefore, the decision below was wrong, and that the reason for the Court to take the case was not only that it was wrong, because the Arizona statute was statutorily preempted, but also because this was an important question.

It's one of the category of cases where—

Senator KYL. Right. It is that third category you said—

Ms. KAGAN. The third category.

Senator KYL—[continuing]. There were not very many, but where they are, they are important.

Ms. KAGAN. That's right. Lots of States are passing these kinds of laws and the guidance from the Supreme Court would be appropriate as to what kinds of legislation.

Senator KYL. Well, the Supreme Court is not in the business of giving guidance, though, is it?

Ms. KAGAN. Well, I think for the Supreme Court to set down its view of what the Federal statute preempts would be very helpful to the State legislatures.

Senator KYL. Sure. But the Court turns down hundreds of cases and I am sure its ruling in each case would be helpful.

As I recorded your comment earlier this morning, in that third category, you said that it would have to be a strikingly significant issue for the Court to take the case in that third category of an important Federal question.

Ms. KAGAN. Senator Kyl, what we argued to the Court in the—

Senator KYL. No. You said it should be a strikingly significant issue, did you not?

Ms. KAGAN. I'm honestly not sure exactly the words I used.

Senator KYL. I got the quote accurately.

Ms. KAGAN. But if I might, Senator Kyl.

Senator KYL. Go ahead.

Ms. KAGAN. What we argued to the Court in *Candelaria* was that it was a Federal statute in this case—I know that—well, there was a Federal statute in this case. Our best read of that Federal statute was that it preempted the licensing provision of the Arizona law. That was our best understanding of what the Federal statutes did.

And that because there's so much legislative activity in this area happening across this country right now, that for the Supreme Court to decide that question and to determine whether the Federal statute preempted the State law was one of those moments where the issue is of real significance across the country.

Senator KYL. So you think that that made it strikingly significant.

Ms. KAGAN. I think that this is a significant issue and people, I think, on both sides agree that it is a significant issue as to whether the Federal statute prevents States from doing this. And this is, again, not a decision or a view as to whether these State statutes are good or bad. They might be very good.

The only question is whether Congress has, by legislation, and here the legislation was in the immigration—

Senator KYL. But here is what the Federal law—I mean, it says this is an area for the Federal Government. But under the Federal law, States are explicitly permitted to legislate in this area, and I am quoting the statute now, “through licensing and similar laws.”

And you argued in your brief that the State’s revoking of a license did not qualify for that explicit exception to Federal preemption under the Federal statute. Right?

Ms. KAGAN. Senator Kyl, what we argued in the brief was that the Arizona law did not qualify under that exception, because what that exception was meant to talk about were sort of traditional licensing laws of the kind when you license a lawyer or you license a doctor or you license a chiropractor, but not a law that essentially imposes sanctions on any employer for hiring illegal aliens.

Senator KYL. But this was a statute that dealt with—the Federal statute deals with hiring people who are not qualified to be hired in the country, who are called illegal aliens. And it said that the Federal Government has the preemption in this area, except where States pass laws through—or attempt to deal with the issue through licensing and similar laws.

So was it not inferred there that the Court meant for States to be able to do exactly the kind of things that the State of Arizona did? It was not limited to licensing a professional. It was the denial of a license to someone who was violating the law.

Ms. KAGAN. Yes. We definitely took a different position, Senator Kyl, and the reason we did is this statute clearly would prevent a State from saying anybody who hires an undocumented or illegal alien would be fined \$25.

The statute clearly prevents a State from saying that, from imposing a penalty on an employer who hires an illegal alien. And if the statute clearly prevents a State from imposing a penalty like that, then surely the statute also prevents a State from imposing a penalty, which is the withdrawal of any of the—

Senator KYL. Well, that is the argument that you made. The Federal Government could impose a fine, but the Federal Government does not get into the licensing of businesses. That is a State activity.

So I could argue just as easily, and I am sure the Court will consider the argument, that, of course, that is the kind of thing that States can do. And so just as a State could grant a license, it could also take a license away if a business violated the law.

We will talk a little bit more about this, I guess, in the second round. But the reason that I raise this is that my guess is, and I would ask you whether you agree, that without the SG having taken the position that you did, that it is much less likely that the Court would have taken the case. Would you agree with that?

Ms. KAGAN. I don't know that, Senator Kyl. Sometimes they listen to us and sometimes they don't. Sometimes we tell them in no uncertain terms this is a terrible case to take, and they take it anyway.

Senator KYL. Well, the stats are 80 percent. So that is a pretty good percentage, when you ask them to take a case and they do.

Chairman LEAHY. Was this a case where the Supreme Court asked the Solicitor General to file a brief?

Senator KYL. Yes.

Ms. KAGAN. This is a case where—and those of—the 80 percent statistic, I think, is the statistic when the government files its own cert petition. I think that we do much less well with the Court when we just—when we answer the Court's requests for our advice on whether to take—

Senator KYL. When we have the next round, I will have the exact statistic on that.

Ms. KAGAN. I hope we do well.

Senator KYL. I think you do very well.

Chairman LEAHY. Senator Feingold. And then when Senator Feingold finishes, we will break. And I would reiterate to Senators—and, Senator Kyl, you are in the leadership, you probably know this, but apparently the vote is at 2:15. I will vote at the desk and come back and I will recognize the next person in line, which would be on the Republican side.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

I guess I would like to start by picking up on your discussion with Senator Hatch about the *Citizens United* decision. Senator Hatch talked about a book with a single mention of a candidate and pamphlets designed by small S chapter corporations.

But, of course, as you indicated already, what Congress addressed in the McCain-Feingold bill was TV and radio election advertising right before the election, paid for out of the treasury funds of unions and corporations, both profit and nonprofit.

So it was the Supreme Court that instead reached out and asked for re-argument and called into question a 100-year-old statute that prohibited corporations, more generally, from spending money on elections.

I just want to clarify this. So let me ask you. Was it not highly unusual, if not unprecedented, for the Court to do this?

Ms. KAGAN. Senator Feingold, the U.S. Government in the case did urge the Court not to decide the case on the grounds that it did. It's obviously unusual whenever the Court reverses a precedent in this way.

The Court thought it had grounds to do so, but it is an unusual action, yes.

Senator FEINGOLD. And was it not unusual how they got to the point where they could make that decision based on the facts?

Ms. KAGAN. Senator Feingold—

Senator FEINGOLD. It was unusual, was it not?

Ms. KAGAN. Senator Feingold, certainly, the case, as it came to the Court, did not precisely address—did not address the question that the Court ended up deciding.

Senator FEINGOLD. Thank you. And the reason that many people, including the President and many members of the community were outraged by the decision was not simply because the Court reversed its 2003 decision upholding the issue and provisions of the McCain-Feingold bill, but it also reached out to decide an issue that was not raised by the case at hand and overturn law dating back more than a century. Did it surprise you that the Court's decision caused such an uproar?

Ms. KAGAN. Oh, I don't know, Senator Feingold. I'm not, you know, an expert in public reaction to things and I don't think that the Court should appropriately consider the public reaction in that—in that sense.

Senator FEINGOLD. Do you take note of public reaction to Supreme Court decisions?

Ms. KAGAN. Senator Feingold, I read the same newspapers that everybody else does.

Senator FEINGOLD. But you're not willing to comment on whether this was a greater reaction or this was a greater reaction that in other—

Ms. KAGAN. I don't know, Senator.

Senator FEINGOLD. All right. Let me go to national security issues that you already discussed a bit with Senator Feinstein. I think it's safe to say that you agree that the *Youngstown* concurrence was the appropriate starting point for these types of questions having to do with whether statute is something that can be overridden.

Go back to your understanding of how to apply Justice Jackson's test. Specifically, do you read it to allow for any circumstances where the President could authorize in violation of the criminal laws that Congress has passed?

Ms. KAGAN. Where the President could authorize the violation of criminal laws that Congress has passed?

Senator FEINGOLD. Congress has passed.

Ms. KAGAN. Senator Feingold, I couldn't think of any circumstance offhand. I don't want to say categorically that there might never be one if something was very much at the core of presidential power under Article 2. But it's—it would be a highly, highly unusual circumstance.

Senator FEINGOLD. And you used the phrase “few and far between” but when pressed about a circumstance where it could occur, the example you gave was not something out of Article 2 or out of the Commander-in-Chief Powers. What you suggested was that, of course there could be a situation where Congress passes a law that would violate, let's say, the explicit pardon power which, of course, I can see. But do you know of any examples of where this could occur simply within the context of the Commander-in-Chief Powers under Article 2?

Ms. KAGAN. It's interesting, Senator Feingold, because I think I read someplace where you stated a hypothetical which was, suppose Congress made somebody else Commander-in-Chief and the President said, I'm going to ignore that and I'm going to continue to be Commander-in-Chief. I don't know where I read that, that you had said that. It struck me as a good example of something where, you know, that's core Commander-in-Chief power.

Senator FEINGOLD. But, you know, of no actual example in any court case where the Supreme Court has upheld a presidential assertion of this power in a way that would override a criminal statute; is that correct?

Ms. KAGAN. I do not know of any court case like that, that's correct.

Senator FEINGOLD. Let me ask you a question; I asked Justice Scalia about this. What is the proper role here of the Judiciary in resolving a dispute over the president's power to disobey an express statutory prohibition?

Ms. KAGAN. I think the Court has an important role. I mean, the Court generally, I think, has a very important role in policing constitutional boundaries. And that might be policing the boundaries when Congress or some other governmental actor violates somebody's individual rights in a way that's not permitted by the Constitution, or it might be a case in which one branch impermissibly interferes with another branch or impermissibly infringes on the appropriate authority of another branch. So there is some category of cases, of course, as between the political branches, that the Courts sort of have left to the political branches to work out themselves. And to the extent that the political branches can work their problems out by themselves, I think that that's generally considered and it's generally right to be considered a good thing. But there are some times when the Court really does have to step in and police those boundaries and make sure that the president doesn't usurp the authority of Congress or vice versa.

Senator FEINGOLD. In 2007 you gave a speech to Harvard Law School graduates about the rule of law. And you talked about an infamous incident where Attorney General John Ashcroft was asked to authorize an illegal government program while hospitalized for an emergency operation and he refused. And you told the graduates that they too would, "face choices between disregarding or upholding the values imbedded in the idea of the rule of law." What prompted you to do discuss this theme and in this incident in that speech? Do you think that this incident holds lessons for Supreme Court Justices as well?

Ms. KAGAN. Senator Feingold, it was a speech I gave to the graduating class. When I speak to students and particularly when I speak to them at important moments in their life like graduation when they are really thinking about what careers they want to have in the law, you know, I try to tell them some things that will stick with them and be meaningful to them and some things that I think that it's important for them to keep in mind as they start their careers. And the rule of law and adherence to the rule of law there's no more important thing for any law school graduate to keep in the forefront of his or her minds than that.

And that was a speech where I thought that there were some current-day incidents as well as I used some historical incidents to just talk about the rule of law. About how no person how ever grand, how ever powerful is above the law; to talk about the importance of adhering to the law no matter the temptations, no matter the pressures that one might be subject to in the course of one's career. And I think that there's nothing more important than that, and that's what I tried to express in that speech.

Senator FEINGOLD. What was it about the Ashcroft incident that fit that category?

Ms. KAGAN. Well, that was—that was one of the examples I used as Senator Ash—then Attorney General Ashcroft had really taken a very principled stand. And I thought that that was notable and pointed that out along with a number of others where people have taken very principled stands notwithstanding some considerable amount of pressure to do otherwise.

Senator FEINGOLD. Thank you. Let's turn to the Second Amendment. I've long believed that the Second Amendment grants citizens a right to own firearms. I was pleased when 2 years ago in the *Heller* decision the Supreme Court agreed with this view. And, as you know, the Second Amendment on its face applies only to the Federal Government, not to the states, but, of course the Court just ruled in the *McDonald* case that the Second Amendment rights apply to the states via the Fourteenth Amendment's guarantee of due process of law.

Now, there will undoubtedly be more cases in the future that test the limits of the government's ability to regulate the ownership of firearms. Accordingly *Heller* specifically indicated that prohibitions on the possession of guns by felons and the mentally ill, laws forbidding guns in sensitive places such as schools and government buildings and concealed carry restrictions could pass muster. And the Court indicated that the examples it gave of permissible restriction was not an exclusive list.

You worked on gun issues when you were in the Clinton White House or you were familiar with the kinds of restrictions that Congress has considered and you obviously are familiar with the Supreme Court cases. Can you give us a sense of how you would approach a challenge to the constitutionality of a law or regulation that restricts gun ownership short of the outright ban and the trigger-lock requirement that were overturned in *Heller*?

In other words, how in your view should a Supreme Court Justice go about deciding whether a law infringes on Second Amendment rights?

Ms. KAGAN. Well, Senator Feingold, I think that the Court—I have not—first, I should say, I have not read all the way through the *McDonald* decision because it came out yesterday. But, I think that it does not suggest anything to the contrary of what I'm going to say.

I suspect that going forward the Supreme Court will need to decide what level of constitutional scrutiny to apply to gun regulations. Some people need *Heller* to apply strict scrutiny. Other people think that *Heller* suggests a kind of intermediate scrutiny. I've seen sort of both views of that decision. It's clearly a decision that will come before the Court.

I think as you said, the *Heller* decision clearly does say that nothing in it is meant to suggest the unconstitutionality of certain very long-standing kinds of regulations, and the felon in possession example is the first on that list. But the Court also says that the list is not exhaustive. And so I think that there will be some real work for the courts to do in this area.

I should say that the work that I did in the Clinton White House was all work, of course, before *Heller* was decided. And so we really

didn't, you know, apply this kind of scrutiny, this kind of examination to those—to those decisions. What President Clinton was trying to do back in the 1990s and what I as his policy aide was trying to help him do was to propose a set of regulations that had very strong support in the law enforcement community, that had actually bipartisan support here in Congress to keep guns out of the hands of criminals, to keep guns out of the hands of insane people. It was very much an anti-crime set of proposals that I worked on back then in the 1990s. And, you know, I think that we did not consider those regulations through the *Heller* prism just because *Heller* didn't exist at that time. But I do think that these cases may be coming before the Court and the Court will consider sort of regulation by regulation which meets that standard.

Senator FEINGOLD. Going back to campaign finance issues. Again, because of your work in the Clinton White House and your advocacy for the government's position in the *Citizens United* case, you're very familiar with this area. I obviously care a lot about this issue and so I'm pleased that obviously your learning curve isn't very steep on this topic. But I'm sure that you heard that Senator McConnell has attacked you because of your previous work as a policy aide in the area. He thinks you approach election law as a political advocate and that you were committed to a political agenda. And he says that's, "the very opposite of what the American people expect in a judge."

I think it's important to point out that when you're in White House counsel's office, you have the job of evaluating the constitutionality of various policy proposals. In there you weren't shy about expressing doubts about whether certain ideas could survive a constitutional challenge. For example, in a note to Jack Quinn that was in the documents provided the committee, you said, "I think it's pretty clear that a ban on non-citizen contributions be unconstitutional (though abandoned foreign contributions would not be)."

In another memo to Quinn you expressed doubt that any constitutionally valid proposal to limit independent expenditures exists. So you said you were, "weary of touting this notion to the President."

It seems to me that you were quite aware of the need to think critically and legally as well as politically as you carried out your responsibilities. Can you say a little bit about the process of reviewing draft legislation in the counsel's office and the importance of developing legislation that is consistent with Supreme Court precedent as it exists at the time?

Ms. KAGAN. Senator Feingold, I tried my hardest when I was in there—when I worked in the Clinton Administration, including as a lawyer, to provide good legal advice to the President. Now, it's a context in which one is dealing with law and policy and politics at the same time. That's the kind of institution it is. But it's very important for political figures and for the policy people to understand what the law requires and what the law permits and for lawyers to give good advice on those topics and that's what I tried to do.

I should say that none of what I did in the Clinton White House whether as a lawyer for the Administration or as a policy person for the Administration really has much to do with what I would do as a judge.

I know that when Chief Justice Roberts was here and he talked about a position that he had had in the Justice Department, I think he separated out those two quite clearly. And I think he was right to do so. But one is simply in a different position and at the same time as one is trying to provide good and independent legal advice to the President, one is also part of the President's team and doing so in that context. A very, very different kind of context from the context that I would be approaching cases as a judge.

But I will say that I think that my experience in the White House during the 1990s is valuable in one sense, which is that it taught me to very much respect the other branches of government. You know, I'm not a person whose experience is only and all about courts. I don't think courts are all there is in this government. I think that the political branches, Congress and the President are incredibly important actors and should be making most of the decisions in this country. Courts do police the constitutional boundaries and do ensure that Congress and the President don't overstep their role, don't violate people's individual rights. But when it comes to policy, it ought to be courts that—excuse me, it ought to be Congress and the President that do the policymaking. And the courts ought to respect that and ought to defer to that.

And I think that my experience in the executive branch and dealing a lot with Congress has made me very respectful of the President's role and Congress's role in our government.

Senator FEINGOLD. I think that's an excellent answer. I thank you for it.

I'm going to turn to something that requires a little more background now. A question that seem especially pertinent in the wake of the Deep Water Horizon disaster. In 1989 the largest oil spill in American history decimated Prince William Sound when we watched with horror as oil from the Exxon Valdez seeped into one of our most fragile ecosystems and caused tremendous damage. At the time it was hard to imagine that we would ever again see an oil spill of this magnitude or this kind of environmental damage. Tragically, we now know better.

Now, as was discussed by a number of Senators yesterday, after extensive litigation a jury in Anchorage awarded \$5 billion in punitive damages to the plaintiff in the Exxon Valdez case which at the time was less than Exxon profits in 1988 and is now less than the total profits Exxon took home in the first quarter of 2010. Nineteen years after the jury awarded that amount, Alaskan landowners and commercial fishermen had still not received a single penny of that \$5 billion award and we were hoping that the Supreme Court would finally vindicate their claims.

But instead of considering the need to punish Exxon and deter this sort of conduct in the future, the Court manufactured a new rule and concluded that the award was excessive. In reaching that decision the Court stated that Exxon and other corporations need to have predictability so they can look ahead and know what the stakes are when they choose one action or another.

Now, it's not hard to read this decision, especially in light of what's happened in the Gulf, as the Supreme Court giving a free pass to reckless corporations even when our health and environment are at stake. This is also one of many decisions over the last

decade where the Court has bent over backwards to find a way to protect corporate interests.

One of the judiciary most important roles is to prevent powerful groups and corporations from running rough shot over the rights of individuals. What did you think of the Exxon decision and do you agree that courts have an important role to play in protecting people who are injured by corporate misconduct?

Ms. KAGAN. Senator Feingold, courts have an important role to play in protecting people under the law who are injured by corporate misconduct or by any other. This is an active area of the law, this question of what limits should be placed, if any, on punitive damage awards.

What the Supreme Court did in the Exxon case was really to decide it under its common law maritime powers. This was actually not a due process case as which some prior punitive damages cases have been. Instead what the Court decided, a majority of that Court, was that there was an appropriate ratio of one to one, I believe it was, for punitive damages as compared with compensatory damages as a matter of Federal common law. And the relevance of that fact is that common law typically can be overturned by statute. And so that gives Congress an important role to play in this area. That would, of course, not be the case to the extent that any limits on punitive damages were a matter of the Constitution. But as I understand the Exxon decision, the Exxon decision was based on common law power rather than a constitutional ruling.

Senator FEINGOLD. Let me do something completely different. Last year I asked Justice Sotomayor how a Yankees' fan could understand the everyday challenges of rural and small-town Americans in Wisconsin who root for the Brewers or Packers. I understand you're a Mets fan, which at least is more the underdog over the——

[Laughter.]

Senator FEINGOLD.——

Ms. KAGAN. I don't know if it's more the underdog——

Senator FEINGOLD. Well, traditionally, certainly.

[Laughter.]

Senator FEINGOLD. So, first of all, if you're confirmed it should make for an interesting dynamic on the Court between the two of you, but I want to ask you the same question.

You grew up in Manhattan. You were a dean at Harvard Law School and you've lived in big cities most of your life. And there may be a perception on some people's part that you may not completely understand what many Americans are struggling with right now. In fact, at a recent town hall meeting I held in Stephens Point, Wisconsin one of my constituents asked why nominees to the Supreme Court always seem to be from the east coast when we have plenty of fine candidates in the Midwest.

How will you strive to understand the effects of the Supreme Court's decisions in the lives of millions of Americans who don't live on the east coast or in our biggest cities?

Ms. KAGAN. Senator Feingold, does it count that I lived in Chicago for some period of my life?

Senator FEINGOLD. Well, you're getting closer.

[Laughter.]

Ms. KAGAN. Senator Feingold, I hope I've always been a person who's able to see beyond my own background and to listen hard to people. Not only we've talked about listening hard to people of different political persuasions and views, but to try to learn from people who have different geographic backgrounds, different religious backgrounds, different racial backgrounds. I mean, I think that this is something not only that makes a good judge, but that makes a good human being is to try to learn from people other than yourself. And I hope I've used the opportunities that life has provided me in my life to do that.

Senator FEINGOLD. I mentioned in my remarks on Monday that public confidence in the Court is extremely important just as it is crucial that the public has confidence in the integrity of its elected representatives. Last week there were news reports that the judge who overturned the Obama Administration's moratorium on deep-water drilling may own stock in energy companies. It's very damaging to the judiciary when a judge's neutrality can be questioned which is why I think, obviously, the ethical choices of a judge must be beyond reproach.

What do you think are the most important ethical questions facing the judiciary, particularly the Supreme Court, and will you be an advocate within the Court and the judiciary for addressing these issues forthrightly and strongly?

Ms. KAGAN. Well, certainly, Senator Feingold, what Chairman Leahy opened up with which is the whole question of making sure a judge is appropriate—is recused from cases that a judge should be recused from. And there are obviously some hard calls there and some judgment calls. But taking those recusal rules very seriously is something that any judge should do. And I'm not speaking particularly about this case, the case that you mentioned which I know nothing about, but in general I think judges should approach their recusal obligations with a great deal of seriousness and care.

Senator FEINGOLD. And when we spoke in my office, you indicated that you had just recently learned that the Supreme Court was basically exempt from the code of judicial conduct and the rules that the judicial conference puts in place to apply it and so you didn't really have an opinion about it. But now that you've had a chance to think about it, do you think, for example, that Supreme Court Justices ought to be able to have contacts with parties to the case that other judges can't?

Ms. KAGAN. Senator Feingold, I really haven't thought about that issue since we talked about it. And I would want to speak with the people whom I hope would be my colleagues about it before I answer that question. I think it's an important question and one worthy of real consideration.

Senator FEINGOLD. All right. I want to talk with you now about the issue of forced arbitration which I've been working on for about a decade. More and more powerful economic interests are forcing consumers and employees to bring their disputes not to the courts but to a parallel legal system where the rule of law barely applies and where the outcome I think is stacked against them.

A century ago Congress passed the Federal Arbitration Act to allow parties who wanted to take their disputes to arbitration to enforce the results of the arbitration in court. In the last several

decades, however, the Supreme Court has twisted this law to allow banks and mortgage companies, health care providers, big Agribusinesses and others to enforce so-called “take-it-or-leave-it contracts” that force people to use arbitration even if they don’t want to. I think that’s wrong and Congress needs to change it.

And just this past week in the Rent-A-Center case the Court held that in most cases where a claim is made that enforcement of an arbitration clause would be unconscionable it would be the arbitrator—the arbitrator who gets to rule on that issue. Do you understand why the Supreme Court’s decisions in favor of powerful interests who want to force consumers and employees into arbitration against their will are so troubling to those who believe that our courts must continue to be available to enforce consumer protection, employment discrimination and other laws written to protect the powerless from misconduct by the powerful?

Ms. KAGAN. Senator Feingold, I have not had an opportunity to read that case. It was not one that the Solicitor General’s office participated in and I don’t have a view of it or much knowledge about it. I think that in this—in this—in that case the Supreme Court was interpreting a Congressional statute and this is another of the areas where Congress does indeed get to state the rules. So to the extent Congress thinks the Court got it wrong in that case or in any other regarding arbitration, I think it’s appropriate and the Court would and should respect what Congress does.

Senator FEINGOLD. With regard to financial regulation. I’ve heard a lot of anger from my constituents about financial institutions that have acted irresponsibly and then looked to the public for a safety net when things went wrong. That’s in part why I pose the Wall Street bailout, to take perhaps the most egregious example. Since the fall of 2008 the Federal Government provided approximately \$170 billion in bailout funding to the insurance giant AIG. But in contrast to the many workers in Wisconsin, and others who faced a cut in their benefits and pensions because of the recession, AIG insisted incredibly that it was contractually obligated to pay roughly \$165 million in bonuses to its executive employees even as it was staying afloat with taxpayer money. I found it hard to believe that the bonuses were legally required. So I was intrigued by a recent piece written by Noah Feldman, who I believe you hired when you were at Harvard. Feldman called for a new constitutional vision that would, “focus on government’s duty to protect the public not the bankers who needed to be bailed out in the first place.”

In light of the recent financial crisis, how should the courts evaluate the constitutionality of government regulation of big corporations and financial markets and other efforts to protect citizens and consumers from economic disaster?

Ms. KAGAN. Senator Feingold, it’s a very broad question and I guess I couldn’t answer it except, you know, with respect to a particular case, a particular set of circumstances, a particular constitutional provision. I’ve not read Noah Feldman’s article on this so I can’t talk about that. But I think, you know, the duty of the Court is obviously to apply the constitution to apply the statutes in any case that comes before it. And to the extent that the Constitution

or some particular statute made illegal some of the conduct that you're talking about, the duty of the Court is to enforce that.

Senator FEINGOLD. One last question. As you know the appointment of so-called "Czars" by the White House got a lot of attention last year. Although there was certainly a political component to some of the criticism, I did think there was some legitimate matter that needed to be explored, particularly since there seems to be a trend over the last several administrations and I held a hearing on the topic.

You've written a lengthy and impressive Law Review article about the President's ability to direct and control action by administrative agencies so I'm interested in your perspective. Do you think there are any constitutional problems with presidents relying on non-Senate confirmed Czars to direct administrative policy rather than the heads of administrative agencies? And how do you think Congress can exercise meaningful oversight over the Czars operating within the White House when the White House counsel often takes the position that they should not testify before Congress about their activities?

Ms. KAGAN. Senator Feingold, I think that there are important considerations on both sides of this question. On the one hand the President wants to have advisors in appropriate positions, advice he can trust, advice he can count upon. On the other hand Congress has an important interest in accountability and making sure that the President and the President's actions can be held to account in this institution.

I think that the balance between those two, when it comes to the President appointing certain people as Czars or whatever you want to call them, probably is most appropriately determined by the political branches themselves, by the give and take, the back and forth between Congress and the President. Congress, of course, has many ways to express to Presidents that it doesn't like some set of actions that he's taken including some appointments that he's made.

I suspect that a judicial case on that subject might be a last resort rather than what seems to me to be the more common, and I think the more appropriate way of dealing with a conflict and a disagreement as to this matter which is Congress and the President kind of battling it out as to the way he should appoint people.

Senator Leahy. That will be it for this morning. We'll come back within a few minutes after the vote which begins at 2:15. I will then recognize the next Republican Senator in line and go to the next Democratic Senator.

I hope you get some lunch.

Ms. KAGAN. Thank you, Mr. Chairman.

Senator Leahy. General, you're the one who has had to do all the work here this morning. I appreciate your testimony. We stand in recess.

[Recess 1 p.m. to 2:27 p.m.]

Chairman LEAHY. I'd welcome everybody back. I understand that the next person to question is Senator Grassley. Could you swap places with somebody else?

Solicitor General Kagan, glad to have you back. I hope you at least had a chance to have some lunch.

Solicitor General Kagan. I did, Mr. Chairman. Thank you very much.

Chairman LEAHY. Good.

Senator Grassley.

Senator GRASSLEY. Glad to be with you, Ms. Kagan. In an interview published May, 2004, in the *Metropolitan Corporate Counsel*, you stated, "Our courts are called upon to decide important matters, matters that often have great public impact. The attitude and views that a person brings to the bench make a difference in how they reach those decisions. So the Senate is right to take an interest in who these people are and what they believe."

Could you explain what kind of attitudes and views you were talking about in the quote? What attitude and views would you bring to the Supreme Court?

So I will stop here: third, and most importantly, how will they "make a difference" in how you, reach decisions? And "make a difference" are words out of your quote.

Solicitor General Kagan. Thank you, Senator Grassley. This really goes back to the questions I started with Senator Leahy about. Senator Leahy asked me, did I think that the Senate had an important role to play in this process. And I said, yes, it did, that the matter of confirming a Supreme Court justice is a highly significant one for the country, and that the Senate has an important role to play.

Different justices approach constitutional interpretation differently, approach statutory interpretation differently. The Senate has both an opportunity, but I think also a responsibility, to try to delve into those matters and to try to figure out what stances, what approaches a person is likely to bring to the court.

I tried to suggest to Senator Leahy earlier the kind of approaches I'd use. With respect to constitutional interpretation, that I thought that a variety—justices should appropriately look to a variety of sources; that I didn't have a grand theory with respect to constitutional interpretation; that I'm more pragmatic in my approach to constitutional interpretation; that I believe justices, depending on the particular provision, depending on the particular case, depending on the particular issue, should look to text, to history, to traditions, to precedent, certainly, and to the principles embodied in that precedent.

Senator GRASSLEY. The attitudes and views that you have, how will they make a difference in how you will reach a decision?

Solicitor General Kagan. Well, I think that approach to interpretation, to constitutional interpretation, is the one that I would bring to the court and is the one that I would use on the court. That's an approach that might be different than some other people, same—some people have that approach, some people have a different approach, and I think that those differences do matter.

Senator GRASSLEY. OK. I'd like to go to the Second Amendment. In *Sandidge v. United States*, the DC Circuit Court of Appeals held that the Second Amendment only protects a collective right, not an individual right, upholding DC's handgun ban and registration requirements. A version of this law was later overturned in *Heller*.

As a clerk to Justice Thurgood Marshall, you recommended against Supreme Court review. Your entire legal analysis was this:

“Petitioner’s sole contention is that the District of Columbia’s fire-arms statutes violate his constitutional right to keep and bear arms. I’m not sympathetic.”

Why were you “not sympathetic”? Were you not sympathetic to that challenge because it was your belief that the Second Amendment protects a collective, not an individual, right to keep and bear arms?

Solicitor General Kagan. Senator—Senator Grassley, I recommended that the court—that Justice Marshall vote to deny certiorari in that case. This was 20 years before *Heller*. The state of the law was very different. No court, not the Supreme Court and no appellate court, had held that the Second Amendment protected an individual right. Indeed, none of the justices on the court at that time voted to take certiorari in that case.

When the Supreme Court took cert in *Heller*, a Circuit Court had held that the Second Amendment protected an individual right. There was a conflict in the circuits. It was ripe for Supreme Court review. But at this time, no court had held that. It had long been thought, starting from the *Miller* case, that the Second Amendment did not protect such a right. And as I say, no justice voted to accept certiorari in that case.

Now, the *Heller* decision has marked a very fundamental movement in the court’s jurisprudence with respect to the Second Amendment. And as I suggested to Senator Feinstein, there is no question that, going forward, *Heller* is the law, that it is entitled to all the precedent that any decision is entitled to, and that’s true of *McDonald* as well with respect to *McDonald*’s holding that the Second Amendment applies to the States, and that’s what I would apply.

Senator GRASSLEY. So then if there had been—the *Heller* case existed, you would have been sympathetic to the challenge, and so the words “I am not sympathetic” were related to what you thought the law was at that time?

Solicitor General Kagan. It certainly was, Senator Grassley. It would have been an entirely different case had *Heller* existed prior to that certiorari petition.

Senator GRASSLEY. I’d like to continue on the Second Amendment. The Supreme Court held, as you know, in *Heller*, that the Second Amendment includes an individual right to possess fire-arms, not collective right conditioned by participation in a militia. Yesterday, the Supreme Court ruled in *McDonald* that the individual right recognized in *Heller* is applied to the States through the Doctrine of Incorporation via the Fourteenth Amendment.

This is not a comment on the case, but do you personally believe that the Second Amendment includes an individual right to possess a firearm?

Solicitor General Kagan. Well, I do think that *Heller* is the law going forward. I have not had, myself, the occasion to delve into the history that the court dealt with in *Heller*, but I have absolutely no reason to think that the court’s analysis was incorrect in any way. I accept the court’s analysis and will apply it going forward.

Senator GRASSLEY. So whether you personally believe that *Heller* or the right to bear arms is a collective or an individual right will

have no bearing in the future, but you don't want to tell us what your own personal belief is? That's kind of what I'm asking.

Solicitor General Kagan. Well, my approach in these hearings has been not to grade cases, even if I thought I had the wherewithal to grade them, which I'm not sure I do in *Heller*, just because the case is based so much on history, which I've never had an occasion to look at.

I know that the scholarship in this area has suggested that there is a very strong view that there is an individual right under the Second Amendment, and certainly Justice Scalia's opinion, which is a very thorough opinion for the court, is entitled to all the weight that any precedent has going forward.

Senator GRASSLEY. The court said in *Heller*, "It's always been"—and I guess I would put emphasis upon the word "always"—"It's always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a preexisting right."

Do you believe that the Second Amendment codified a preexisting right or was it a right created by the Constitution?

Solicitor General Kagan. Senator Grassley, I've—I've never really considered that question, as to whether the Second Amendment right—

Senator GRASSLEY. Well, it's basic to our Declaration of Independence that says we are endowed by our Creator with certain individual rights, among them. You know what it says. And we aren't endowed by our government, so the question here is, are we endowed by our Constitution with this right or did it exist before the Constitution existed?

Solicitor General Kagan. Well, Senator Grassley, I do think that my responsibility would be to apply the Constitution as understood and previously applied by the court, and that means as understood and interpreted by the court in *Heller*, and that's what I would do. So I think that the fundamental legal question would be whether—that a case would present would be—

Senator GRASSLEY. Yes.

Solicitor General Kagan.—whether the Constitution guarantees an individual right to bear arms, and *Heller* held that it did, and that's good precedent going forward.

Senator GRASSLEY. I know the Declaration of Independence is not the law of the land, but it does express the philosophy of why we went to war and why our country exists. You understand, I hope, that if we're endowed by our government with certain rights the government can take them away from us, whereas if we possess them ourselves and give them up from time to time to the government to exercise in our stead, then the government can't take away something that's inherently ours.

Do you believe that the Second Amendment right to bear arms is a fundamental right?

Solicitor General Kagan. Senator Grassley, I think that that's what the court held in *McDonald*.

Senator GRASSLEY. OK. And you agree with it?

Solicitor General Kagan. Good precedent going forward.

Senator GRASSLEY. In response to questions from Senator Leahy and Feinstein, you stated that *Heller* and *McDonald* are now settled law. Do you agree with the decisions in *Heller* and *McDonald*?

as an individual? Not as a Supreme Court justice, but do you believe in them as settled law personally?

Solicitor General Kagan. I do think that those decisions are settled law and are entitled to all the weight that any precedent of the Supreme Court has.

Senator GRASSLEY. OK. Will you follow stare decisis and uphold *Heller* and *McDonald*?

Solicitor General Kagan. I will follow stare decisis with respect to *Heller* and *McDonald*, as I would with any case.

Senator GRASSLEY. When you became dean of Harvard Law School, you spearheaded a sweeping overhaul of the academic curriculum. One change required students to take an international or comparative law course during their first year. You said, "We're in a new world and internationalization is an example. There's a recognition that a traditional curriculum does not provide some of what lawyers today need to know." I don't disagree with that statement. You also said that the first year of law school is the "foundation of legal education"—those four words are your words—because what students learn in that year "shapes their sense of what the law is, its scopes, its limits, and its possibilities."

I agree that the first year of law school is critical in framing a future lawyer. I also believe that taking an international law course is worthwhile. However, I'm troubled by your failure to recognize the obvious importance of requiring a class in constitutional law.

I am troubled by your decision to shape a student's understanding of U.S. constitutional law, if any, through the eyes of foreign legal systems, some of which have little respect for the value and principles that we hold so dear in this country.

Surprisingly, constitutional law is not a first-year requirement at Harvard. In fact, it isn't even a requirement to graduate from the law school. Yet, almost all the top law schools across the United States require their students to take a constitutional law course to graduate, and it's usually a first-year requirement.

When you said that "the traditional curriculum does not provide some of what lawyers today need to know", are you saying that they don't need to know constitutional law? And why, then, is it more important for a law student to take an international law course than a course in U.S. constitutional law? In other words, which is more important, our Constitution or other nations' constitutions and laws?

Solicitor General Kagan. Our constitutional law is absolutely basic. When we were doing the curricula review of the law school some years ago, we did think about what should be in the first year. One of the questions we considered was whether to put some constitutional law in the first year.

Harvard has long taught constitutional law in the second and third year since as far back as I can remember; I know that when I was a student it was taught in the second and third year. And we had a very serious discussion among our faculty as to whether to put constitutional law in the first year, as some schools do. Although the two schools I've taught at, both Harvard and the University of Chicago, teach constitutional law in the second and third year.

The reason for that is really a sense that students are better equipped to understand and to appreciate and to really delve into thoroughly all the subtleties and complexities of constitutional law issues in the second and third year, and that when you put it in the first year it actually short-changes constitutional law because you can only give students a very small amount of what they really should know.

So both at Harvard at in the University of Chicago, it's taught in the second and third year where it can be stretched out over a longer stretch of time, where students can delve more deeply into it, and also study it more broadly.

Now, we did decide, when we were doing this curricula review—we did decide to put some more constitutional law in our first year, and the way we did that was through a course that focused on the governmental process: legislation, regulation. That course is, in part, an introduction to constitutional law because it focuses quite a lot on separation of powers issues.

So, in fact, during that curricula review, although we decided, and the constitutional law faculty felt extremely strongly about this, the constitutional law primarily be kept in the upper years where students can deal with it in a much more sophisticated and in-depth way. We did put some constitutional law into the first year curriculum, specifically separation of powers issues, in a course that we devoted to the governmental process.

Senator GRASSLEY. But in the process of your explanation, you're justifying that constitutional law is less of a foundation course than international law, are you not?

Solicitor General Kagan. No. Senator Grassley, constitutional law is absolutely basic. The Harvard faculty has decided that it's actually best taught and most thoroughly taught and most broadly taught when it is done in the second and third years. Almost all students take a very wide set of constitutional law issues, more than they could do in the first year, at Harvard. So I think it's absolutely basic to our understanding of who we are as a people, and certainly to the knowledge of lawyers.

Now, I do think that international law is something that all law students today should be familiar with. I know that the students who graduate from Harvard, they go out, they do international litigation, they do international arbitrations, they do international business transactions, they do——

Senator GRASSLEY. I said I didn't disagree with you on the importance of international law. Let me go on, please.

Should judges ever look to foreign law for "good ideas"? Should they get inspiration for their decisions from foreign law?

Solicitor General Kagan. Well, Senator Grassley, I guess I'm in favor of good ideas coming from wherever you can get them, so in that sense I think for a judge to read a *Law Review* article or to read a book about legal issues or to read the decision of a State court, even though there's no binding effect of that State court, or to read the decision of a foreign court, to the extent that you learn about how different people might approach and have thought about approaching legal issues. But I don't think that foreign law should have independent precedential weight in any but a very, very narrow set of circumstances.

So I would draw a distinction between looking wherever you can find them for good ideas, for just to expand your knowledge of the way in which judges approach legal issues, but—but making that very separate from using foreign law as precedent or as independent weight. Fundamentally, we have an American Constitution. Our Constitution is our own.

It's the text that we have been handed down from generation to generation, it's the precedents that have developed over the course of the years. And except with respect to a very limited number of issues, that Constitution ought to—the fundamental sources of legal support and legal argument for that Constitution ought to be American.

Senator GRASSLEY. Which foreign countries would you suggest we look to for good ideas?

Solicitor General Kagan. Senator Grassley, I guess I would say again what I started with, which is, you can look to good ideas wherever they come from. You know, there's a brief that we filed recently in the Supreme Court, the Solicitor General's Office filed it. It regarded a Foreign Sovereign Immunities Act case. And in the course of that brief, we noted a number of different foreign precedents regarding what other Nations do with respect to the immunity of foreign officials. So, you know, that's the kind of way in which I think having an awareness of what other Nations are doing, you know, might be—might be useful.

Senator GRASSLEY. Some judges, and maybe justices, have said that our “influence in the world” should be a factor that a judge consider in constitutional interpretation. So do you believe that our “influence in the world” should be a factor that judges consider in constitutional interpretation?

Solicitor General Kagan. Senator Grassley, I think judges should let the President and the Congress worry about our influence on the world. I think that that's not something that judges should pay much attention to, should pay any attention to.

Senator GRASSLEY. If confirmed, would you rely on or cite international foreign law when you decide cases?

Solicitor General Kagan. Well, Senator Grassley, I guess I think it depends. There are some cases in which the citation of foreign law or international law might be appropriate. We spoke earlier—I forgot with which of the Senators—about the *Hamdi* opinion. The *Hamdi* opinion is one in which the question was how to interpret the authorization for the use of military force. Justice O'Connor, in that case—one of the ways that she interpreted that statute was by asking about the law of war and what the law of war usually provides, what authorities the law of war provides.

That's a circumstance in which, in order to interpret a statute giving the President various wartime powers, the court thought it appropriate to look to what the law of war generally provided. So there are a number of circumstances, I think. I mean, another example would be, suppose the President has the power to recognize Ambassadors under Article 2.

There might be a question, well, who counts as an ambassador? One way to understand that question is to look at what international law says about who counts as an ambassador, and that might or might not be determinative, but it would be, you know,

possibly something to think about and—and—and something to cite.

Senator GRASSLEY. You wrote in your Oxford thesis, “Judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid.” Then in addition, you wrote, “And yet, no court should make or justify its decisions solely by reference to the demands of social justice. Decisions should be based upon legal principle and reason; they should appeal no less to our intellectual than to our ethical sense. If a court cannot justify a ruling in terms of legal principle, then the court should stay its hand: no judge should hand down a decision that cannot plausibly be grounded in principles referable to an accepted source of law. If, on the other hand, a court can justify a ruling in terms of legal principle, then that court must make every effort to do so. Judicial decisions must be based, above all else, on law and reason.”

Is it ever appropriate for judges to “mold and steer” the law?

Solicitor General KAGAN. Senator Grassley, all I can say about that paper is that it’s—it’s dangerous to write papers about the law before you’ve spent a day in law school. So, I wrote that paper when—before I spent a day in law school. I was trying to think about whether to go to law school and I decided to write a paper about law in order to figure out whether I was interested in the subject, and I discovered that I was interested in the subject and I went to law school, where I found out that I might have been interested in the subject but I didn’t know much about the subject at the time. So, I would—I would—I would—I would just ask you to—to recognize that I didn’t know a whole lot of law then, and there are—I didn’t know a whole lot of law then.

[Laughter.]

Senator GRASSLEY. You know, if I accept your answer it’s going to spoil a whole 5 minutes I had here.

[Laughter.]

Chairman LEAHY. Chuck, go ahead and accept it.

[Laughter.]

Senator GRASSLEY. Let me enjoy it anyway, will you?

[Laughter.]

Senator GRASSLEY. When you said that, “No court should make or justify its decisions solely by reference to the demands of social justice”, are you saying that it’s acceptable for a court to make and/or justify its decision based upon “the demands of social justice”? And if so, whose “demands of justice” are you referring to?

Solicitor General KAGAN. Well, the first thing I’m going to do is just to ask that what I just said about that paper just be repeated for the record. And now I’ll say, no, I don’t think it’s—it’s—it’s appropriate to decide cases based on demands of social justice that are external to the law that—that ought to be applied to the case, whether that’s constitutional law or statutory law.

Senator GRASSLEY. OK. Well, let me leave that then and say that you learned a lot by going to law school. I’m not sure I say that to very many people.

[Laughter.]

Senator GRASSLEY. I’m not a lawyer, you know.

[Laughter.]

Senator GRASSLEY. Let me go to one of your judicial heroes, Judge Barak. Because you don't have any judicial experience, we have no concrete examples of how you decide cases. So we have to look elsewhere for clues as to what your judicial philosophy might be, including your judicial role models, because we have to assume that you agree with their judicial method.

I am troubled by the fact that you hold up Judge Barak to be a judicial role model. You've called him your "judicial hero." Judge Barak's judicial philosophy is undeniably activist and seen by many as a brazen abuse of power. He's been described as having "created a degree of judicial power undreamt of by most aggressive United State Supreme Court justices." For example, Judge Barak believes that "a judge has a role in the legislative project." Will you look to Judge Barak's judicial method as a model for deciding cases?

Solicitor General KAGAN. I will not, Senator Grassley. I do admire Justice Barak, who is, of course—was for many years the chief justice of the State of Israel. He is very often called the "John Marshall of the State of Israel" because he was central in creating an independent judiciary for Israel and in ensuring that Israel, a young nation, a nation threatened from its very beginning in existential ways, and a nation without a written constitution—he was central in ensuring that Israel, with all those kinds of liabilities, would become a very strong rule of law nation, and that's why I admire Justice Barak, not for his particular judicial philosophy, not for any of his particular decisions.

As you know—I don't think it's a secret—I am Jewish. The State of Israel has meant a lot to me and my family, and I admire Justice Barak for what he has done for the State of Israel in ensuring an independent judiciary.

Senator GRASSLEY. So then I suppose I can assume that you would disagree with his statement that "a judge has a role in the legislative project"?

Solicitor General KAGAN. I do disagree with that.

Senator GRASSLEY. OK.

Solicitor General KAGAN. I think that the legislative role and the judicial role are fundamentally different and that judges owe a great deal of deference to legislatures and should not—the legislative way of thinking is entirely different from the judicial way of thinking, and judges should think of themselves, as I indicated before, only as policing the constitutional boundaries, only as ensuring that the legislature does not overstep its constitutional role by interfering with the States or by violating individual rights, but certainly the judges should not be doing what the legislature ought to be doing, which is making the fundamental policy decisions for this Nation.

Senator GRASSLEY. One last statement he made, and I assume you would disagree with this as well. At Harvard Law, he spoke, "There are cases . . . in which the judge carries out his role properly by ignoring the prevalent social consensus and becoming a flag bearer of a new social consensus." Would there be some time you might find that appropriate for the Supreme Court to take a leap like that?

Ms. KAGAN. Well, I'm not exactly sure what he meant by that, but if he meant that the court should sort of make decisions that the American people—that more appropriately should make, the sort of fundamental policy decisions of our society, I don't agree with that. As I said, I was talking about Justice Barak, and my admiration for Justice Barak comes from his important role at the State of Israel in ensuring an independent judiciary, and most fundamentally in ensuring that Israel is this strong rule of law nation.

Senator GRASSLEY. Last question. Do you believe that Judge Barak endorses a philosophy of judicial restraint or judicial activism?

Ms. KAGAN. I think that Justice Barak's philosophy is—is so different from anything that we would use or would want to use in the United States. I mean, for one thing, Israel is a country without any written constitution, a very fundamental difference from the United States. So nothing about what I said about Justice Barak suggests in any way that I think that his ideas about the judge's role in constitutional interpretation should be transplanted to the United States.

Senator GRASSLEY. Thank you.

Chairman LEAHY. And I would just put in the record, Justice Antonin Scalia said about, as he said his good friend Judge Barak when he gave him the American Association of Jewish Lawyer's Pursuit of Justice Board and Justice Scalia expressed his profound respect for the man and with Judge Richard Posner, conservative luminary, described him by saying if there were a Nobel Prize for law, Judge Barak would probably be an early recipient.

But I would also note on the question of looking at foreign law, I was thinking the record, another nominee sent to us and I think there is a question, there are other legal issues that come up in which I think it is legitimate to look to foreign law and gave some examples. It is something useful to look to. That was Justice Alito and I just note that parenthetically the Republican voted for him.

Senator GRASSLEY. Mr. Chairman, I can only assume that with your quick comeback that you have a copy of my notebook.

Chairman LEAHY. You probably wonder why there was a door to your shed that was open this morning.

Senator SESSIONS. I respect the Chairman's prerogative, but I don't think we should be in the situation where the Chairman rebuts the questioning of each and every witness on this side. I think it kind of alters the dynamics.

I would just say with regard to Justice Scalia's comments about Mr. Barak at that same comment on lightening Kagan, he expressed a clear difference on philosophy about the activist vision that Justice Barak has for the role of a judge.

Judge Posner said his, that Judge Barak's activism exceeds anything dreamed of by the most activist American judge. I think you misquoted and failed to quote completely the nature of those two people's comments. There is a raging debate in this country and no one denies it over the extent to which foreign law can be cited to define a constitution and laws of this country.

I would assume that this nominee from her statements would be on the side of Justice Ginsburg who favors that and——

Chairman LEAHY. I will reclaim. We will have plenty of time to debate this. As you know, I gave Senator Grassley extra time and then I responded with an equal amount of time. We will put it into the record. Of course I would yield to anybody who wants to put it into the record just exactly what Justice Alito said and Judge Posner said and Judge Scalia said.

Ms. KAGAN. Senator Leahy, if I might just make one last point. I made these remarks about Justice Barak when he came to Harvard Law School to give a speech.

One of the things that I did as Dean of Law School was I gave introductions. I gave introductions to many, many people. If any of you had come to Harvard Law School, I would have given you a great introduction, too.

Chairman LEAHY. Thank you. And with that, I yield to, you see, Senator Grassley, you've got something to look forward to yet. Senator SPECTER, go ahead.

Senator SPECTER. Mr. Chairman, thank you to you and Senator Sessions on your second or third round. Some of us having had a first round.

Senator SESSIONS. Your effective role as ranking member.

Senator SPECTER. May we start at 30 minutes on my clock without Senator Sessions' interjection?

Madam Solicitor General, I begin with concern for separation of powers which is a foundation of the constitution and the concerns I have with what the Supreme Court has done really in having a consolidation of power. A lot of it going to the court, a lot of it going to the executive branch, and it is all coming from the traditional power of Congress.

Before I move into that area, I want to take up a couple of points. Senator Sessions has raised the issue about your being a progressive, a legal progressive. When he was doing that this morning, I was thinking about the Supreme Court's decision yesterday, incorporating the Second Amendment into the due process clause of the Fourteenth Amendment and remember how many objections were raised to the activist liberal Warren Court for doing that.

I was a prosecutor at the time and the law changed, constitutional law changed, *Map* in Ohio in '61 and *Gideon* in '63 and *Rand* in '66 and now we have the five conservatives being progressives or activists.

I was intrigued by Senator Hatch's questioning you on the citizens in the *United* case, really an extraordinary case characterized by what Justice Stevens had to say. You have Congress constructing a detailed record, 100,000 pages, and Congress has structured *McCain Feingold* based upon the standard set forth by the Supreme Court in *Austin* versus Michigan Chamber of Commerce.

Then as Justice Stevens noted, the court pulled the rug out from Congress, affirming the constitutionality where it had been in effect for 100 years and as Justice Stevens concluded showing "great disrespect for a equal branch." I will try to make my questions as pointed as I can. To the extent that you can answer them briefly, I'd appreciate it. We don't have a whole lot of time.

What is your thinking on disrespect for the Congress when we take a Supreme Court decision and we structure a law based on

those standards with a customary deference due Congress on fact finding? Isn't that really what Justice Stevens calls disrespect?

Ms. KAGAN. Well, Senator Specter, as you know, I argued that case as you know. I filed briefs on behalf of the United States in that case. In those briefs, the government made a similar kind of argument that great deference was due to Congress in the creation of a quite voluminous——

Senator SPECTER. Ms. Kagan, I know what you said. You have talked about that a great deal. My question is very pointed. Wasn't that disrespectful?

Ms. KAGAN. Senator Specter, as I suggested before, when I walked up to that podium at Citizens United, I thought we had extremely strong arguments. I was acting as an advocate of course, but I thought we had various——

Senator SPECTER. I'm going to move on. I know all of that. The point that I'm trying to find out from you is what deference you would show to Congressional fact finding. Let me move on.

Ms. KAGAN. May I try again? Because I think that the answer to that is great deference to Congressional fact finding.

Senator SPECTER. Well, was it disrespectful or not?

Ms. KAGAN. Well, again, I don't want to characterize what the Supreme Court did.

Senator SPECTER. Well, I want to move on. If you don't want to characterize, I want to ask my next question.

In the U.S. versus Morrison involving the issue of violence against women, we had a mountain of evidence assembled as Justice Souter pointed out in dissent, and the court rejected Congressional findings because of our "method of reasoning."

You haven't crossed the street to the Supreme Court yet, but do you think that there is some unique endowment when nominees leave this room and walk across the street to have a method of reasoning which is superior to Congressional method of reasoning so that a court can disregard voluminous records because of our method of reasoning?

Ms. KAGAN. Well, to the contrary, Senator Specter. I think it's extremely important for judges to realize that there is a kind of reasoning and a kind of development of factual material more particularly that goes on in Congress.

Senator SPECTER. Then you disagree with Chief Justice Rehnquist?

Ms. KAGAN. I think that it is very important for the courts to defer to Congressional fact finding, understanding that the courts have no ability to do fact finding, are not, would not legitimately, could not legitimately do fact finding.

Senator SPECTER. Well, I know all of that, but what do you think of our method of reasoning?

Ms. KAGAN. As I said earlier, Senator Specter, I have enormous respect for the legislative process. Part of that respect comes from working in the White House and working with Congress on a great many pieces of legislation.

Senator SPECTER. I'm going to move onto my next question. Justice Scalia and Lane attacked the standard of congruence in proportionality saying that this court is acting as Congress's task master.

The court is checking on Congressional homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional.

Now, I picked out three instances, *Citizens United* where Justice Stevens has great disrespect and the attack by Rehnquist on our method of reasoning and Scalia talking about proportionality and congruence. That brings me to the question for you where you have been very explicit in the now famous University of Chicago *Law Review* article about dealing with substantive issues.

We had the standard for determining constitutionality under the Commerce Clause from *Maryland versus Wirtz*, 1968. Justice Harlan who established that standard, "where we find that the legislators have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

In the city of Burnie case, 1997, the court pulled out of thin air a new test. The test is whether the legislation is proportionate and congruent. That is the test which Justice Scalia so roundly criticized saying it was flabby, that it was an excuse for a judicial legislation.

Now, would you take Harlan's test as opposed to the congruence and proportionality test?

Ms. KAGAN. Senator Specter, Justice Scalia is not the only person who has been critical of the test. A number of people have noted that the test which is of course a test relating to Congress' power to legislate under Section 5 of the Fourteenth Amendment that the test has led to some apparently inconsistent results in different cases.

So you have a case like *Garrett* on the one hand and a case like *Tennessee versus Lane* on the other.

Senator SPECTER. I know those cases very well. Five to four, O'Connor went the other way, but they both used proportionate and congruent.

What I want to know from you is whether you think that is an appropriate standard to replace the rational basis test of *Wirtz*.

Ms. KAGAN. Well, it is the standard of the court right now. It is precedent and it is entitled to weight as precedent.

Now, as you very well know, Senator Specter, there are times when the court decides that precedent is unworkable. It just, it produces a set of chaotic results.

Senator SPECTER. What was unworkable about the *Wirtz* test for a reasonable basis contrasted with congruent and proportional which nobody understands?

Ms. KAGAN. No, I wasn't suggesting that the *Wirtz* test was unworkable. I think that the question going forward, and it is a question. I'm not stating any conclusion on it, but I think that something that Justice Scalia and others are thinking about is whether the congruent and proportionality test is workable or whether it produces such chaotic results and gives you—

Senator SPECTER. So you think it is workable?

Ms. KAGAN. Senator Specter, I've not really delved into the question the way I would want to as a judge, reading all the briefs, listening to the arguments, thinking through the issues from both

sides. But I do know that the court needs, excuse me, that Congress needs very clear guidance in this area.

It is not fair to Congress to keep on moving the goal posts. It is not fair to say oh well, you know, if you do this this time it will be OK but if you do that the next time, it won't.

Senator SPECTER. This is an issue we discussed weeks ago. This is an issue I raised in a series of letters which I'll put into the record. This is a standard which has been around for a long time. You know a lot of law. Senator Grassley established that.

Is it a satisfactory test? Let me move onto another question. I don't think I'm making too much progress.

One of the grave concerns which has risen out of the, out of recent confirmation proceedings with Chief Justice Roberts and Justice Alito, and I have spoken about this subject extensively on the floor citing how emphatic Chief Justice Roberts and Justice Alito were on deferring to Congress.

It is a legislative function. It is not a judicial function they said. If you engage in fact finding, if the court does that, the court is transgressing into the Congressional area. Then you have a case like *Citizens United* and others and you have the declarations by the Chief Justice of Modesty, you have adopted that standard. His more emphatic standard was not to jolt the system.

Is there any way you could look at *Citizens United* other than it being a tremendous jolt to the system?

Ms. KAGAN. Senator Specter, again, this is one that as an advocate, I have taken a strong view on which is that it was a jolt to the system. There was a great deal of alliance interests involved and many states had passed pieces of legislation in reliance upon Austin that Congress had passed legislation after accumulating a voluminous record.

Senator SPECTER. Ms. Kagan, you have said that many times today about your advocacy in the case. But what I want to know is as a perspective Justice, do you consider it a jolt to the system?

Ms. KAGAN. Senator Specter, it is a little bit difficult to take off the advocate's hat and put on the judge's hat. One of the things that I think is important is that I appreciate the difference between the two and I have been an advocate with respect to *Citizens United* and that's the way I came to the case, it is the way I approached the case, I hope that I did a good and effective job in it. I believed what I was saying. But it's a different rule and it's a different thought process than the role and the thought process that one would use as a judge.

Senator SPECTER. Well, what I'm interested in is what you use as a judge. But let me move on again.

There is a lot of concern in the Senate about the value of these hearings when we have the kinds of declarations at that table, your predecessor and nominees on deference to Congress and then there is none given. Not to jolt the system and be modest, there is a 180 degree U-turn.

We wonder what we can do about that. Judicial independence is the ball work of this republic. Judicial independence gives us the rule of law and it is our most highly prized value.

While the Congress and the executive branch fumbled on segregation for decades, really centuries, the court came along and

acted on the subject in a progressive way, a very progressive way and a very activist way.

Nobody challenges it on either side of the aisle today. So we may have the highest respect for judicial independence, but what do we do when we confirm nominees and they don't follow through on very flat commitments?

This is not just my view. The view of Richard Posner is very tough in his book, *How Judges Think*. This is what he has to say about the subject I'm addressing. "Less than 2 years after his confirmation, referring to Chief Justice Roberts, he demonstrated by his judicial votes and opinions that he aspires to make changes in significant areas of constitutional law. The tension between what he said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts' reputation for candor and further displacement of the already debased currency of the testimony of nominees at judicial confirmation hearings."

Now, we are trying to raise the level of that currency. I don't believe you want to make a comment about that, but if you do, you are welcome to.

Ms. KAGAN. Senator Specter, I assume the good faith of everybody who sits in this chair. There is no reason in my mind to think otherwise.

Senator SPECTER. Madam Solicitor General, I agree with you as to good faith. In raising these issues on a series of speeches on the floor, I have explicitly said that I'm not challenging the good faith of Chief Justice Roberts or Justice Alito. I understand the difference between sitting at that witness plot and deciding a case in controversy that comes before the court.

But that still leaves us with a problem. The best answer that a group of senators, and we talk about this with some frequency, can come up with is to put some sunlight on the court.

As I said in my opening statement, the disinfectant that Brandeis talked about, sunlight, the best disinfectant. Well, it's not quite a disinfectant. But I think if the public understood what was happening, there would be a strong temptation to stand by what had been said in these confirmation hearings.

I was really glad to hear you say in response to Senator Kohl's questions that you favor television the Supreme Court. I think we may be getting closer. I have been at it for more than a decade with a whole series of bills.

Recently the judiciary Committee voted out a bill to televise the Supreme Court 13 to 6. We did it a couple of years ago 12 to 6. I know it is going to be something the court is going to have to come to, perhaps on its own. But the public views are increasing.

A poll which was released by CSPAN just yesterday shows that 63 percent of the American people favor televising the court. Among the 37 percent who opposed, when they were told that people can only be in the Supreme Court chamber for about 3 minutes, only a couple hundred people, 60 percent of those, 37 percent thought the court should be televised which brings the total to about 85 percent.

I know we don't run the court by public opinion polls, but isn't that fairly weighty as to what the American people would like to know?

We talked about a living constitution and about the constitution expressing the changing values of our society, as Cardozo said so eloquently in *Palco*. If the people of this country knew that the court was deciding all of the cutting edge questions, a woman's right to choose, who lands death penalty cases for juveniles, who dies, affirmative action, who gets into college, freedom of speech and religion, the American people responded on a poll to *Citizens United* and 85 percent thought it was a terrible decision. Ninety 5 percent thought that corporations paid contributions to influence legislators.

One of the great problems of the skepticism of the American people about Congress, is it heavy out there. It so open season on Congress because of so much of what people think about.

Well, coming back to the court, wouldn't it be, you have already said you're in favor of televising the court. Wouldn't televising the court and information as to what the court does have an impact on the values which are reflected in the American people?

Ms. KAGAN. I do think, Senator Specter, it would be a good thing from many perspectives and I would hope to if I am fortunate enough to be confirmed to engage with the other Supreme Court Justices about that question.

I think it is always a good thing when people understand more about government rather than less and certainly the Supreme Court is an important institution and one that the American citizenry has every right to know about and understand.

I also think that it would be a good thing for the court itself that that greater understanding of the court I think would go down to its own advantage. So I think from all perspectives, televising would be a good idea.

Now, I recognize that some people, some justices may have views to the contrary and I would want to hear those views and to think about those views. But that is sort of my going in thought.

Senator SPECTER. I will put into the record what the justices have had to say. I have questioned almost everybody about this subject and I've had the opportunity to question all of the people on the court now, but there are a lot of those who have been favorably disposed to, or at least have acknowledged its inevitability.

I reminded them that they all appeared on television this year on CPSAN and most of them, many of them have appeared over the years selling books and being in a variety of situations.

Ms. KAGAN. It means I'd have to get my hair done more often, Senator Specter.

Senator SPECTER. Let me commend you on that last comment. I say that seriously. You have shown a really admirable sense of humor. I think that is really important.

As Senator Schumer said yesterday, we are looking for somebody who can moderate the court and a little humor would do a lot of good.

In the case of *Richmond Newspapers versus Virginia*, the Supreme Court said that a public trial belongs not only to the accused, but to the public and press as well.

People now acquire information on court procedures truthfully through the print and electronic media. That's a 1980 decision

which upheld a newspaper's rights to be in court and observe a trial.

Isn't that some pretty solid precedent to say, that is a matter of law the court ought to have television to have public access because that's the way most people get their information these days?

Ms. KAGAN. That's very interesting, Senator Specter. I had never considered the relevance of that case to the televising question. But I think certainly the principles in that case, the values in that case are about the public's ability to know how our governmental institutions work, which is what is critical to this issue as well.

Senator SPECTER. Let me move onto another subject which I consider to be of great importance. That is the agenda of the court, the number of cases the court hears.

In 1886, the court decided 451 cases. In 1987, a little more than 20 years ago, 146 cases. In 2006, 67. In 2007, 76. In 2008, or 2006, 68, in 2007, 67, 2008 was 75, 2009, finishing yesterday of 73. The court leaves a lot of circuits split, unresolved.

The court does not hear a great many critical cases. I discussed this with you in our meeting several weeks ago and wrote you about it as well. That is the case involving the Terror Surveillance Program on the Foreign Intelligence Surveillance Act which arguably poses the sharpest conflict between the Congress legislating FISA and the President asserting Article 2 powers.

A Federal court in Detroit found the Terror Surveillance Program unconstitutional. The 6th Circuit ducked it 2:1 with a very strong dissent on standing grounds which is traditionally a way of avoiding a case and the Supreme Court denied cert.

Congress has the authority to tell the court what cases to take. We have legislated giving you discretionary authority. But in many cases illustratively the flag burning case and the McCain/Feingold and Federal Labor Standards Act, we directed the court to hear the case. So I think it is fair to ask what you would have done, not how you will decide that case, but whether you would take the case.

Had you been on the Supreme Court, would you have voted to grant cert in the Terror Surveillance Program case?

Ms. KAGAN. Senator Specter, if I might, just to your first point which was the point about the court's declining docket. I do generally agree with that. I clerked on the court in 1987 which was pretty much at the high point of what the court was doing, about 140 cases a year.

It is a bit of a mystery why it has declined so precipitously. I do agree with you that there do seem to be many circuit conflicts and other matters of vital national significance.

Senator SPECTER. The other issue I raised was much more important.

Ms. KAGAN. OK.

Senator SPECTER. And there are only 2 minutes left for me now.

Ms. KAGAN. Senator Specter, the issue about the TSP and the constitutionality of the TSP is I think one of the kinds of issues I previously set out three categories where the court might grant cert. One which is circuit conflicts, one which is the invalidation of an act of Congress and the third is just an issue of some vital national importance.

In a case where the executive branch is determined or is alleged, excuse me, is alleged to be violating some Congressional command, it is I think one of the kinds of cases that the court typically should take.

Now, there is in this case the complexity that there is a potential jurisdictional bar. Of course the court typically decided——

Senator SPECTER. What jurisdictional bar?

Ms. KAGAN. Well, the question whether somebody has stood. So often the court will decline to take a case when there is a significant jurisdictional issue because the court will think well, if we take this case, we might hold that we don't have jurisdiction.

Senator SPECTER. They can take the case and say they don't have jurisdiction.

Ms. KAGAN. Yes. You're exactly right. I'm just suggesting that that is often the reason why a court doesn't take a case. If it doesn't know ——

Senator SPECTER. I don't care what is often a reason. Here we have a specific case, you had a lot of notice, it's in concrete. Would you have voted to grant cert?

Ms. KAGAN. Senator Specter, I can just tell you, there was this jurisdictional issue. Now, the jurisdictional issue itself was an important one. It was an important one because how is a person going to know whether——

Senator SPECTER. The 6th Circuit decided there was no standing after they heard the case. Well, my time is almost up, 10 seconds. I was 13 seconds over last time.

There are a couple of other cases, the holocaust survivors, the 9/11 survivors victims which I'll come back to when I have a green light.

Chairman LEAHY. Thank you very much, Senator Specter. Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Chairman LEAHY. Then we will just for planning purposes, and Senator Graham, we will go to you. Then we will go to Senator Schumer and then we'll take a short break. Does that work? OK. Senator Graham, it is all yours.

Senator GRAHAM. Thank you. So far have the hearings been what you thought they would be?

Ms. KAGAN. I'm not sure I had, I'm not sure I exactly pictured it.

Senator GRAHAM. Let's try to go back in time and say you are watching these hearings and you are critical of the way the Senate conducted these hearings. Are we improving or going backwards? And are you doing your part?

Ms. KAGAN. I think that you have been exercising your constitutional responsibilities extremely well.

Senator GRAHAM. So it's all those other guys that suck, not us, right? It was all those other witnesses that were too cagey, right? All right. Fair enough.

Now, do you know Greg Craig?

Ms. KAGAN. I will say one thing, Senator Graham, which is it just feels a lot different from here than it felt from back there.

Senator GRAHAM. I bet it does. It feels a lot different when you're the nominee too, doesn't it? If it didn't, I'd really be worried about you. You know Greg Craig?

Ms. KAGAN. I do.

Senator GRAHAM. He was previously the counsel to the President.

Senator GRAHAM. Do you know him well? Pretty well?

Ms. KAGAN. You know, OK.

Senator GRAHAM. I'm not trying to trick you. I don't have anything on Greg. He said on May 16th that you are a largely progressive in the mold of Obama himself. Do you agree with that?

Ms. KAGAN. Senator Graham, you know, in terms of my political views, I have been a Democrat all my life. I have worked for two Democratic Presidents and that is what my political views are.

Senator GRAHAM. And would you consider your political views progressive?

Ms. KAGAN. My political views are generally progressive, generally—

Senator GRAHAM. Compared to mine, for sure, right? OK, that's fine. There is no harm in that and that makes the hearings a little more interesting. I would be shocked if President Obama did not pick someone that shared his general view of the law and life and so elections have consequences. Do you agree with that? Elections do have consequences.

Ms. KAGAN. It would be hard to disagree that elections have consequences.

Senator GRAHAM. Right. And one of the consequences is a President gets to fill a nomination for the Supreme Court. That's a power that the President has, right?

Ms. KAGAN. Yes, sir.

Senator GRAHAM. So it would be OK from your point of view if a conservative president picks someone in the mold of a conservative person?

Ms. KAGAN. I would expect that.

Senator GRAHAM. There we go. Good. We'll remember that. OK. We may have a chance to bring those words back. Do you know Miguel Estrada?

Ms. KAGAN. I do.

Senator GRAHAM. How do you know him?

Ms. KAGAN. Miguel and I were classmates at Harvard Law School, but we were more than classmates at Harvard Law School. Harvard Law School has a way of, has required seating in the first year. Miguel and I were—

Senator GRAHAM. Trust me, I don't know because I could have never gotten there, but I trust you.

Ms. KAGAN. Miguel and I were required to sit next to each other in every single class in the first year. I can tell you Miguel takes extraordinary notes. So it's great. Every time you missed something in class, you could just kind of look over and, but that's how I know Miguel. We have been good friends ever since.

Senator GRAHAM. What is your general opinion of his legal abilities and his character?

Ms. KAGAN. I think he is a great lawyer and a great human being.

Senator GRAHAM. He wrote a letter on your behalf. Have you had a chance to read it?

Ms. KAGAN. I did.

Senator GRAHAM. Can I read part of it? I write in support of Elena Kagan's confirmation as Associate Justice of the Supreme Court of the United States. I have known Elena for 27 years. We met as first year law students at Harvard where we were assigned seats next to each other. So you're consistent, for all our classes.

We were later colleagues as editors of the law review and as law clerks to different Supreme Court Justices and we have been friends since.

Elena possesses a formidable intellect, an exemplary temperament and a rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments.

Elena would also bring to the court a wealth of experience at the highest levels of our government and of academics, including teaching at the University of Chicago serving as a Dean of the Harvard Law School and experience at the White House as current Solicitor General of the United States.

If such a person who has demonstrated great intellect, high accomplishments and an upright life is not easily confirmable, I fear we will have reached a point where no capable person will readily accept a nomination for judicial service.

What do you think about those comments?

Ms. KAGAN. Senator Graham, I think those comments reflect what an extraordinary human being Miguel Estrada is. I was deeply touched when I read that letter, deeply grateful to him of course and all the nice things that he said about me I would say back about him double.

Senator GRAHAM. Well, I am going to give you that chance because Miguel Estrada, as most people know, maybe not everyone, was nominated by President Bush to the court and he never made it.

I think it is one of the great tragedies for the country that he was never able to sit on an appellate court, but that's the past. I do think it reflects well of him that he would say such things about you. Quite frankly, I think it reflects well of you that you would say such things about him.

In your opinion, Ms. Kagan, is he qualified to sit as an appellate judge?

Ms. KAGAN. He is qualified to sit as an appellate judge, he is qualified to sit as a Supreme Court Justice.

Senator GRAHAM. Your stock really went up with me. So what I would like you to do since you might 1 day be on the court yourself is to, if you don't mind at my request, write a letter to me, short or as long as you'd like it about Miguel Estrada. Would you be willing to do that in the next couple of days?

Ms. KAGAN. I would be pleased to do that, Senator Graham.

Senator GRAHAM. Thank you. Now, let's talk about the war. As Solicitor General of the United States, you represent the United States government before the Supreme Court, right?

Ms. KAGAN. I do.

Senator GRAHAM. OK. Let's shift gears here. And you had to get confirmed before this body for that job. Do you remember that confirmation process?

Ms. KAGAN. I do.

Senator GRAHAM. Do you remember me?

Ms. KAGAN. I do remember you.

Senator GRAHAM. OK. Good. Do you remember when I asked you, are we at war, and you said?

Ms. KAGAN. Yes.

Senator GRAHAM. OK. Now, that is a bold statement to make but an accurate statement. Who are we at war with and what does that mean in terms of this Nation's legal policy?

Ms. KAGAN. Well, we are at war with Al Qaeda and the Taliban and under the AUMF, the President has a wide range of authorities with respect to those groups.

Senator GRAHAM. Now, under domestic criminal law as we know it today, is there any provisions in our domestic criminal law that would allow you to hold someone indefinitely without trial?

Ms. KAGAN. Not that I know of, Senator Graham.

Senator GRAHAM. And quite frankly there shouldn't be, should there?

Ms. KAGAN. No, sir.

Senator GRAHAM. And under the law—

Ms. KAGAN. I feel as though we are doing this again.

Senator GRAHAM. We are.

Ms. KAGAN. We are sort of doing an instant replay.

Senator GRAHAM. Yes, we are going to do this again and I hope we get the same answers. That will help you a lot if we do. If we don't, we'll have a problem.

Under the law of armed conflict, is it permissible to hold an enemy combatant as long as the holding force deems them to be dangerous?

Ms. KAGAN. Under the traditional law of war, it is permissible to hold an enemy combatant until the end of hostilities. The idea behind that is that the enemy combatant not be enabled to return to the battlefield.

Senator GRAHAM. That's a good summary. The problem with this war is there will never be a definable end to hostilities, will there?

Ms. KAGAN. That is exactly the problem, Senator Graham. *Hamdi* very briefly discussed this problem, the court in *Hamdi* suggesting that perhaps if this war was so different from the traditional law of war that there might need to be alternative procedures to put in place.

For example, one could imagine a system in which because of the duration of this war, it was necessary to ensure that enemy combatants continue in dangerousness. That is a question that I think has not been answered by the court.

Senator GRAHAM. Do you believe it would serve this country well if the Congress tried to work with the executive branch to provide answers to that question and others?

Ms. KAGAN. Senator Graham, let me take the question and make it into a legal question because I think it is directly relevant under the *Youngstown* analysis whether Congress and the Presidents do work together.

Senator GRAHAM. When the two are together, the courts find more power.

Ms. KAGAN. That's correct.

Senator GRAHAM. Now, you are still Solicitor General of the United States. From that point of view, would you urge this Congress to work with the executive branch to create statutes to help the courts better answer these questions?

Ms. KAGAN. Senator Graham, I think I don't want to talk as Solicitor General as to legal policy here.

Senator GRAHAM. OK.

Ms. KAGAN. But I will say as to the legal matter that it makes a difference. Whether Congress and the President work together, that courts should take note of that, that courts should, when that occurs, the action is at, ought to be given the most deference and that there is a reason for that. It is because the courts are basically saying Congress and the President have come together, Congress and the President have agreed upon a policy jointly and there should be deference in those circumstances.

Senator GRAHAM. Are you familiar with Judge Lamberth and Judge Hogan?

Ms. KAGAN. I don't know either of them. I know who they are.

Senator GRAHAM. Fair enough. They are DC judges, Federal District Court judges who are hearing a habius of bills from GTMO detainees. I will provide you some of the comments they made.

It is unfortunate, according to Judge Hogan, it is unfortunate in my view that the legislative branch of the government and the executive branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases.

I have got other quotes that I will provide you. What I'm trying to do here is lay the foundation for the idea that our laws that exist today do not recognize the dilemma the country faces. The administration has determined that 48 people held at GTMO are too dangerous to let go but are not going to be subject to normal criminal proceedings.

In other words, we believe the evidence suggests they are members of Al Qaeda, they have all gone before a habius judge and the judge agreed, but they are never going to be tried in a traditional fashion.

Is the administration's decision in your opinion consistent with the power under the law of war to do that?

Ms. KAGAN. Well, as Solicitor General, Senator Graham, I have argued the position that this is fully legal.

Senator GRAHAM. And I think very well, very well. You have argued for the proposition that this President and all future Presidents has the ability to detain an enemy combatant with sufficient process if the executive branch believes that they are dangerous and not require them to go through a normal criminal trial.

What we have to do is find out what that process would be, this hybrid system. You argued against expanding habius rights to detainees held in Afghanistan, is that correct?

Ms. KAGAN. I did, Senator Graham.

Senator GRAHAM. As a matter of fact, you won.

Ms. KAGAN. In the—Circuit.

Senator GRAHAM. And you probably won't be able to hear that case if it comes to the Supreme Court, will you?

Ms. KAGAN. Well, that's correct.

Senator GRAHAM. Well, that's good because we can talk openly about it.

Ms. KAGAN. If I could just say, in general the Solicitor General only signs her name to briefs in the Supreme Court, authorizes appeal but does not sign appellate briefs.

I determined that I should be the counsel of record on that brief because I thought that the United States' interests were so strong in that case based on what the Department of Defense told our office.

Senator GRAHAM. Right. I want every conservative legal scholar and commentator to know that you did an excellent job in my view of representing the United States when it came to that case.

You said previously that the first person you have to convince when you submit a brief or take a case on is yourself, is that correct?

Ms. KAGAN. Well, I said that in reference to the cases that I argued specifically. Of course when I write briefs, I write from, or when I sign briefs, when I am counsel of record on briefs, I am taking the position of the United States, that I am representing the position that I believe and that our office believes is most consistent with the long-term interests of the United States government.

Senator GRAHAM. Have you convinced yourself as well as representing the United States government it would be a disaster for the war effort if Federal judges could intervene and require the release of people in detention in Afghanistan under military control?

Ms. KAGAN. Senator Graham, I chose to put my name on that brief, as I said, which is a very, very rare thing in the appellate courts because I believe that they were very significant—

Senator GRAHAM. Well, let me read a quote. "The Federal court should be come the vehicle by which the executive is forced to choose between two intolerable options, submitting to intrusive and harmful discovery of releasing dangerous detainee." Do you stand by that statement?

Ms. KAGAN. Senator Graham, can I ask whether that statement comes from that brief?

Senator GRAHAM. Yes, it does.

Ms. KAGAN. That statement is my best understanding of the very significant interests of the United States government in that case which we tried forcefully to present to the court. As you said before, the DC circuit, a very mixed panel of the DC circuit upheld our argument.

Senator GRAHAM. You also said the courts of the United States have never entertained *habeas* lawsuits filed by enemy forces detained in war zones. If courts are ever to take that radical step, they should do so only with the explicit blessing by statute. Do you stand by that?

Ms. KAGAN. Anything that is in that brief, I stand by as the appropriate position of the United States government.

Senator GRAHAM. Fair enough. The brief needs to be read by your supporters and your critics because some of your supporters

are going to be on—and some of your critics may like what is in there.

I am here to say from my point of view that this area of your legal life, you represented the United States well and I hope that Congress will rise to the occasion working with the executive to provide some clarity so that we will be able to find a way to fight this war within our value system and recognize the difference between fighting war and fighting crime.

The battlefield you told me during our previous discussions that the battlefield in this war is the entire world, that if someone were caught in the Philippines who was a financier of Al Qaeda and they were captured in the Philippines, they would be subject to enemy combatant determination because the whole world is the battlefield. Do you still agree with that?

Ms. KAGAN. Senator, I was speaking there as a legal policy matter representing the position of the Obama administration. That's obviously a very different role as the advocate role that I play is also a different role.

Senator GRAHAM. Let's just stop there. When you were an advocate, you had no problem advocating that position.

Ms. KAGAN. There are certain parts of that that I think that we have not addressed in the United States government. So the United States government has argued that the battlefield extends beyond Iraq and Afghanistan.

Senator GRAHAM. Attorney General Holder said that the battlefield is the hearts, the minds and wherever Al Qaeda may reside. Do you believe that is a consistent statement with Obama policy?

Ms. KAGAN. Senator Graham, when I was here before, you asked me if I agreed with the Attorney General and I said that it would be bad to disagree with the Attorney General given my position. I am still the Solicitor General and I still agree with the Attorney General.

Senator GRAHAM. But you strike me as the kind of person that if you thought he was wrong you'd say so even though it may cost you your job. Am I right in assuming that?

Ms. KAGAN. I certainly would tell him if I thought he was wrong.

Senator GRAHAM. And I think you would tell me if you thought it was wrong, so I'm going to assume you thought he was right because that's the kind of person you are. I quite frankly think he's right.

Now, as we move forward and deal with law of war issues, Christmas day bomber. Where are you at on Christmas Day?

Ms. KAGAN. Senator Graham, that is an undecided legal issue. Well, I suppose I should ask exactly what you mean by that. I'm assuming that the question you mean is whether a person who is apprehended in the United States is—

Senator GRAHAM. No, I just asked you where you were at on Christmas.

Ms. KAGAN. You know, like all Jews, I was probably at a Chinese restaurant.

Senator GRAHAM. Great answer. Great answer.

Chairman LEAHY. I could almost see that one coming.

Senator GRAHAM. Me, too. So you were celebrating—

Chairman LEAHY. Senator Schumer explained this to me earlier.

Senator GRAHAM. Yes, he did.

Senator SCHUMER. No other restaurants are open.

Senator GRAHAM. Right. You were with your family on Christmas Day at a Chinese restaurant?

Ms. KAGAN. Yes, sir.

Senator GRAHAM. OK. That's great. That's what Hanukkah and Christmas is all about.

Now, what happened in Detroit on Christmas Day? Can you recall? What was so unnerving about that day?

Ms. KAGAN. Well, that there was a failed but only just failed terrorist incident.

Senator GRAHAM. We were lucky as a nation that a bunch of people didn't get killed on Christmas day or in the middle of Hanukkah or whatever holiday it may be. We are lucky that bomb didn't go off.

Ms. KAGAN. Senator Graham, it seemed a close thing. I don't know more than I read in the newspapers about that incident.

Senator GRAHAM. I understand.

Ms. KAGAN. I was not involved in any of the discussions about what to do on that day.

Senator GRAHAM. The Times Square incident, do you recall that, right?

Ms. KAGAN. Yes, sir.

Senator GRAHAM. We were lucky that van didn't explode.

Ms. KAGAN. Every time one of these things happens, it is extremely unnerving. It makes us aware of the need to take efforts to make sure that such a thing never happens.

Senator GRAHAM. Tell me about Miranda warnings. Do we need to read soldiers, do soldiers need to read people their rights captured in the battlefield in Afghanistan?

Ms. KAGAN. Senator, the way Miranda warnings would come up is of course only with respect to the admissibility of evidence in a criminal court. So to the extent that we are talking about a battlefield capture and not a criminal trial, an Article 3 criminal trial, the Miranda issue would never come up.

Senator GRAHAM. So you agree with me that in war you don't have to read the enemy their rights because you are not talking about fighting crime, you are talking about fighting a war, is that correct?

Ms. KAGAN. Well, the Miranda issue is only applicable in Article 3 courts as a matter of criminal law.

Senator GRAHAM. OK. If you catch a person in Afghanistan—

Ms. KAGAN. I should correct that. I should correct that because I think that the question of whether Miranda is applicable in military commissions has not been decided.

Senator GRAHAM. Right. Well, you have Article 31 rights which are the same thing, but that is yet to be decided. But under general rule of war, you don't read the enemy the Article 31 rights when you're in a fire fight.

For these hearings to be meaningful and instructive, I think it is good for us to have an open discussion about when we are fighting a war and when we are fighting a crime, what is the consequences of criminalizing this war.

My fear is that if we criminalize this war, we're going to get Americans killed for no higher purpose and that the idea that you would take someone off an airplane or in Times Square and start reading them their Miranda rights within a few hours is criminalizing the war because the reason we are capturing these people initially is to find out what they know about the enemy.

Do you have any concerns that reading Miranda rights to suspected terrorists caught in the United States would impede our ability to collect intelligence?

Ms. KAGAN. Senator Graham, I have never dealt with that question as Solicitor General.

Senator GRAHAM. Just as Elena Kagan.

Ms. KAGAN. Senator Graham, I feel as though——

Senator GRAHAM. Harvard Law School dean.

Ms. KAGAN. I'm a part of this administration and I think that, you know, I should let the Attorney General——

Senator GRAHAM. Well, let me tell you the administration generally speaking has been pretty good to work with on this issue. We have had discussions about having exceptions to Mirandas so that we don't lose intelligence gathering opportunities and not criminalize the war.

What does the public safety exception mean when it comes to Miranda? What's your understanding?

Ms. KAGAN. The public safety exception which was, comes from the Quarrels case, it is right now I think a limited exception. It enables——

Senator GRAHAM. Very limited.

Ms. KAGAN. That's right.

Senator GRAHAM. Very undefined.

Ms. KAGAN. It enables the police essentially to be able to question to find the gun, you know, to find something that might pose an eminent risk of public safety.

Senator GRAHAM. Now, let's stop there. So the public safety exception is about protecting the law enforcement officers and maybe securing the crime scene.

What I'm trying to illustrate is that the public safety exception I'm looking for would allow the intelligence community to find out about where this guy came from. Where did you train? Is there another attack coming?

Right now the law is very, do you think it would be in the United States' best interest to have clear guidance to the intelligence community, give them the tools and the flexibility when they capture one of these guys whether it be in Times Square or Detroit to find out without having to do anything else at the moment what is the next attack? What do you know about future attacks? Where did you train?

Would that make us a more secure nation if our intelligence and law enforcement community had those tools? In your opinion.

Ms. KAGAN. Well, of course it's a question that might come before the court in some guise as to whether the public safety exception should apply.

Senator GRAHAM. I'm just talking about being an American now. Forget about the courts. As an American, a patriotic American, liberal or conservative, don't you believe that we would all be better

off if we had the opportunity within our values, humanely without torture, to hold a terror suspect and gather intelligence before we did anything else because another attack may be coming?

Not that a gun is in the next room, but somebody else may be coming our way. Don't you think as an average, everyday citizen that would make us a safer nation?

Ms. KAGAN. I suppose on this one, Senator Graham, that I'm reluctant to say how I would think about the question as an average, everyday citizen because I might have to think about the question as a judge and that would be a different way of thinking about the question.

Senator GRAHAM. OK. Let's talk about what a judge may think about here. If we applied domestic criminal law to the war on terror without any hybrid mix, would that be a good thing?

I mean, if we took the war on terror and just made it a crime, would we be limiting our ability to defend ourselves?

Ms. KAGAN. Well, as we discussed before, Senator Graham, I mean, the administration of which I'm a part—

Senator GRAHAM. Here is what I don't understand is because you said to me previously that you understand why this administration are holding 48 people without trial because they are enemy combatants and that makes sense to you.

Ms. KAGAN. Yes.

Senator GRAHAM. What I'm trying to extrapolate is if we took other parts of criminal law and applied it to the war on terror, would that create a problem for this country?

Ms. KAGAN. I guess I feel—

Senator GRAHAM. Like Miranda warnings.

Ms. KAGAN. Yes. I mean, the question of intention of enemy combatants is one that I have dealt with as Solicitor General, it is one that I have argued as Solicitor General. This is a question that I have not dealt with and I am hesitant to make any comments in a personal view or in a policy view given that these questions I think are likely to come before the court.

The question of the good faith exception to Miranda, how it applies to terrorism cases is I think quite likely to get to the court.

Senator GRAHAM. Is it fair to say that the letter you wrote to me about the Detainee Treatment Act Amendment, I think you call the Graham/Kyl proposal that it would lead to a dictatorship or something?

Ms. KAGAN. No, I didn't say that.

Senator GRAHAM. What did you say?

Ms. KAGAN. I—

Senator GRAHAM. I'm not easily offended. You could say that. It would probably help me in South Carolina. It wouldn't hurt that the Harvard Law School dean was mad at Lindsey.

But you did, you wrote a letter that was pretty challenging. What did you say in the letter?

Ms. KAGAN. It was a challenging letter. I think I said that we hold dictatorships to high standards and we should hold ourselves to even higher ones.

But I did criticize the initial Graham amendment for—

Senator GRAHAM. And that is absolutely OK. It is absolutely OK. You did criticize the original Graham amendment and I didn't take it personally.

Ms. KAGAN. Well, I'm glad to hear that.

Senator GRAHAM. But you did say that's what dictatorships do and I thought that was a little over the top, but the difference between the Graham/Kyl amendment and the amendment that passed by 84 votes wasn't a whole, what's the difference between what I proposed and what passed?

Ms. KAGAN. Right. Well, I think one difference was that military commission adjudications now receive DC circuit review. In fact, the letter we wrote was about that, was saying that military commission adjudication —

Senator GRAHAM. Now, did you assume that we precluded final verdicts in military commissions from Article 3 review?

Ms. KAGAN. Well, my initial understanding of the initial Graham amendment —

Senator GRAHAM. We didn't, but you could have had that understanding, but I can assure you that wasn't my goal.

The point I'm trying to make here is that the Military Commission Act of 2009 has been a work in progress for many, many years. We are trying to as a nation get this right.

As Solicitor General, do you have confidence in our military commissions that we have set up? Do you find that they are a fair form to try people in?

Ms. KAGAN. Senator Graham, I really haven't had any exposure to the military commissions as yet. Of course there has been no military commission proceedings.

Senator GRAHAM. Have you had exposure to military lawyers?

Ms. KAGAN. I think that they are absolutely top notch.

Senator GRAHAM. What if I told you that the same lawyers who will be doing the commissions are also the same lawyers, judges and jurors that would try our own troops. Would that make you feel better?

Ms. KAGAN. Well, I do think that the military lawyers with whom I have had the pleasure and honor to work as Solicitor General are stunningly good.

Senator GRAHAM. So is it fair to say that Elena Kagan, whatever day it is in 2010 doesn't believe that military commissions are a miscarriage of justice or unconstitutional? Strike unconstitutional.

Do you believe that this country submitting a suspected terrorist to military commission trial is within our value system?

Ms. KAGAN. Senator Graham, on the part of an administration that clearly has stated that some people —

Senator GRAHAM. Do you personally feel comfortable with that?

Ms. KAGAN. I do. I wouldn't be in this administration if I didn't.

Senator GRAHAM. Thank you. Thank you.

Chairman LEAHY. Thank you, Senator Graham. Before I go to Senator Schumer, I should know when Senator Schumer is finished his questions, we will have about a 10-minute break.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman and thank you, Solicitor General. I think you're doing just great. I think the hearings are showing the American people that you are the kind of person

many of us believe you to be, thoughtful and practical and moderate. You try to understand and appreciate many differing points of view but you have fidelity to law above all and I think they are learning too that you are a very nice person with a pretty good sense of humor.

You know, there was a recent study I read that showed when he sits on the Supreme Court bench hearing cases, Justice Scalia gets the most laughs.

Ms. KAGAN. He is a funny man.

Senator SCHUMER. Yes. If you get there, and I believe you will, you are going to give him a run for his money.

Anyway, I'd like to ask you a few questions first about modesty, something that we've talked about in this and other nominations.

That is a very important quality to me and I was really pleased to see you speak about modesty in your opening statement. I thought you not only spoke eloquently about the importance of modesty, but you sort of embodied modesty in your whole demeanor and way and have done that today. So I think people don't believe it is just talk.

You said you believed it was critical for judges to be deferential to the decisions of the people and their elected representatives. I agree. While I think just about anyone can and everyone does pay lip service to the notion of judicial modesty, it can mean different things to different people.

So just tell us in general a little bit about what you mean by the idea of judicial modesty.

Ms. KAGAN. Senator Schumer, I think there are three components to it. The first is the one that you mentioned which is deference to the political branches. To Congress, to the President, to the states. An understanding that they are looking after the people's business, that they are acting in good faith, that they too take constitutional oaths, that they ought to be the policymakers for the Nation and that the courts, the courts have an important role to play, but it is a limited role. It is essentially sort of policing the boundaries and making sure that Congress doesn't overstep its role, doesn't violate individual rights or interfere with other parts of the governmental system, but that even in doing that, even in policing those boundaries the courts should look at Congress and the President as, it should give them a lot of deference and should be hesitant and reluctant to interfere and should make sure that they understand what Congress is doing and why Congress is doing it before they do.

So to sort of give Congress a good deal of the benefit of the doubt to look at those Congressional findings that Senator Specter was asking me about, to really explore what Congress thought it was doing. There will be some times, there will be some times where the courts will have to say no, Congress has overstepped. Congress has violated individual rights or Congress has somehow interfered with state prerogatives perhaps.

But those times, the court ought to feel hesitant about doing that and ought to make sure that it has gotten it right. So that's the first thing.

The second thing is respect for precedent. I think precedent is extraordinarily important in our law. It is important because it leads

to predictability and stability in the law, but it is important also precedent itself is a kind of measure of humility.

It is a way of current justices saying even if I think these past judges got it wrong, I'm going to be hesitant about saying that. I'm going to doubt myself. I'm going to think that this law that has built up over the years by prior judges has real wisdom to it. Even if I can't quite see that wisdom right now, I'm going to be hesitant about saying that it doesn't exist. So it is a doctrine really of humility, of judicial humility.

It is also a doctrine of constraint. It constrains judges and makes sure that judges warrant doing, importing anything inappropriate into the decisionmaking process. So the judges aren't taking their personal views and their personal commitments and their political commitments and using those in the decisionmaking process.

If your precedent binds judges, and that is a very good thing for the legal system for that reason, too.

I suppose the third part of judicial modesty is a set of rules really about deciding cases. It is making sure that you have a case before you that you're not deciding an abstract legal issue.

It is taking one case at a time, not really thinking down the road how this, if I decide this case this way, maybe another case can be decided that way. Really just focusing on the case before you and the question before you.

It is avoiding constitutional questions if you can in favor of statutory questions. It is generally making sure that you are deciding questions on the narrowest possible grounds rather than on broader ones. So all of those techniques of judging, if you will, I mean, some people have called these passive virtues I think are very important.

Senator SCHUMER. Well, I think that is a great answer. It is almost a textbook like answer and I hope the Supreme Court continues to follow it. Or follows it.

Let me just ask you this. Would your own personal views ever play a part in interpreting the statute given your definition of modesty?

Ms. KAGAN. It would not, Senator Schumer. I mean, with respect to a statute, the only question is Congress' intent and that's what the court should be looking at, what Congress wanted the statute to apply to, how Congress wanted the statute to apply.

Now, sometimes that won't be altogether clear. Sometimes Congress leaves ambiguities or uncertainties of various kinds and it is the court's job to try to clarify those ambiguities and to try to remove those uncertainties, but it should all be done with a question of what is Congress intending here?

To the extent that the text suggests that, all well and good. To the extent it doesn't, I think a judge should look to other sources, should look to the structure of the statute, should look to the history of the statute in order to determine Congress' will.

Senator SCHUMER. Right. And just one final question. Let's just posit for the moment the term activism, judicial activism is bandied around a lot. But it is sort of the opposite of modesty as you defined it and I think as most define it.

Just let me, it is my view that activism so to speak which means beyond, going beyond the bounds of modesty that you have outlined

can come from the right or from the left. It can probably even come from the middle in certain ways. Do you agree with that?

Ms. KAGAN. I think activism does not have a party.

Senator SCHUMER. Or a philosophy.

Ms. KAGAN. Or a philosophy.

Senator SCHUMER. There can be liberal activists and conservative activists.

Ms. KAGAN. I think that that's right.

Senator SCHUMER. OK. All right. Let's go on now to pragmatism, a second quality that you exhibit and talked about. To me at least I find it refreshing about your nomination is that you don't come straight from the judicial monastery, that you have real hands on practical experience because I think some of the times certainly speaking for me and I think most people think sometimes judges impose decisions from on high without any sort of thinking or not enough thinking as to the practical effects on either a business or a person or a government or whatever.

To me, the practical experience you had is almost the best one can have in terms of being a good judge because you have had to deal with the law in a very practical way. What I mean there is your tenure as Dean of Harvard Law School. You managed a budget of over 160 million dollars, dealt with hundreds of employees, had a very fractious legal faculty who probably spanned the kind of judicial philosophies that you'll find should you get to the Supreme Court.

Your job as Dean, I'm not saying as Justice, was to sort of bring them together and create a better tone and better atmosphere which you did, which most observers found, you know, they were in awe almost of what you did there given how bad it was before and how smooth it was afterwards.

Just tell us a little bit about the challenges that you had and what you learned from them as Dean. Practical stuff.

Ms. KAGAN. Well, mostly I learned, Senator Schumer, that you can never do too much listening to people because it turns out you learn a lot by listening. You said that the faculty was fractious and you kind of portrayed them in a negative light, but in truth I loved my faculty and I thought that my faculty was sort of endlessly generous to me and good spirited in terms of the things that they did for the school.

I think that that was so in part because people respected that I listened to people, that I was willing to change my mind if they could convince me that I was wrong, and sometimes I was wrong. I got a lot of good ideas from my faculty along the way.

So I suppose the best thing I learned by being Dean of that school was just the value of listening hard and realizing that you don't start by knowing everything.

Senator SCHUMER. And how were you so successful in bringing people of different views who were pretty fractious when you walked in? Because I understand it was hard to get faculty appointments because one part of the faculty would always object to the other.

How did you get to bring them together into a body that was at least from all reports, much more cohesive and happier as a result of your tenure there?

Ms. KAGAN. Well, Senator Schumer, I think everybody did it. I don't think I did it. I think everybody did it. I think all I did was try to encourage people to work together and I think that once that started happening, people just understood that working together brought great benefits to the institution. It was a little bit of a kind of virtuous circle, you know, because once it started, it just kept on going. The ball kept on rolling because people saw some of the good things that it brought.

Senator SCHUMER. This relates to something I have given a lot of thought about and still haven't come to any firm conclusions.

What is the role of pragmatism in judging in this sense? This is a key question I have wrestled with. What happens when the law seems to lead to a result that just doesn't make any sense? I have occasionally read decisions at every level. They could be local level and individual stuff.

The judge seems to be following the law and then the actual result just in the real world doesn't make any sense. Do judges have a responsibility to interpret a statute in a way to make sense when it is actually applied?

Ms. KAGAN. Well, Senator Schumer, I think that if the text of a statute is clear, it would be wrong for a court to say well, the text says X but I don't think X makes sense, so I'll choose Y.

I don't think that a court should do that. If the text says X, the text is the best evidence of Congress' intent and the text might say X for a variety of reasons. Even if you think gee, what sense does that make and how is that consistent with the broad purposes of the statute?

In fact, the legislative process is a messy thing and people make compromises along the way and a legislative text is the result of all that deliberation and all those compromises.

To the extent that the text says something clear about a statute, the court should stick with that and stick with it even in the court's view that is not what makes sense.

Now, sometimes there is ambiguity in statutes and then the question is well, what do you do? How do you clarify that ambiguity?

One of the things to do is to look to Congress' purposes in enacting a statute and try to figure out, you know, if Congress knew that this result would happen, is that result consistent with Congress' purpose or not? That's a very sensible thing for a court to do because in the absence of textual guidance, and maybe in the absence of any structural guidance, one, you know, good and appropriate approach is to look to the purposes of the statute and to try to figure out which interpretation of the statute is more consistent with that Congressional purpose.

One way to do that is to say well, what would that interpretation of the statute actually do in the world and is that consistent with what Congress thought ought to be done.

Senator SCHUMER. Right. OK. Let me go to a couple of specific cases. One case, recent case was Gross versus FBL. There the court said that in an age discrimination case, the statute passed by Congress requires the plaintiff to prove that the employer's only motive was discriminatory, even though for years courts have recognized

that only employers have access to the evidence of their own motivation.

It almost said to a plaintiff who thought that he or she was discriminated against, we're going to sort of put you in a Catch 22. You have got to prove that the only motive was discriminatory and you can't, which seems to me just in line for what you said. Congress never would have intended that because it is impractical and the law had some I think latitude in terms of interpretation.

I'm not going to ask you to comment because it is a specific case, but at least I'd like to throw that one out.

The second one which I do want to talk about a little bit is *Citizens United* which has been talked about here before. It is a confounding and deeply troubling opinion for a whole lot of reasons. I'm going to start with some basics of First Amendment law.

My colleagues and I may have some philosophical differences about campaign finance. While I disagree with *Buckley v. Voleo*, it certainly undertook a lengthy First Amendment analysis. Yet as we know, no amendment is absolute. The First Amendment isn't absolute and there are countless cases related to liable, related to imminent danger, you can't scream fire in a, falsely scream fire in a crowded theater. So there are limitations on the First Amendment like there are limitations on every amendment.

The *Heller* case recently in a case that was decided yesterday certainly said there could be limitations on the Second Amendment even if it applied to the states in the way the courts did.

Do you agree with that principle that no amendment is absolute and there are reasonable limitations, balance tests on every amendment?

Ms. KAGAN. The First Amendment has not been thought to be absolute. I think that the last Justice who thought that was maybe Justice Black. I think almost all Justices have understood.

Senator SCHUMER. Right. He wrote a lot of descents.

Ms. KAGAN. You know, you yell fire in a crowded theater or you yell into a cardiac victim's ear, nobody is going to protect that under the First Amendment.

Senator SCHUMER. Right. So then the correct question is when is law tailored enough to address a specific action and how strong is the government interest behind that law?

In the McCain/Feingold law, Congress as you talked about a little bit some of my colleagues here, studied and considered the effect that special interest money had on campaigns. Congress came to the common sense conclusion that these expenditures had a poisonous effect on our democracy.

But the five Justice to majority ignored Congress' judgment. We won't go into the fact that they went out of their way to find the case, and undermined Congress' powers to pass laws based on Congress' collective judgments.

I think some of my colleagues on the other side of the aisle missed the mark of what McCain/Feingold, what was at issue about McCain/Feingold in *Citizens United*. With respect to my good friend Orrin Hatch's earlier points, it wasn't about banning books or about restricting who can speak, it was about Congress making its best judgment on limits on how much can be spent and what are the appropriate limits to protect our electoral process.

Congress tried to tailor its approach with respect to speakers and speech and McCain/Feingold sets limits very high up. It's not about publishing a pamphlet. It is about putting an ad on for the 4,111th time and is that the same right as saying it initially.

Corporations, let's remember, corporations always, could always spend money on politics. They had to do it through packs, Congress made the determination that unlimited spending by corporations could create corruption and the appearance of corruption.

So I don't agree with how this case has been characterized by some of my colleagues. In fact, the court many times has upheld Congress' right to pass anti-corruption campaign finance laws.

In 2003, the court said prevention corrupting activity clearly qualifies as an important governmental interest and yet just 7 years later with the addition of Justices Roberts and Alito, the court completely reversed itself.

The majority wrote this court now concludes that independent expenditures including those made by Corporations do not despite huge Congressional findings to the contrary in what seems to me to be common sense, do not give rise to corruption or the appearance of corruption. Those two holdings clearly are not consistent, right?

Ms. KAGAN. Well, Senator Schumer, I argued the case before the court. I focused quite heavily on the Congressional record that had been put together before McCain/Feingold. I argued that the court should give deference to that Congressional record.

Now, the court disagreed. The court said use the compelling interest standard which I think everybody agreed was the right standard but said that standard had not been met.

Senator SCHUMER. And what about, what do you think if you could comment generally, I'm not asking about the Roberts concurrence in which he distinguished Austin as an abhorration. What do you think of that?

Ms. KAGAN. Oh, I'm sorry. Senator Schumer, the government argued that it was not an abhorration and this was very much an issue in this case. This was certainly the theory of the other side and it was adopted by the court and specifically discussed in the Chief Justice's opinion that the chief Justice said that Austin itself had been contrary to prior precedent.

The government argued that it had not been. That it was consistent with a line of precedent and with a historic understanding of appropriate role of—

Senator SCHUMER. And there had been a broad line, the government argued that there had been a broad line of cases that had been consistent with Austin, isn't that right?

Ms. KAGAN. Yes. That's correct.

Senator SCHUMER. And the government argued that moving, you know, distinguishing, moving away from Austin was the abhorration, right?

Ms. KAGAN. The government certainly argued that moving away from Austin would be a disruption of the system, especially given the reliance that Congress and that the states had placed on Austin.

Senator SCHUMER. Right. OK. I'd like to move on here. Just one little thing on these revered judges. This was about the Israeli justice Barak. I'd just like to ask you.

You said you introduced a whole lot of people. You said you'd do a very nice introduction for any of us which we appreciate.

Here is something you wrote about Judge Posner who clearly doesn't have the same ideology, the same views as Justice Barak or of many, of me for sure.

But you wrote Judge Posner is a prober. He is constantly asking why the problems before him have arisen. What features of the world are responsible for the party's conflict and their inability to resolve them. He is always exploring why legal documents are the way they are, behind the boilerplate statements and string citations provided by the litigants, what purposes and goals the law is seeking to serve.

Should I because you wrote something so nice about Judge Posner think that you have the same views that he does?

Ms. KAGAN. I think that that's a pretty good description of Judge Posner, but no I don't think you should think that.

Senator SCHUMER. The same as with Judge Barak, right?

Ms. KAGAN. The same as with Judge Barak.

Senator SCHUMER. OK. And we could probably find you wrote glowing tributes to all kinds of people of many different ideologies. So it would be impossible for you to agree with all of them, right?

Ms. KAGAN. One of my greatest introductions was to Justice Scalia.

Senator SCHUMER. There you go. Good.

Ms. KAGAN. Whom I in fact have the greatest admiration for.

Senator SCHUMER. Thank you for that. Let's go a little to foreign law which came up a few times here.

Some of your critics have implied that you will improperly consider foreign law and sources in cases before you. They cite your inclusion of international law into the first year curriculum, shame on you, as an indication that you don't sufficiently respect the autonomy of the U.S. from foreign law.

Just so the record is clear 100 percent, what do you believe is the appropriate role, if any, of foreign law in U.S. courts?

Ms. KAGAN. Senator Schumer, the American constitution is an American document with an American history with American precedence. The fundamental way in which courts should approach interpretation of that document is by looking at that document and the American sources that interpret it.

Now, there may be instances such as some of the ones that I suggested where international law or foreign law is relevant, you know, the meaning of Ambassador, the interpretation of the authorization for the use of military force were two instances I gave.

But in general, this is an American constitution which needs to be interpreted by American judges using American sources.

Senator SCHUMER. All right. Just tell us why you put international law into the curriculum at Harvard. Is it because as some of the critics I have seen in some of the blogs and other places, is it as some of these critics suggested because you believe it is more important than U.S. constitutional law?

Ms. KAGAN. No, Senator Schumer. It is what I said to Senator Grassley. U.S. constitutional law is basic, it is fundamental, but I do believe that law graduates in our world today need to have some understanding of the laws beyond American shores to do international litigation, to do international transactions.

We live in an interconnected world, we live in a competitive world and if our lawyers don't understand that world, quite honestly we are going to be at a competitive disadvantage.

Senator SCHUMER. Do you know any law school that doesn't have some kind of international law course in its curriculum?

Ms. KAGAN. I think that that would be unthinkable.

Senator SCHUMER. OK. And of course when an American judge considers, they consider many non-binding sources when they reach a determination.

I asked this of Judge Sotomayor because it came up then. Judge Roberts' prominent citation in a voting rights act case decided last year, Justice Roberts, he cited an article by NYU Professor Samuel Isacarooff published in the *Columbia Law Review*.

Would you agree that *Law Review* articles are not binding on American judges even though they might be cited by some?

Ms. KAGAN. Some law professors would like them to be binding, but no. I agree, Senator Schumer, that the way they are cited in these decisions are just, this isn't binding, this isn't precedent, but this is a person who had a good idea and the decision in some sense cites or reflects that.

Senator SCHUMER. And it sure wasn't improper of the Chief Justice to consider such sources in reaching his decision, was it?

Ms. KAGAN. Absolutely not.

Senator SCHUMER. And how about Justice Scalia? He has a well known regard for dictionary definitions in determining the meaning of words or phrases and statutes being interpreted by the court.

In one case, MCI versus AT&T, Justice Scalia cited not one but five different dictionaries to establish the meaning of the word "modify" in a statute. Would you agree that dictionaries are not binding on American judges?

Ms. KAGAN. That's correct.

Senator SCHUMER. OK. But was it improper for Justice Scalia to consider dictionary definitions?

Ms. KAGAN. Of course not.

Senator SCHUMER. Right. So in conclusion, wouldn't you agree that American judges of all ideological stripes keep their minds open to sources and ideas other than those that are directly binding on them under the constitution and the laws of the United States?

Ms. KAGAN. I do think that that's right, Senator Schumer, that judges should keep their minds open, should learn from a variety of sources that are not binding, that do not have precedential force.

Senator SCHUMER. Thank you. Mr. Chairman, I will yield back my remaining time.

Chairman LEAHY. Thank you very much. Of course I encourage any Senators who want to do that. We will stand in recess for approximately 10 minutes. Everybody will get a break. How are you doing?

Ms. KAGAN. I'm good.

Chairman LEAHY. I'm enjoying some of the ethnic humor here. Wait until I talk about the Italian side and the Irish side of my family and the French Canadian side of my wife's family. We will have something going. We stand recessed.

[Recess 4:35 p.m. to 5 p.m.]

Chairman LEAHY. The only reason I don't stop the photographers immediately, they have the one job that I wish I had if I wasn't in the U.S. Senate, and that's being a photographer. So out of sheer envy, I can't stop them.

We're going to see how far we can go. Senator Cornyn, you've been waiting patiently here for a day and a half. Please go ahead.

Senator CORNYN. Thank you, Mr. Chairman.

Ms. Kagan, you had an interesting and refreshing exchange with Senator Graham a little earlier about Miguel Estrada, who as you know was nominated to the D.C. Circuit Court of Appeals. I would say that your friendship and mutual admiration is apparent. But I'm curious. During the time that he was nominated to the Circuit Court of Appeals, did you ever speak out publicly or talk to him privately about his nomination and the fact that he was filibustered seven times?

Ms. KAGAN. You know, I—I—I don't think that we—we—we've sort of been in and out of touch during those years. I'm not actually sure that we talked during that time. We might have, I'm just not sure.

Senator CORNYN. And I gather you did not have any public comment about the filibuster of his nomination?

Ms. KAGAN. Senator Cornyn, I would have done whatever he asked me to do because I think he's a great lawyer, as I said, and a great human being. I don't think he ever asked me. There was a time when I was dean when I didn't do any letters of that kind. Before I was dean, I wrote letters of that kind for Michael McConnell and for Peter Keissler. I think if I didn't with Miguel, it's because he never asked me to do so.

Senator CORNYN. You've had a very interesting questions-and-answers session with Senator Specter, who asked you about cameras in the courtroom. I happen to agree with him, and you, that that would be a great educational opportunity for the American people. I know from experience that cameras can be placed unobtrusively in an appellate court and no one really pays any attention to them, but it's a great opportunity for people to watch and learn, just as I hope they are watching and learning something about our judiciary and the Supreme Court as a result of these hearings.

While I agree with you on that point, I confess to be troubled still about the exchange that you had with Senator Sessions over banning military recruiters at Harvard, and I expect we'll come back to that at a later point.

But I'd like to go back to where I started in my opening statement, talking about the traditional concept of the role of a judge as opposed to the role of an activist, as I try to define it. Traditionalists who feel bound to a written Constitution and written laws and precedent as opposed to judges who believe that there is—that there—whether it's their empathy, as the President has talked about it, or a living Constitution which has no fixed meaning, that's what I mean by the activist role.

In an earlier exchange with Senator Leahy, you stated that there are two ways to change the Constitution. Obviously by Article 5. You said, secondly, by court decision, and I want to ask you a little bit about that. You cited *Brown v. Board of Education* as an example of a court decision that changed the Constitution, stating that the Framers of the Fourteenth Amendment believed it allowed segregation in schools.

I believe, and I think a number of prominent legal scholars agree, that *Brown* did not change the Constitution. Rather, I believe *Brown* affirmed and restored the original meaning of the Fourteenth Amendment by overturning the repugnant and unconstitutional separate but equal regime sanctioned by *Plessy v. Ferguson*. So I support *Brown* on originalist grounds.

I would just refer you to Senator Charles Sumner, a leading framer of the Fourteenth Amendment, who said, "It's easy to see that the separate school, founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of equality."

Between 1870 and 1875, both Houses of the U.S. Congress voted repeatedly, by significant majorities, in favor of legislation premised on the theory that segregation in the public schools is unconstitutional.

So in light of this history, I believe that *Brown* did not change the Constitution, but rather realigned the interpretation of the Fourteenth Amendment with the intentions of the Framers of the Fourteenth Amendment.

So on this, you and I may disagree, but let me—

Ms. KAGAN. If I could, Senator Cornyn.

Senator CORNYN. Sure.

Ms. KAGAN. I think I didn't say that *Brown* changed the Constitution. I think I said that *Brown* interpreted the Constitution in a different way than it had been interpreted theretofore. I do think it's hard to make the case that school desegregation was thought of as commanded by the Fourteenth Amendment in 1868, and I think that there are a variety of other practices that similarly were countenanced in 1868 that are not now. That doesn't mean that the Constitution has changed.

In fact, the Constitution's Equal Protection Clause is a quite general provision. It speaks in broad terms. It lays down a general principle of equality. And in writing the provision that way, I think that the drafters of the Constitution knew exactly what they were doing. They didn't mean to constitutionalize all of their practices in 1868. They meant to set forth a principle of equality that would be applied over time to new situations and new conditions, and I think that that's exactly what has occurred.

Senator CORNYN. I appreciate your answer. What I'm trying to figure out is whether you and I agree or disagree about how the American people can change their Constitution. Do you think the courts can change the Constitution or do you agree with me that Article 5 has the sole means by which the Constitution can be modified—that is either by Congress proposing a constitutional amendment or by a constitutional convention proposing constitutional amendments which are later ratified by three-quarters of the States?

Ms. KAGAN. I think the Constitution is a timeless document, setting forth certain timeless principles. It's the genius of the Constitution that not everything was set forth in specific terms, but that instead certain provisions were phrased in very general terms that enabled people, that enabled the courts over time to apply the principle to new conditions and to new circumstances.

I think that that's the continuing obligation of the Court to do that, to ensure that the Constitution does apply appropriately and that the timeless principles set forth in the Constitution do apply appropriately for our posterity.

Senator CORNYN. Do you believe in the idea of a living Constitution, that the Constitution itself has no fixed meaning?

Ms. KAGAN. You know, I think that—I—I don't particularly think that the term is apt, and I especially don't like what people associate with it. I think people associate with it a kind of loosey-goosey style of interpretation in which anything goes, in which there are no constraints, in which judges can import their own personal views and preferences. And I most certainly do not agree with that.

I think of the job of constitutional interpretation the courts carry on as a highly constrained one, as constrained by text, by history, by precedent, and the principles imbedded in that precedent. So the courts are—are—are limited to specifically legal sources. It's a highly constrained role, a circumscribed role.

So to the extent that that term is used in such a way as to suggest that that's not the case, I don't agree with that. But I do think, as I just indicated, that the Constitution, and specifically—not the entire Constitution, but the general provisions of the Constitution, that the genius of the drafters was—was to draft those so that they could be applied to new conditions, to new circumstances, to changes in the world.

Senator CORNYN. So I'm clear, do you agree or disagree that the Supreme Court of the United States can change the Constitution?

Ms. KAGAN. The Constitution does not change. The Constitution is a—you know, unless by amendment. The Constitution is a document that—that—that does not change, that is timeless, and—and timeless in the principles that it embodies. But it of course is applied to new situations, to new facts, to new circumstances all the time. In that process of being applied to new facts and new circumstances and new situations, development of our constitutional law does indeed occur.

Senator CORNYN. And so do you agree that honoring the Constitution means respecting the ability of only the people to change it through constitutional amendment under Article 5?

Ms. KAGAN. Senator Cornyn, Article 5 gives the—the only way to actually amend the text of the Constitution. That is the only way to amend the text of the Constitution. But I also want to say again the sort of second half of this, that the text of the Constitution has to be applied to new circumstances, to new conditions, to new developments in the world, and that it's the job of the courts to do that.

Senator CORNYN. And I can't disagree with what you just said. But to me, when you interpret the Constitution, and how it applies to a given set of facts, that does not, to my way of thinking, imply

that you're changing the Constitution, but rather interpreting and applying the Constitution to that set of facts. Do we agree?

Ms. KAGAN. I think that's right. The Constitution is the Constitution, but it is interpreted and it applies to new facts as they come up, new cases as they come up, new circumstances as they come up.

Senator CORNYN. As I've—

Ms. KAGAN. Just to, you know, give a concrete example of this, and it goes to—

Senator CORNYN. Let's—let's move on, because I think you and I agree so far. But let me challenge it a little bit more. As I've defined the term "judicial activism," it is the belief that there is no such thing as a fixed meaning of the Constitution and laws, but rather that judges possess some sort of power to—to create constitutional rights out of whole cloth. Do you believe that that kind of judicial activism, as I've tried to define it, is ever justified?

Ms. KAGAN. I think that judges are always constrained by the law. They're constrained by—you know, I mean, sometimes the text speaks clearly and then they're constrained by the text alone. Where the text doesn't speak clearly, they look to other sources of law. They look to original intent, they look to continuing history and traditions, they look to precedent and the principles embodied in those precedents. But they're always constrained by the law. It's law all the way down.

Senator CORNYN. Let's change the topic slightly and talk a little bit about Federalism. Millions of Americans believe that the Federal Government is simply out of control today because they were taught, as perhaps all of us were taught, that the Federal Government is one of enumerated powers and that all powers not delegated to the Federal Government are retained by the people and by the States. That's paraphrasing the Tenth Amendment, of course.

Under the Framers' Constitution, the Supreme Court has an important role in limiting the reach of the Congress, which in my experience, and by my observation, knows no limits to its own power. The only way Congress is going to be restrained is by one of two ways. Either the Court is going to say "you've gone too far," which occasionally they've done, or the people will amend the Constitution, either through the Congressionally proposed constitutional amendment process or through the constitutional convention process, proposing amendments which are then ratified.

But do you agree with me that Supreme Court cases in recent decades have largely eliminated the important role of the Supreme Court in checking the size and scope of the Federal Government?

Ms. KAGAN. Senator Cornyn, I guess I actually think that in recent decades the Court has suggested that there are some limits on the scope of the Federal Government, so if you go back to the earliest days, *Chief Justice Marshall and Gibbons v. Ogden*, that was the first case that—at least the first important case that interpreted the scope of the Commerce Clause, and there Justice Marshall wrote a fairly expansive opinion, talking about the interconnectedness of the United States and the need for the Nation to function as a Nation.

Now, over time the Court imposed very significant limits on Congress' power. This was basically until about 1935, imposed very significant powers—limits on Congress' power under the Commerce Clause. At that point, a switch took place and—and the Supreme Court determined that the old jurisprudence really wasn't working, that the distinctions that the Court had set up between direct and indirect effects on Congress wasn't working, that the distinction that the Court had set up between manufacture and commerce wasn't working. And the Court also, I think, realized—and this was really the great recognition of those New Deal years—was that deference to Congress was appropriate in this area.

Senator CORNYN. How about—how about today? You talked about some legal history that I'm vaguely familiar with. But today—let me give you an example. I'm not going to ask you to tell us how you would decide the case, but, for example, many Americans are concerned by the fact that the Federal Government, in the recent health care legislation that was passed, has imposed an individual mandate on health coverage and imposed a penalty, a financial penalty, if you don't purchase government-approved health insurance. To my knowledge, that would represent an unprecedented reach of Congress' authority to legislate under the Interstate Commerce Clause, under the guise of regulating interstate commerce.

But again, the Tenth Amendment, which I think most people sort of popularly view as an expression of our Federal system and the fact that the States and individuals retain power that's not been delegated to the Federal Government, has largely, in my opinion, been rendered a dead letter by Supreme Court decisions.

Now, I grant you that the Rehnquist court, in the *Lopez* case and others, did begin to work a little bit around the edges, but if Congress can force people who are sitting on their couch at home to purchase a product and penalize them if they don't purchase the government-approved product, it seems to me there is no limit to the Federal Government's authority, and we've come a long, long way from what our Founders intended. Do you agree?

Ms. KAGAN. Well, I think the current state of the law is to grant broad deference to Congress in this area, to assume that Congress knows what's necessary in terms of the regulation of the country's economy, but to have some limits. The limits are the ones that were set forth in the cases that you mentioned, the *Lopez* case and the *Morrison* case, which are where the activity that's being regulated is not itself economic in nature and is activity that's traditionally been regulated by the States.

But to the extent that Congress regulates the channels of commerce, the instrumentalities of commerce, and also to the extent that Congress is regulating things that substantially affect interstate commerce, there the Court has given Congress broad discretion.

Senator CORNYN. And would you agree with me that if the Supreme Court of the United States is not going to constrain the power grabs of the Federal Government and constrain Congress in terms of its reach down to people's everyday lives, that there remain only two constitutional options available: one is either to pass a constitutional amendment, for Congress to propose it, and then

to have that ratified by three-quarters of the States, or for a constitutional convention to be convened for purposes of proposing constitutional limits on Congress, which would then have to be ratified by three-quarters of the States. Do you agree with me, that's the only recourse of the people to a limitless reach of the Federal Government, assuming the Supreme Court won't do it?

Ms. KAGAN. Well, I do think that there are limits on Congress' commerce power. They're the limits that were set forth in *Lopez* and *Morrison*, and they're basically limits saying that Congress can't regulate under the Commerce Clause where the activity in question is non-economic in nature. I think that that's the limit that the Court has set. But within that, you're quite right that Congress has broad authority under the Commerce Clause to act. To the extent that you or anybody else thinks that Congress ought not to have that authority under the Commerce Clause to act, an amendment to the Commerce Clause would be a perfectly appropriate way of changing the situation.

Senator CORNYN. Under Article 5 of the Constitution?

Ms. KAGAN. Under—

Senator CORNYN. In other words, the amendment process?

Ms. KAGAN. Yes, yes, yes.

Senator CORNYN. Either through—

Ms. KAGAN. I mean, any—any—

Senator CORNYN.—a constitutional amendment proposed by Congress—

Ms. KAGAN. You know, any part of it.

Senator CORNYN.—or a constitutional convention—

Ms. KAGAN. Any part of the—

Senator CORNYN.—proposed by the States.

Ms. KAGAN. Any part of the Constitution can be amended through Article 5.

Senator CORNYN. I was—I was pleased to hear you say that, once decided by the Supreme Court, even by a 5–4 margin, that cases like *Heller*, *McDonald*, and *Citizens United* are—are the law of the land and entitled to—entitled to deference by succeeding Courts, even if you may disagree with the outcome. Did I state that correctly?

Ms. KAGAN. Yes. Surely. The entire idea of precedent is that you can think a decision is wrong, you can have decided it differently if you had been on the Court when that decision was made, and nonetheless you are bound by that decision. That's the—if—if—if—if the doctrine of precedent enabled you to overturn every decision that you thought was wrong, it wouldn't be much of a doctrine.

Senator CORNYN. I would just distinguish that from Congress. The rules, I guess, dating back to Parliament in England, that no Congress, no Parliament, could bind a succeeding Parliament. So this Congress can pass a law and the next Congress can essentially repeal that act. That's entirely appropriate, should Congress decide to do that. Correct?

Ms. KAGAN. That's quite right, Senator Cornyn. It's a really fundamental difference between the legislative process and the judicial process. The reason that the doctrine of precedent has developed—or I suppose many reasons. One is just the incredible importance of stability in the system, but also just a notion of humility, that

no judge should look at a case and say, oh, I would have decided it differently, I'm going to decide it differently, that a judge should—should view prior decisions with a great deal of humility and deference.

Senator CORNYN. Well, it would be—it would be a strange system indeed if succeeding Supreme Courts—in other words, once you're confirmed to the Supreme Court and you're sitting there it would be a strange situation if then the litigants could bring the same case back that was decided in *McDonald* or *Heller* and, because you happen to disagree with it, that you could change the meaning of the Constitution more or less at will. That would not be a good system of jurisprudence, would it?

Ms. KAGAN. I do believe that, Senator Cornyn. I think when—when the Court looks as though it's flipping around and changing sides just because the justices have changed, that that's bad for the credibility of the institution and it's bad for the system of law.

Senator CORNYN. Let me talk a little bit more about guns. I was—I was—I kind of chuckled when I saw a notation in some of the records we got from the Clinton archives, that you referred to some of the gun—gun advocates as “gunners.” But I really didn't take that too seriously. I just thought it was kind of—it made me chuckle a little bit.

Ms. KAGAN. You know, I just don't know what you're referring to, Senator Cornyn. I've not seen that ever.

Senator CORNYN. OK. Well, maybe I'll show that to you sometime.

But I just want to—

Ms. KAGAN. You know, gunners is a kind of law school term of art.

Senator CORNYN. Well, basketball, law school, whatever, you know.

But let me just ask you, isn't it true that in the *McDonald* case, as in the *Heller* case, that the Court did not touch a number of permissible prohibitions on gun ownership and gun possession? For example, concealed weapon prohibitions, prohibitions on possession of firearms by felons or persons who are mentally ill, carrying guns in government buildings, and the like. In other words, just by recognizing that individual right to bear and keep arms, the Supreme Court didn't touch those prohibitions on gun ownership under a number of those circumstances, wouldn't you agree?

Ms. KAGAN. Senator Cornyn, I've not yet had a chance to read the *McDonald* opinion that came out yesterday, but I know that in *Heller* the Court specifically says that nothing in the opinion is meant to suggest the unconstitutionality of a number of kinds of provisions. I think the kinds of provisions listed in *Heller* are felon and possession laws, are laws regulating the possession of guns in certain sensitive places, and I think that there's one dealing with various commercial activities regarding guns.

Senator CORNYN. Right.

Ms. KAGAN. So the Court said that really nothing, in its opinion, is meant to in any way cast doubt on the constitutionality of those longstanding laws.

Senator CORNYN. I would just—and in *McDonald v. Chicago*, Justice Alito, on page 39 and 40 of the slip opinion, reiterated the

same assurances that you just talked about in *Heller* that they would apply after the *McDonald* case was decided as well.

Ms. Kagan, one of the things that you've heard a lot of us talk about, is obviously you've had a very distinguished career and we all congratulate you for the great honor of being nominated to the United States Supreme Court. But since you haven't been a judge—and no, that's not a disqualifier, we all know that—we don't have a judicial record, for example, like we had with Judge Sotomayor by which to sort of see what her track record looked like when it came to deciding cases. And so we've been trying to get everything we can to understand where you're coming from, how you would perform your duties as a judge. I congratulate you on your testimony here today. I think you've done a good job of explaining from the witness chair how you would decide cases.

But one of the things that—that makes me a little skeptical sometimes is, for example, during the confirmation hearings of Judge Sotomayor, she said—we were talking about the right to keep and bear arms—She said: “I understand how important the right to bear arms is to many, many Americans. In fact, one of my godchildren is a member of the NRA, and I have friends who hunt. I understand the individual right fully that the Supreme Court recognized in *Heller*.” Let me read that last sentence again: she said, “I understand the individual right that the Supreme Court recognized in *Heller*.”

But on Monday, in the dissenting opinion filed by Justice Sotomayor, along with Justices Breyer and Ginsburg, that dissenting opinion said: “The Framers did not write the Second Amendment in order to protect a private right of armed self-defense.”

I don't know how you reconcile those two statements, that there is an individual right, and then to conclude later, in the context of *McDonald*, that the Framers did not write the Second Amendment in order to protect a private right of armed self-defense.

Justice Sotomayor went on and said, “I can find nothing in the Second Amendment's text, history, or underlying rationale that would warrant characterizing it as fundamental insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes.”

Now, it is disconcerting, to say the least, where what appears to me—I think, and in fairness, does appear to be—a direct contradiction of what Judge Sotomayor said in her confirmation hearings with what she has decided in the first opportunity to decide a case on that same subject.

And so you understand why members of the Committee are careful to understand not just a nominee's qualifications, background, and experience, but also the judicial philosophy and approach of the nominee, so that we can have some reasonable assurance that the way the nominee testifies is—not in deciding individual cases, but generally speaking—going to be honored and respected once they receive a lifetime appointment.

Let me just ask you, do you believe that the Second Amendment guarantees a fundamental individual right to keep and bear arms for law-abiding Americans?

Ms. KAGAN. Senator Cornyn, I think that *Heller* is settled law, and *Heller* has decided that the First—excuse me, that the Second Amendment confers such an individual right to keep and bear arms.

Senator CORNYN. And do you believe like the majority in *McDonald*—do you agree with that decision that the Second Amendment is fully applicable to the States, has full stare decisis effect? And is there any reason that you know of why it would not be controlling?

Ms. KAGAN. There is no reason I know of, that *McDonald*, as well as *Heller*, as settled law and entitled to all the weight that precedent usually gets.

Senator CORNYN. OK. Well, in the minute and 35 seconds we have remaining for this round, let me just ask you, take you back again to *Citizens United*. I think a number—in the opening statements you heard a number of differences of opinion on the part of this Committee about—about the decision.

But I would ask, something you said that the Court would look at in determining the constitutionality of restrictions on free political speech, that I think I heard you say that the Court could look at the motives of the people advocating for those restrictions. Did I understand that correctly?

Ms. KAGAN. I don't think so. I'm not sure what I—what I said that you might have gleaned that from. I actually did write an article about this during my years as a law professor at the University of Chicago. It was not that the Court should look to the motives of the legislature, it was really that First Amendment doctrine—a lot—quite a number of the rules of First Amendment doctrine were understood as reflecting a concern about governmental motive, but that the rules were set up so that the court never had to make that underlying inquiry about governmental motive.

Senator CORNYN. Let me ask you one last question in the few seconds we have. Assuming that a majority party, let's say Democrats who enjoy a very large majority in both Houses of the legislature, decide to suppress the speech of political supporters of the minority because they have the votes in order to do so, in effect trying to put a thumb on the—on the scales in terms of political speech. Do you think a court can look at those kinds of motives—seeking advantage, picking winners and losers in the course of restricting political speech?

Ms. KAGAN. Senator Cornyn, I think that the Court does it, but not by looking directly at motive. The—the most—one of the most important doctrines of the First Amendment is the near-complete ban on viewpoint discrimination, that viewpoint discrimination is held to the highest constitutional standard.

And that's because of a concern that the majority is attempting to suppress the speech of a minority, and the classic example is very much along the lines that you gave, is a legislature saying there will be no speech by Republicans or there will be no speech by Democrats. And the way that the Court would view that is that that's a classic example of a viewpoint discrimination and is pretty much presumptively prohibited.

Chairman LEAHY. Thank you.
Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Ms. Kagan, welcome. You are probably aware of the fact that about 12 years ago, then-Majority Leader Tom Daschle began a tradition—thank goodness, it became a tradition—that every 2 years the Senate would join the justices of the Supreme Court for a dinner at the Supreme Court building. It's one night out of 2 years and the only time when we come into direct contact with justices on the Supreme Court in a social setting. And most of us look forward to it and wonder which Supreme Court justice we'll draw at our table to have a chance for conversation.

And this last time that we got together I was sitting with Justice Kennedy, and we talked about a lot of things. And I said to him at one point, it appears that I'm going to be chairing the Crime Subcommittee of the Senate Judiciary Committee, and what kind of issues do you think I ought to consider? And he said, well, I'll tell you what I think and I'll tell you, most Supreme Court justices would probably agree with me. He mentioned an issue which has not been raised during the course of this hearing. It related to the system of incarceration and corrections in the United States.

He felt—and I agree—that our system is broken, badly broken. Today in the United States, more than 2.3 million people are in prison. We have the most prisoners of any country in the world, as well as the highest per capita rate of prisoners in the world, and African-Americans are incarcerated at nearly six times the rate of white Americans.

One of the highlights of Justice Sotomayor's confirmation hearing last year was Senator Sessions, who told Wade Henderson of the Leadership Conference on Civil Rights, "We're going to do that crack cocaine thing." Many people joked about Senator Sessions' choice of words, but I heard him and followed up on it because I was glad to hear that he shared my interest in this important issue.

He was referring to the crack/powder disparity in sentencing in the United States, which is one significant cause for our record levels of incarceration and racial disparity in our system. It takes 100—under current law, it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum sentences. Possessing 5 grams of crack cocaine carries the same 5-year mandatory minimum sentence as selling 500 grams of powder cocaine.

Senator Sessions is a man of his word. Earlier this year, the Committee unanimously passed legislation to reduce the crack/powder disparity from 100:1 to 18:1. Some of us had hoped for 1:1 or some other configuration, but this was, in fact, a wholesome, bipartisan agreement that was reported favorably with an overwhelming vote from this committee, and then passed on the floor with a voice vote, now sitting in the House, which I hope they'll soon address.

You were involved with this issue during your time in the Clinton White House. In 1997, you and your colleague Bruce Reid, who I believe was with you yesterday, recommended that President Clinton support a 10:1 crack/powder ratio, and you wrote, "Precisely because it takes a middle position . . . this recommendation offers the best hope of achieving progress." Perhaps if you'd been

advising this Committee we could have taken action on the issue even earlier.

Some have argued that you demonstrated your far left political views during your time in the Clinton White House, but I think this example, and many others, prove them wrong. Can you give me your views on this crack/powder ratio disparity, why you thought 10:1 was a reasonable alternative? And if you could, address this general question that Justice Kennedy raised about what's happening in America when it comes to our prisons and corrections system.

Ms. KAGAN. Senator Durbin, the crack cocaine ratio is the part of our sentencing system that I've had most to do with as a policy matter. When I was in the Clinton White House and when I was serving as a policy aide to the President, we did deal with this issue and suggested that the ratio be reduced to 10:1. I think at that point some of us felt that it might go down even further, but thought that 10:1 was the practical approach to take, that it was conceivable.

Now, in the end it wasn't. That was—that—that—that—the Clinton administration did not manage to make progress on that issue. I know that the Attorney General whom I serve, and the President, President Obama, has stated that their view is that it should go down all the way to 1:1, that in fact there's no real rational distinction between crack and powder cocaine for—for sentencing purposes.

The—and that—and that that—the distinction that does exist is a distinction that has a great deal of racially disproportionate impact. I know that Congress has—has struggled with this issue. It is a policy issue, quintessentially. It's one, you know, that Justice Kennedy—he could have said, well, this is a good idea, or that's a good idea, but it really is one for Congress. There's—there's nothing that the Supreme Court, or that any court, can do about it.

It's really one that Congress has to decide, what the sentencing rules ought to be with respect to—to crack and powder cocaine. As a policy aide to President Clinton, and President Clinton felt strongly that it should go down. I tried to the best of my ability to implement his policy view on that question. President Obama believes the same. But as a judge—as a judge, the only thing that would matter would be the actual statute and—and unless and until Congress changes that statute, the—the current sentencing system would be the system that any judge should apply.

Senator DURBIN. So go to the broader issue for a moment. And I understand what you're saying. We write the laws and, as a judge, you need to follow those laws. As you step back, looking at this system, I mean, in light of your training in the law and all you've done, when you look at our system of corrections and incarceration in this country and you see the dramatic incarceration of minorities in our country, for example, does it suggest to you that we truly have equality under the law?

Ms. KAGAN. Senator Durbin, the crack/powder distinction is the one that I've dealt with most. There—there are many that I have not dealt with as a policy matter. I have seen some sentencing issues with—in my time as Solicitor General, but I have tried very hard during that time to apply the law that exists and to take ap-

peals in the way that—that—that appropriately implements that law.

So, you know, I think this—I think justices of the Supreme Court are appropriately interested in these kinds of questions. I know Justice Kennedy has taken a deep interest in sentencing issues. I think that that's much to his credit, but it's a kind of interest that I think has to be advanced in conversations of the kind that he had with you, because when a justice sits on the bench the justice can only apply the law that Congress is—that Congress gives him or her, and it really is up to Congress to decide whether the system that we have is the correct one or whether to change it.

Senator DURBIN. I'd like to take this line of questioning to the next level, the ultimate criminal penalty: the death penalty. Because what I found interesting—I'm such a fan of John Paul Stevens. If you look back at his political origins, we came out of different branches of the Illinois political tree, that's for sure. But in the time that he served on the court, I've really come to respect him so much and the role that he plays, the important role that he plays there.

And what I find interesting is a parallel outcome in judicial careers. The first was from Justice Harry Blackmun. Linda Greenhouse wrote this book that I've quoted from before. And Justice Blackmun, at the end of his career, near the time of his retirement, made an observation about the death penalty which he had supported throughout his term on the Supreme Court.

A case came along and he had this famous sentence, oft-quoted: "From this day forward," Justice Blackmun wrote, "I no longer shall tinker with the machinery of death." He basically had reversed his position on the death penalty after more than 30 years of service on the bench, when he concluded that it could not be applied fairly based on his experience in all the cases that had come before him.

Justice Stevens had a similar epiphany in the case of *Baze v. Rees*. He went through this long analysis of the death penalty and concluded as well that it was cruel and unusual and he basically said, though, it wouldn't affect the ruling in this particular case, that he believed that at this point in his career he could no longer support the death penalty.

You've had questions asked of you from this Judiciary Committee, when you came before us for Solicitor General, about your position on the death penalty. I think I know what your answer's going to be, and I'm going to give you a chance to put it on the record again. But then I would like to ask a follow-up question about Justices Stevens and Blackmun at the end of their judicial careers.

For the record, would you state your position on the death penalty?

Ms. KAGAN. Well, you're exactly right, Senator Durbin, that this was asked me during my Solicitor General hearing and in the written questions that followed, and I said then what I will repeat today, which is that the constitutionality of the death penalty generally is established law and entitled to precedential weight.

Senator DURBIN. You—

Ms. KAGAN. I think somebody also asked me whether I had moral qualms about imposing the death penalty. This was in connection with my Solicitor General nomination, so I think that the concern was whether, in any work as Solicitor General, I could appropriately make decisions. And I said that I had no such moral qualms and that I could conscientiously apply the law as it was written.

Senator DURBIN. Now I'll ask you to reflect on what happened at the end of the judicial careers of Justices Blackman and Stevens, where, after considering all of these death penalty cases throughout their time on the bench they came to the conclusion that we could not apply this law in a fair way without creating an unfair result. What do you think led them to that at that point in their careers?

Ms. KAGAN. I don't know, Senator Durbin, and I would be reluctant to speak for either one of them. This is obviously a difficult area of the law, an area in which there are great stakes and where people and judges feel their responsibilities is very heavy, and appropriately so. As I suggested to you, I do think that the constitutionality of the death penalty generally is settled precedent. I think even Justice Stevens agreed with that. He—in those comments that he made, he suggested that he did not think it was appropriate to do what Justice Brennan and Justice Marshall had done, which was to dissent in every death penalty case. He thought that that was inappropriate because of the weight of the doctrine of precedent.

Senator DURBIN. When you clerked for Justice Marshall, his views on the death penalty were well-known. Can you recall conversations with him on the subject when you were his clerk?

Ms. KAGAN. Well, they were well-known and Justice Marshall's clerks had, as a kind of special responsibility, and Justice Brennan's clerks as well—clerks carry out the vision of the people whom—with—for whom they work, and Justice Marshall and Justice Brennan did believe that the death penalty was unconstitutional in all its applications, but more specifically, I think, viewed themselves as having a special role in each death penalty case to make sure that there were no special problems in the imposition of a death penalty, and if there were, to bring those problems to the attention of the rest of the court to make sure that those issues would not be—would not be missed or overlooked. And the clerks for Justice Marshall and Justice Brennan, of whom I was one, that was a significant part of the job.

Senator DURBIN. And for the record, I mean, your position as you view this issue, if you are confirmed and become the Supreme Court justice, would be different than that of Justice Marshall?

Ms. KAGAN. Senator Durbin, it would be because I do believe that the constitutionality of the death penalty is settled precedent going forward and—and—and Justice Marshall did not believe that.

Senator DURBIN. General Kagan, you've been nominated to replace Justice Stevens, who led the Supreme Court's efforts to reign in the Bush administration's claims of executive power. The American people, I think, need to have confidence that you, too, will

stand up for our basic constitutional rights if you come to conclude that the President has overreached.

The Bush administration took the position that the President has constitutional authority as Commander-in-Chief to indefinitely detain an individual who provides support to a terrorist organization, even if the person didn't know or intend to support terrorism. The administration infamously argued that a little old lady in Switzerland can be held indefinitely without trial for innocently making a donation to a charitable organization that she did not know was actually a front for a terrorist organization.

You discussed at length with Senator Graham earlier, and Senator Feinstein as well, as Solicitor General you've argued the Obama administration position, that the AUMF, Authorization for Use of Military Force, permits the detention of someone who provided substantial support to the Taliban, Al Qaeda, or associated forces, even if this individual is not on the battlefield and has not directly participated in hostilities.

This is obviously a change or improvement on the Bush administration position because it's based on constitutional authorization, not Presidential dictate. But I am still concerned that it is inconsistent with some of our treaty obligations, which only permit the military detention of battlefield combatants.

A non-battlefield combatant who provides support for terrorism should be prosecuted and not subject to military detention. You have argued the Obama administration's position on detention authority as Solicitor General, but does this necessarily represent your personal opinion or how you would rule on its legality as a Supreme Court justice?

Ms. KAGAN. Senator Durbin, I think in general the positions that I've taken as Solicitor General do not necessarily represent positions that I would take as a justice, and I appreciate your actually suggesting that point in case I haven't emphasized it enough. The positions that I've taken as Solicitor General are positions for the U.S. Government.

Senator DURBIN. Advocacy.

Ms. KAGAN. And—and are—I have a client and I'm the best advocate I possibly can be for that client. And the role of a judge is—is different from the role of an advocate, and it's important to recognize that.

Senator DURBIN. And in this particular area, the Supreme Court has not ruled on the legality of detaining an individual for providing material support to terrorism. Is that not right?

Ms. KAGAN. The Supreme Court, in *Hamdi*, discussed only the detention of enemy belligerents who are picked up on the battlefield.

Senator DURBIN. And in *Hamdi*, Justice O'Connor famously said that a "state of war is not a blank check for the President", and the Supreme Court held that, with certain due process protections, the U.S. may detain individuals who fought against the United States in Afghanistan as part of the Taliban. The Supreme Court has not upheld military detention in the war on terrorism for anyone other than this narrow class of battlefield detainees, as I understand it. Is that the way you understand it?

Ms. KAGAN. Yes. Your understanding is mine, that *Hamdi* talked only about enemy belligerents who are picked up on the battlefield.

Senator DURBIN. That was one of the concerns I had with the nominations of Justices Roberts and Alito in terms of their interpretation of the law in this particular area. As an appellate court judge, in *Hamdan v. Rumsfeld*, John Roberts held that President Bush's military commissions were legal, even though they were created without congressional authorization, and allowed the use of evidence obtained by torture. The Supreme Court reversed Judge Roberts—then—Judge Roberts, holding that the military commissions violated the law. Incidentally, Justice Stevens was the author of that opinion.

The *Hamdan* case, while it was pending, there was an extraordinary effort in Congress to force the Supreme Court to dismiss the case by retroactively stripping the right to habeas corpus from Guantánamo detainees. As dean of Harvard Law School, you, along with the deans of Georgetown, Stanford, and Yale Law Schools wrote a letter opposing that legislation. Could you tell me about that position and why you took it at that point?

Ms. KAGAN. Senator Durbin, I did write that letter and it was a letter that urged Congress to—really the principle point that were making in that letter was that the adjudications made by military commissions ought to be reviewed in Article 3 courts. And as Senator Graham and I discussed earlier, Congress did indeed do exactly that, that the initial amendment was re-crafted into the Graham-Kyl-Levin amendment, and it was really an extraordinary act of bipartisanship that occurred to—I think it was—the vote was 85:14.

And one of the things that that piece of legislation did was exactly what—I'm not—I'm not remotely suggesting cause and effect, but the letter urged that there be Article 3 review, and the Kyl-Graham-Levin amendment provided Article 3 review of military commission determinations.

Senator DURBIN. I bring this up because it's come up during the course of this hearing, raised by Senator Kyl, and then in your discussion with Senator Graham. And there's one other element that should be mentioned. In *Boumediene v. Bush*, the Supreme Court agreed with your conclusion in that letter. It held that it violates the U.S. Constitution to deny Guantánamo detainees the right to habeas.

Justice Kennedy wrote for the majority and said “the laws and Constitution are designed to survive, and remain in force in extraordinary times.” Justice Stevens was the fifth vote in the cases; no surprise, Chief Justice Roberts and Justice Alito dissented. So, even before the passage of this legislation by 84:14, the Supreme Court had agreed with the conclusion in that letter that you sent, which I think is pretty good validation of the point that you were making.

I'd like to ask about one other area that's come up here a couple of times. My friend Senator Cornyn has left, but I know that his position is shared by many others on the other side of the table, on this whole question that comes up at virtually every hearing about this notion of activism and the role of a judge and the Constitution, particularly a Supreme Court justice and the Constitu-

tion. And it strikes me, there's something missing in this conversation. This notion of a mechanical court and robot judges just doesn't seem to me to reflect the reality of our system of justice and our history on the court.

I will acknowledge, and I certainly wouldn't question, Justice Cornyn's conclusion that he thinks *Brown v. Board of Education* had been well hidden in the Fourteenth Amendment for a long time and was discovered in 1954, that it really was the original intention. But for at least 60 years, or close to 60 years, *Plessy* was the controlling case on this and said separate versus equal was acceptable in the United States when it came to our schools.

I listened carefully to your answers, and it sounds as if you agree with the concept that we have to stick within the Constitution, but you understand that within that Constitution different conclusions could be reached. Certainly that's what *Brown* teaches us, that in that same Fourteenth Amendment they came to the opposite conclusion of *Plessy*. So can you—for my sake, could you clarify the questioning of Senator Cornyn in light of that precedential case in *Brown*?

Ms. KAGAN. Well, Senator Durbin, I think I guess I would like to make two points and insist that they're not inconsistent with each other. The first point is that judges are always constrained by law and that the only sources that judges can appropriately look to are legal sources, that judges can't import their own personal preferences or their political preferences or their moral values, that it would be inappropriate to do so. The role of a judge is to determine, as best that person can, what the law requires and then to do that thing. That's the first proposition.

But the second proposition is that there are hard legal cases where people struggle with these issues, where people struggle with what the text, and the structure, and the history of the Constitution, and the precedents that apply that the Constitution requires in a given case. And—and that can happen in—in cases of the kind that you suggested in *Brown*, but it happens really all over the place. It happens—it happens not infrequently, I would say, at the Supreme Court level. Just because the Supreme Court is dealing with cases in which lower courts have disagreed, so usually the cases the Supreme Court hears are the hardest cases.

Now, sometimes the lower courts disagree, and in fact the case is not so hard, the Supreme Court decides 9:0, and it's all easy. But there are some very difficult cases which involve clashes of constitutional principles.

Senator DURBIN. So if I could follow through on one that I've not been able to raise, and don't know how often it's come up here: the *Griswold* case. *Griswold v. Connecticut*, in the 1960s, when the State of Connecticut was basically regulating the availability of family planning and birth control. This case challenged that law as to whether Connecticut had that right.

Basically, the Supreme Court found a word in this Constitution which we can't find, privacy, and said that we have a right to privacy in our homes and families. Some who have analyzed it took a look at Justice Douglas' opinion, writing for the court. We're kind of stunned to see that he even went to the Third Amendment, to say that that guaranteed a right to privacy, the right to privacy in

our homes. The Third Amendment talks about quartering soldiers, but he referred to it during the course of that opinion.

So could you put that decision of *Griswold* and privacy in the context of this explanation you're giving me?

Ms. KAGAN. Well, Senator Durbin, I actually think that the—that *Griswold* and that the holding in *Griswold* does have grounding in the constitutional text, and the way most justices have thought about this is that the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment guarantees liberty and that it guarantees—when it guarantees such liberty it means more than freedom from physical constraints, and it also guarantees more than procedural protections, that there is some substantive protection of liberty that's incorporated within the Fourteenth Amendment of the Constitution, and I think most justices on the Supreme Court believe that to be the case.

Now, there are still very hard questions about what that liberty consists of. I think most justices of the Supreme Court do, at this point, fully accept the *Griswold* holding, which suggested that a couple's ability to use contraceptives ought to be up to that couple, that the government could not appropriately interfere with that decision, consistent with the Fourteenth Amendment's protection of liberty. But the Liberty Clause of the Fourteenth Amendment surely does give rise to some real disagreement in other cases, the extent to which that sphere extends. Those are one, but not the only kind of cases in which there are hard questions to be determined by the court.

Just another very different kind of case which raised this to me recently—I mean, it shows the varying contexts in which these difficult questions involving constitutional principles can occur—is a case that I argued recently called *Holder v. The Humanitarian Law Project*, which involved this question of the application of the material support statute that Congress passed to combat terrorism as to certain kinds of expressive activities, certain kinds of—assistance to terrorist organizations that took the form of speech.

And when I was arguing that case I was subject to questions, and the opposing lawyer also was subject to questions from all the justices, that all the justices clearly thought that this was an incredibly hard case because it involved very hard, but competing, legal values: the value of free speech on the one hand and the value, really, of protecting and defending our country on the other.

And, you know, that's a case in which the—this clash of constitutional principles can occur, in which—in which reasonable judges could reasonably disagree about the results. So—so to say that something is law all the way down, which is absolutely the case, that it would be completely improper for a judge to import personal, or moral, or political preferences into the occasion. But that's not to say that law is robotic. It's not to say that everything is easy in the world of constitutional law, or indeed of statutory law.

Senator DURBIN. Thank you very much, Ms. Kagan.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator COBURN.

Senator COBURN. Thank you. Am I next-to-last, Mr. Chairman, or last? What's our plans?

Chairman LEAHY. Well, let's see how we go.

Senator COBURN. All right. Thank you.

Well, it's been a long day for you. Thanks for being here.

Chairman LEAHY. And I'm concerned about the witness and her stamina. Mine is——

Senator COBURN. Her reputation says she's tough as nails. She can make it.

[Laughter.]

Ms. KAGAN. If you say so.

Senator COBURN. First of all, you do get the Arthur Murray award. You are dancing a little bit, much to my chagrin. I would rather you not win. Maybe you should be on "Dancing With the Stars", or something. I want to go, first, to a couple of areas.

One of the people that I respect most in the Senate is somebody that's a polar opposite of me. His name is Russ Feingold, and he unabashedly stands for his liberal positions, defends them, doesn't run away from them, talks about them, and stands up and beats his chest because he thinks he's right. And I've never walked away from my conservative positions. I don't apologize for my social conservatism or my fiscal conservatism.

One of the things I told you, I want America to know who you are. You've kind of not allowed us—you know, I don't know what a liberal progressive is. I know what a liberal is, and I think you're a liberal. I think you're proud enough to defend that. And as Senator Graham said, there's nothing wrong with that.

But the point is, is you have a very different belief system than most of the people who come from where I come from. And it's not wrong to have that belief system. It doesn't mean mine's right and yours is wrong. But it is wrong for us not to know what you believe about a lot of things. You're very pro-Choice. You believe in a woman's right to choose. You believe in gender-mixed marriages, or gay marriage. You believe that States ought to recognize those throughout. If I say something that is inappropriate, please tell me.

Ms. KAGAN. Well, Senator Coburn, I suppose what I would want to say at this point is that the way I would vote as a legislator with respect to any or all of those issues is——

Senator COBURN. I'm not trying to—I'm not trying to label as a judge. I'm just saying it's important. I'm not saying you are not going to have the capability to separate those positions. I'm not saying that. But it is important. I mean, you've told this Committee that you think it's—that there is appropriate time to use foreign law. You told this Committee that in your Solicitor General testimony in terms of answers to questions.

Ms. KAGAN. Can I interrupt you on that one, too?

Senator COBURN. Well, I'll give you a chance.

You're for—you—you—you have made statements for assisted suicide, in terms of that being an appropriate thing. So I'm not saying that that will limit your ability to make great decisions as a jurist, and I want to separate that right now. But I don't want us to—the American people have a right to know, what makes up Elena Kagan? There's all these other characteristics, too: smart as all get-out, super-accomplished, tough as nails.

I believe you're tough as nails. I would not want to be a Supreme Court justice with you. I think I'd get run over. You know, I believe

you have the intellect—superior intellect—and ability to reason, and I've listened to a lot of it here. But—and again, there's nothing wrong. I love Ross Feingold to death, but we're totally different. That's one of the things that makes our country great. But it's not something that I—I don't want you to run away from that.

That's who you are. That's what you—you've fought for a lot of causes in your life and—and those are a part of who you are. And a part of who you are will, in some small instances, influence you—I don't know one judge that can 100 percent separate themselves from who they are as they make a decision, and I don't think anybody knows a judge that can do that. So it's not unfair to say who you are. And it's not a slam at all, it's just, you're different than me and you're different than many of the people that I represent.

So I wanted to established that and I wanted to give you a chance. If you want to say something in response to that, I'll be happy to give you that chance right now. But, you know, I'm a proud conservative. I'll fight anybody on the—you know, I'm for it. I'll debate anybody about what I believe and why I believe it, and I think you would do the same, and that's one of the reasons I have admiration for you.

Do you have a comment about what I've said?

Ms. KAGAN. Well, I suppose a few comments, Senator Coburn. Let me take on just a couple of the particulars, and then maybe make a more general comment. You said, as Solicitor General, I advocated the use of—of foreign law in some circumstances. I do just want to make clear that what I said in those—those questions—

Senator COBURN. Here's your quote exactly.

Ms. KAGAN—[continuing]. Was—was that, because there are justices on the Supreme Court who believe in the use of foreign law in some circumstances, that I would think it was appropriate, as an advocate, to argue from foreign law or to cite foreign law in any circumstance—

Senator COBURN. Well, but that isn't what you said here.

Ms. KAGAN. Well, I think, Senator Coburn, with all respect, that if you look at the question and you look at the answer, I was speaking in my role as an advocate, saying that the primary consideration of an advocate is to count to five and to try to do the best the advocate can to ensure that the position that the advocate has taken will prevail.

Senator COBURN. But it's not your position, because some other justices are using foreign law, you have the authority to do that as well.

Ms. KAGAN. As an advocate, to the extent that I think that foreign law arguments will help the government's case, then I will use those foreign law arguments, is what I—

Senator COBURN. All right. Let me read something to you. As is obvious, I'm not a lawyer. OK. It's pretty obvious. But Article 3, Section 2 says this: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made."

Nowhere—nowhere—in our Constitution does it give the authority for any judge, chief justice of the Supreme Court, any jurist on the Supreme Court, or any other court, to reference foreign law in

determining the interpretation of what our statutes or our Constitution will be. So this is an area where we have grasp, where our judicial majority, much like the Israeli judge, we start reaching beyond the Constitution. You said it was all law. You said the determination will always be law. It's down to law, law, law, the earliest questions that you were asked in this hearing. Well, this is the founding document of what the law is. Nowhere that I can find, in this writing or in these guys' writing, says anything about using foreign law.

So please explain to me why it's OK sometime to use foreign law to interpret our Constitution, our statutes, and our treaties.

Ms. KAGAN. Senator Coburn, I think for the most part I wouldn't try to convince you of that because I don't think that foreign law is appropriate as precedent or as an independent basis of support, you know, in the vast majority of legal questions. Now, I suggested to you a few that specifically might reference international considerations, such as, you know, the right to receive Ambassadors or something like that. Even there, I think the citations would not be a precedent. They would not have binding weight of any kind. But they might be relevant to interpretation of—

Senator COBURN. Relevance is about getting knowledge and gaining knowledge, but you have a different guide. The oath that you'll take as a justice of the Supreme Court is to uphold the Constitution and our statutes.

Ms. KAGAN. Well, I think I agree with you on that, Justice—Senator Coburn.

[Laughter.]

Senator COBURN. Don't worry, I will never get there.

[Laughter.]

Senator COBURN. All right. Let me move on then, if I—if I may, if I can keep playing.

One of the things that you said today really concerned me, and let's see if I've got the—you were being asked a question. You said, "But in other cases, original intent is unlikely to solve the question, and that might be because the original intent is unknowable or might be because we live in a world that's very different from the world in which the Framers lived. In many circumstances, precedent is the most important thing." Is this precedent more important than original intent?

Ms. KAGAN. Well, Senator Coburn, let me give you an example. I'm not sure if it was an example I used before or not, but in the First Amendment context, which is a context I've—I've—I've written about a good deal, it's fairly clear that the First Amendment doctrine that's been established over 100 years departs significantly from the original intent of the Framers. And here's one example, is that I think that the Framers would never have dreamed that the First Amendment would in any way protect people against libel suits, that the First Amendment had anything to do with libel.

So when the court said, in *New York Times v. Sullivan*, that a public figure could not sue the *New York Times* and claim damages for libel without meeting a very high bar, without meeting the so called "actual malice" standard, I think that was something that the Framers would not have understood.

Senator COBURN. Why don't you think they wouldn't have understood that? I mean——

Ms. KAGAN. Well, I think that their——

Senator COBURN. I mean, they had—they had print back then. I mean, we didn't start that early in terms of formation of our country.

Ms. KAGAN. I think the—I'm sorry for interrupting. I think that the historic evidence is very clear that the Framers didn't think that the First Amendment at all interfered with libel suits. Now, over time, as—as—as courts have applied the First Amendment to different contexts, to different circumstances, have seen different factual problems, have had to consider different cases, I think that the court sensibly thought that the principles that are embodied in the First Amendment could not be protected unless the decision in *New York Times v. Sullivan* was issued, unless the——

Senator COBURN. So—so let me go forward with that. Who can change precedent?

Ms. KAGAN. Well——

Senator COBURN. Let's have a little law lesson here. Who can change precedent?

Ms. KAGAN. Well, the court can, but it's a very high bar.

Senator COBURN. OK. I know, but they can, right?

Ms. KAGAN. It—the court can change, can overturn a ruling, but it's a very high bar. The precedent——

Senator COBURN. What does the high bar mean to the average person watching this hearing today?

Ms. KAGAN. Well, that—that—that it has to be a very extraordinary circumstance or a very unusual circumstance for a court to overturn a precedent, and the usual circumstances that are mentioned are where the precedent has become completely unworkable, where it's clear that the precedent just is producing massively inconsistent results or——

Senator COBURN. So, for example, *Brown v. Board of Education*. That upset precedent, *Plessy v. Ferguson*, on its ear, didn't it?

Ms. KAGAN. It did, Senator Coburn. I think that——

Senator COBURN. So what was the purpose in changing the precedent?

Ms. KAGAN. You know——

Senator COBURN. Was it to change *Plessy v. Ferguson* or was it to go back to original intent? That's—that's—that's why I'm having trouble with what you said, because, you know, I know our Framers weren't perfect, but I think their motivations were really pure. And for us to have a justice that says precedent is more important than original intent is going to give a lot of people in this country heartburn, because what it says is our intellectual capabilities are better than what our original founding documents were, and so we're so much smarter as we've matured that they couldn't have been right. That's dangerous territory for confidence in the court.

Ms. KAGAN. Senator Coburn, I think what I'm trying to say is that courts appropriately look to both kinds, both keys to constitutional interpretation, that courts appropriately look to original intent, that courts appropriately look to precedent, and that it depends on the provision of the Constitution, it depends on the case, it depends on the issue as to whether—which—as to which one of

those is most helpful, and that it's a pragmatic approach, looking case by case, to try to figure that question out.

And I think what I'm saying—I would say two things about it: it's both extremely descriptive of what the court has done, that the court in—

Senator COBURN. Historically speaking.

Ms. KAGAN. Historically speaking and currently. The second point I would make is that, in fact, when the chief justice was sitting here, Chief Justice Roberts, he stated the same thing, the same principle that I'm trying to state, is that one should approach the question of constitutional interpretation pragmatically, without a single, over-arching theory, without something that says you always look to the specific original intent, or you always look to something else, that sometimes the original intent controls and other times it may be unknowable or it may be far removed from the current problems we face.

Senator COBURN. But that's a—but that's a judgmental decision, correct? You're going to—you're going to make a judgment about whether original intent doesn't apply or is unknowable, and what may seem to be unknowable to you may seem to be knowable to another judge. Correct?

Ms. KAGAN. Senator Coburn, I don't disagree with you that judging requires judgment.

Senator COBURN. Yes.

Ms. KAGAN. And—

Senator COBURN. Well, that's the whole basis of why we're having this hearing, is where's the judgment going to come from, because it takes me to the next thing that you said that I have heartburn with. "I have great difficulty in the ability to take off my advocate hat and put on my judge's hat." And my question to you is, I would have the same problem. I will tell you, how are you going to take off your political hat?

What are the processes with which Elena Kagan is going to take off this advocacy of a liberal position in this country as she becomes a justice of the Supreme Court so that that advocacy hat is gone and only the judgment hat is left? How are you going to do that? You've already admitted you're going to—you have trouble doing that now just from a Solicitor General standpoint.

Ms. KAGAN. Senator Coburn, my—the advocate's hat that I was referring to was not a political hat, it was the hat that I wear as Solicitor General of the United States, representing the interests of the United States. That has nothing to do with my own political views. It has to do with a long and historic tradition that the Solicitor General's Office has of representing the long-term interests of the U.S. Government.

Senator COBURN. Then let's move back to your political hat. How are you going to take that off?

Ms. KAGAN. Senator Coburn, that hat has not been on for many years.

[Laughter.]

Ms. KAGAN. Senator Coburn, I know that, you know, some people have said, oh, she's a political person. I've had a 25-year career in the law. Of that 25-year career, 4 were spent in the Clinton White House. This was a period of time that I am proud of and that I feel

as though, you know, I helped to serve the American people for President Clinton.

But this is by no means the major part of my legal career. The major part of my legal career has been as a scholar and teacher of constitutional and administrative law, has been, you know, teaching, by this point, many thousands of students, has been writing about constitutional and administrative law issues.

Senator COBURN. Let me ask you another question, then, on it. This is to inquire—this is softball. OK. What do you say—

Ms. KAGAN. You promise?

Senator COBURN. I promise.

[Laughter.]

Ms. KAGAN. Because it's getting late.

Senator COBURN. I told you, you're terrific. What do you say to people who are worried that your political positions would influence your judicial opinions? What do you say to the average American that's sitting here watching this right now? What assurance, other than knowing Elena Kagan, that we know who you are, we've met you, we've read about you, both positive and negative? What are the assurances that you would tell the American people, that you can trust me to make a pure jurist decision, that I'm not going to be biased? What is it that you would tell them?

Ms. KAGAN. Well, I hope that they would listen to this hearing and come away with that view, come away with a person who believes that it's—it's all about law when you put on a judge's robe. It's not about politics, it's not about policy, it's all about law and making your best judgments about what the law require.

And that is the pledge that I said was the only pledge that I would make yesterday and—and—and I'll make it again now. But I think it's consistent with—with—with the way I've approached my life, in a fashion that respects the rule of law, in a fashion that's temperate and respectful of other people's views, and, you know, with respect, which I don't think is partisan in the kinds of ways that a few people have suggested.

Senator COBURN. You can understand why some of us, when Justice Sotomayer told us—I mean, her words were, "I think I agree with you, Senator Coburn, we shouldn't use foreign law," and then in one of her opinions she's embracing the use of foreign law in a decision. You know, we become skeptical because—and as I said earlier and as I said on the floor speech about these hearings, is, you know, it really isn't going to matter what you said, because once you're there you're there and we have very little ability to change it.

So when we see histories and then we see statements that don't coincide, and quite frankly, you haven't done that to us that I know of yet today, but you can understand the skepticism we might have, and especially in the fact that many on the other side of the aisle, the implication has been that the same thing by Alito and Roberts, that they weren't straightforward, that in fact they didn't keep their word on stare decisis.

So you understand what we're battling with, and that's why I'm not even sure the hearings are a great thing. I think we ought to do it the way we used to do it, is sit down and talk and spend a lot of time with you and get a comfort level to where we feel like

we really get to know you and what you believe and what your actions will be.

Let me go to one other thing. Senator Cornyn attempted to ask this, and I think it's a really important question. If I wanted to sponsor a bill and it said, Americans, you have to eat three vegetables and three fruits every day, and I got it through Congress and it's now the law of the land, you've got to do it, does that violate the Commerce Clause?

Ms. KAGAN. Sounds like a dumb law.

[Laughter.]

Senator COBURN. Yes. I've got one that's real similar to it I think it equally dumb. I'm not going to mention which it is.

Ms. KAGAN. But I think the question of whether it's a dumb law is different from whether the question of whether it's constitutional, and—and—and I think that courts would be wrong to strike down laws that they think are—are senseless just because they're senseless.

Senator COBURN. Well, I guess the question I'm asking you is, do we have the power to tell people what they have to eat every day?

Ms. KAGAN. Senator Coburn, I think—

Senator COBURN. I mean, what is the extent of the Commerce Clause? We have this wide embrace of the Commerce Clause, which these guys who wrote this never, ever fathomed we would be so stupid to take our liberties away by expanding the Commerce Clause this way. Matter of fact, let me spend just—I've got a little time. Let me just read you what they said, because they actually said if the executive branch and the judiciary branch wouldn't enforce their limited view of the Commerce Clause, that in fact we needed to change the Members of the Congress so that they would. And let me read it to you: "If it be asked, what is to be the consequence of the——"

Ms. KAGAN. I'm sorry, Senator. Where is this from that you're reading? I'm sorry.

Senator COBURN. This is the *Federalist Papers*.

Ms. KAGAN. OK.

Senator COBURN. OK. This is number 44. I presume you've read this book?

Ms. KAGAN. I have.

Senator COBURN. I thought you might have.

Ms. KAGAN. It's a great book.

Senator COBURN. It is. Actually, I hope you'll read it a lot as a justice, if you become one. "Constitution exercise powers not warranted by its true meaning." They're sitting there warning us to not do things. "What are you going to do about it? And I answer, the same as if they should misconstrue or enlarge any other power vested in them as if the general power had been reduced to particulars and any one of these were to be violated. The same, in short, as if the State legislature should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments." In other words, you become complicit in not slamming it down and saying, Congress, you're going the wrong way.

I would make the case today that we find ourselves in trouble as a Nation because the judiciary and the executive branch has not

slapped Congress down on the massive expansion of the Commerce Clause. "Which are to expound and give effect to the legislative acts, and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the act of the usurpers."

So I go back to my original question to you: is it within the Constitution for me to write a bill, having been duly elected by the people of Oklahoma, to say, and get it signed by the President, that you have to eat three fruits and three vegetables every day?

Ms. KAGAN. Well, Senator, first, let me say about the *Federalist Paper* quote that you read, that it is absolutely the case that the judiciary's job is to, you know, in *Marbury v. Madison*'s famous phrase, to say what the law is and to make sure—I think I've—I've talked about it as policing the constitutional boundaries as—and making sure that Congress doesn't go further than the Constitution says it can go. It doesn't violate individual rights and also doesn't act outside its enumerated authorities. We live in a—in a—in a government in which Congress—Congress' authorities are enumerated in Article 1 of the Constitution, and Congress can't act except under one of those heads of authority.

Now, as I talked about with Senator Cornyn, the Commerce Clause has been interpreted broadly. It's been interpreted to apply to regulation of any instruments or instrumentalities or channels of commerce, but it's also been applied to anything that would substantially affect interstate commerce.

It has not been applied to non-economic activities, and that's the teaching of *Lopez* and *Morrison*, that the court—that the Congress can't regulate non-economic activities, especially to the extent that those activities have traditionally been regulated by the States, and I think that that would be the question that the court would ask with respect to any case of this kind.

But—but I do want to sort of say again, you know, we can come up with sort of, you know, just ridiculous-sounding laws, and the—and the principle protector against bad laws is the political branches themselves. And I would go back, I think, to Oliver Wendell Holmes on this. He was this judge who lived, you know, in the—in the early 20th century. Hated a lot of the legislation that was being enacted during those—those years, but insisted that if the—if the people wanted it, it was their right to go hang themselves.

Senator COBURN. OK.

Ms. KAGAN. Now, that's not always the case, but—but—but there is substantial deference due to political—

Senator COBURN. I'm running out of time. I want to give you another condition. What if I said that eating three fruits and three vegetables a day would cut health care costs 20 percent? Now we're into commerce. And since the government pays 65 percent of all the health care costs, why isn't that constitutional?

Ms. KAGAN. Well, Senator Coburn, I—I feel as though the principles that I've given you are the principles that the court should apply with—

Senator COBURN. Well, I have a little problem with that because if we're going to hang ourselves, as our founders—three of the critical authors of our Constitution thought the judiciary had a—had

a reason to smack us down. And as Oliver Wendell Holmes, if we want to be doing stupid stuff we can do stupid stuff. I disagree.

I think—you know, and that's not activism, that's looking at the Constitution and saying, well, we're going to ignore it even if it does expand the Commerce Clause, because the Commerce Clause is what has gotten us into a place where we'll have a \$1.6 trillion deficit that our kids' future has been mortgaged, that we may never recover from. That's not an understatement at all. In 25 years, each of our kids are going to owe \$1.113 million and pay interest on that before they do anything for themselves or their kids.

So the fact is that we have this expansive clause and we have to have some limit on it. And if the courts aren't going to limit it within the original intent, instead of continuing to rely on precedent of this vast expansion of it, the only hope is, is that we have to throw out most of the Congress.

But the point is, the original intent is that you wouldn't ignore their original intent. What we found ourselves today on the Commerce Clause is that, through a period of precedent-setting decisions, we have allowed the Federal Government to become something that it was never entitled to become, and with that a diminishment of the liberties of the people of this country, both financially and in terms of their own liberty.

Ms. KAGAN. Well, Senator Coburn, I—I guess, a few points. The first, is I think that there are limits on the Commerce Clause of the ones I suggested, which are the ones that are articulated, were articulated by the court in *Morrison* and in *Lopez*, which are primarily about non-economic activity and Congress not being able to regulate non-economic activity.

I guess the second point I would make, is I do think that very early in our history, and especially I would look to *Gibbons v. Ogden*, where Chief Justice Marshall did, in the first case about these issues, essentially read that clause broadly and provide real deference to legislatures and provide real deference to Congress about the scope of that clause. Not that the clause doesn't have any limits, but that deference should be provided to Congress with respect to matters affecting interstate commerce.

And I guess the third point is just to say that I think the reason for that is—is that \$1.6 trillion deficit may be an enormous problem. It may be an enormous problem, but I don't think it's a problem for courts to solve. I think it's a problem for the political process to solve.

Senator COBURN. You missed my whole point. We're here because the courts didn't do their job in limiting our ability to go outside of original intent on what the Commerce Clause was supposed to be. Sure, you can't solve the problem now, but you help create it as a court because you allowed something other than what our original founders thought was a legitimate role for the Federal Government.

Chairman LEAHY. If the—if the——

Senator COBURN. I thank the Chairman. I will yield back and I'll follow up on the next round.

Chairman LEAHY. You will yield back. Your time is up. I didn't know if you wanted to respond to that.

Did you want to take a break before we go to some of the others, or——

Ms. KAGAN. Some of the others?

[Laughter.]

If it is some of the others, I definitely want to take a break. If it is one of the others, we can do that.

Chairman LEAHY. I'll tell you what, let's go one of the others and see where we stand after that. Senator Cardin. You're doing such a great job, we don't want you to leave.

[Laughter.]

Senator CARDIN. Solicitor General Kagan, I'm one of the others. Let me welcome you to the Committee.

I have been amazed and disappointed as to how the brilliant trail-blazing legal career of Thurgood Marshall has been portrayed by several of my colleagues. Justice Marshall came from Baltimore, Maryland, the city where I was born, in the State of Maryland that I have the honor of representing in the U.S. Senate. Justice Marshall was one of the great Americans that have come from Maryland. We are very proud of what he's meant to this country.

It's interesting that this week on July 2nd we'll celebrate his 92nd birthday. And I must tell you, we've had a great deal of discussion about background. As you know Justice Marshall was the great grandson of a slave. And he grew up in a segregated country.

I talked during my opening statements about how I remember attending segregated public schools in Baltimore City. I also remember swimming pools and theaters and amusement parks that were restricted as to who could attend, who could be there. So we talk a lot about empathy, we talk a lot about background, we talk about how important that is, but on behalf of the millions of Americans who have benefited from Thurgood Marshall's public service, I'm glad he brought his real world experiences to public service. He helped make a more perfect union and made a real difference in the lives of Americans.

I agree with the NAACP Legal Defense Fund in their release where they say, simply put, Thurgood Marshall helped make our union more perfect. And the legacy illuminates the highest possibilities for all Americans, yesterday, today and tomorrow.

Yesterday I talked about how we can assure that the public understands how important the decisions of the Supreme Court are in their lives. And how I want American citizens to understand just how important your role will be on the Supreme Court of the United States. I just one more time express this concern about following legal precedent and activism. I listened to Senator Coburn and I must tell you, I think his definition of original intent reminds me of some of my colleagues' definition of activism. They use it for a particular purpose. Judicial activism is OK if you agree with the results. And I think it's the same thing with original intent. It's OK if that's the result that you want.

But I want a Justice who is going to follow legal precedent. I want a Justice who believes that it's up to Congress to legislate, not the courts. I want a Justice that is going to follow in the best traditions of protecting individuals against the abuses of government and special corporate interests. That's what I'm looking for.

It's very difficult for us to legislate—to pass legislation to expand rights. It's extremely frustrating when we finally get it done and then see the courts reverse legal precedent, reverse our Congressional intent and take away those rights that affect people of our nation.

So, when we look at our Constitution and when it was created, citizens were defined very differently than they are today. Women and African-Americans were excluded from the definition of “we the people.” But the real triumph of our Constitution is that we've overcome these faults.

Chief Justice Roberts said, “I think the Framers, when they used broad language like ‘liberty’, like ‘due process’, like ‘unreasonable’ with respect to search and seizures, they were crafting a document that they intended to apply in a meaningful way down through the ages.” This is the same point that you have raised before this Committee about how times change and how does the Constitution apply to current circumstances.

The strength of our Constitution and the Supreme Court is that it advances rights envisioned by the Framers to current times.

Now, it's been a bumpy road on Civil Rights. We've made progress and we have moved in the wrong direction. We've talked a lot about *Plessy v. Ferguson*. It might have been a pragmatic decision by the Court in its time, but it was fundamentally flawed. There is nothing equal by separate and we know that today.

Then came *Brown v. Board of Education*, one of the proudest moments in the history of the Supreme Court and indeed one of the proudest moments in the history of the United States. The Supreme Court decision had real impact on real people's lives.

Your opening statement gives me comfort that you will follow in the best traditions of the Supreme Court in meeting the challenges of change. You talked about a fair shake for every American. I'm going to mention that a couple times during our questioning. You also talked about the Supreme Court, of course, which has the responsibility of ensuring that our government never oversteps its proper bounds or violates the rights of individuals. The fundamental opportunities of America depend upon those goals. Your grandparents and mine came to this country because of the opportunities this country enshrined in our Constitution.

In preparation for this hearing I came across a Supreme Court case involving educational opportunity that you happened to be the clerk for the Justice who wrote the dissenting opinion, Justice Marshall. In *Kadrmas v. Dickinson Public Schools*, Justice Marshall said—and I'm quoting, “Today the Court continues to retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives 16 miles from the nearest school to use a school bus without paying a fee does not violate the Fourteenth Amendment's equal protection clause.”

Now, I mention that because I think Justice Marshall was looking at factual circumstances that were not present 10, 15, 20 years ago. But he was trying to use current circumstances under our law to advance what we all believe was the Framers' intent of “we the people.” How do you believe the Framers intended the Constitution

to provide for the protection of people against abuses of government or special corporate interests?

Ms. KAGAN. Well, Senator Cardin, I think that the Constitution is a kind of genius document in that while certain of its provisions are quite specific and, you know, it just doesn't matter how times and circumstances change. We still have a Senate and we still have a House of Representatives and they're still elected the same way and all manner of things like that that the Framers and then in subsequent amendments and especially with respect to the Civil War amendments, the Fourteenth—Thirteenth and Fourteenth and Fifteenth Amendments wrote some provisions broadly, generally. And this goes back to what Chief Justice Roberts said in that quote that you mentioned.

And I think actually if I remember it correctly, Chief Justice Roberts said, "it would be wrong to give general provisions a crabbed interpretation." That the point of these general provisions is to ensure that the principles that the Framers held so dear or that the ratifiers of the Fourteenth Amendment held so dear, that those principles would continue to apply throughout the ages for our posterity.

And that's so with respect to, you know, a number of ways in which the government can deprive people of equal protection of the laws or violate people's liberty.

Senator CARDIN. Well, I agree with that comment. Last year the Supreme Court chipped away at the existing precedent in *Brown v. Board of Education*. So these are real concerns. I think the Framers of our Constitution would have been proud of *Brown v. Board of Education* even though at that time, as you know, African-Americans were not included in the Constitution in the full sense. But in that case of *Parents v. Seattle School District*, the Court held that voluntary integration programs were unconstitutional. Chipping away at *Brown v. Board of Education*, Justice Breyer writing the dissent said, "what has happened to stare decisis?"

I noted Senator Cornyn talked about following legal precedent. Well, Justice Breyer was concerned about that. He said, "to invalidate the plans under review is to threaten the promise of *Brown*. The plurality position, I fear, would break that promise. This is a decision that the Court and nation will come to regret."

Do you believe that decisions like *Brown v. Board of Education* are still relevant today, and are precedent for the Court to carry out what that Court did in advancing we the people for all?

Ms. KAGAN. Senator, I hope and I know that *Brown v. Board of Education* and the principles that *Brown v. Board of Education* set forth are still relevant today and they're the principles that the Equal Protection Clause has set forth. And the idea of equality under law is a fundamental American ideal, a fundamental American value or fundamental American constitutional value. And one of the Court's most important missions is to ensure that that value remains strong over time.

Senator CARDIN. Well, let me move on from education to voting rights on the Civil Rights agenda. It took a long time. A lot of people worked hard, people gave up their lives in order that we have the right to vote and expanded the right to vote. It took constitu-

tional amendments and even the Civil Rights Act of 1964 failed to address the hurdles that people used to exclude black voters and poor white voters, but Congress passed the Voting Rights Act of 1965. So it was difficult for us to expand voting rights. And we have challenges today as to whether we can do what we have done.

There was just recently a Supreme Court decision of *Northwest Austin Mud* that didn't directly deal with the issue of whether Congress has the right to continue the covered jurisdictions with preclearance. But it raises the question as to whether Congress has the constitutional power to protect minority voting rights.

So my question to you is, you have said several times without reference to this specific issue, that you will give due deference to Congress. I want to put it in context to where we believe there is need to expand protection under our Constitution. And will you give due deference to Congressional actions where Congress is pretty clear. This is not where Congress is saying X, and you know what X, this is not substituting a Y for an X, which I heard you say you don't believe is right. Will you give due deference to Congress where we are expanding protections under the Constitution?

Ms. KAGAN. Senator Cardin, you raised the question of the scope of Congress's Section 5 power; Section 5 of the Fourteenth Amendment which gives Congress the ability to enforcement the Fourteenth Amendment. And the scope of that power has been an issue in several recent cases. In the case of *Bernie*, which I believe Senator Specter referred to earlier, the Court said that it wanted to distinguish between Congress's ability to enforce—to remedy Fourteenth Amendment violations and also to prevent Fourteenth Amendment violations on the one hand, which was appropriate, and on the other hand what the Court found in *Bernie* was not appropriate, was that Court acting under that Section Five power to change that constitutional rights that had been found by the Court. So that's the line that the Court has developed in *Bernie* and subsequent cases which is, Congress clearly has the authority to remedy and to prevent Fourteenth Amendment violations, but doesn't have the authority essentially on its own to change the meaning of the Fourteenth Amendment.

Senator CARDIN. And I understand the point that was before the Court. I guess my point is that voting restrictions today still exist. And we who are involved in the political system understand that directly.

Ms. KAGAN. And I should say, of course, the Fifteenth Amendment has its own enforcement provision and the Voting Rights Act was passed under that enforcement provision. I think it's undeniable that the Voting Rights Act has been a major historic achievement for this nation.

There, of course, may be a case that will come before the Court on the question of the constitutionality of certain provisions or the Voting Rights Act generally. That case—that issue was potentially before the Court last year. The Court did avoid it and resolved the case on statutory grounds. It was a case that the Solicitor General's Office filed a brief on in strong support of the Voting Rights Act. But it's not likely to be the last time that the Court will consider those issues. And Congress clearly has an important role in this

area and the exact scope of that role is going to be addressed in future cases.

Senator CARDIN. Thank you for that response. I find that comforting. I'd just point out that we live through the election procedures and we see obstacles in the way of voters. And my own election in 2006, it was undeniable that the lines in the predominantly African American voting places were three, four, five times as long as other communities. That there was targeted information sent out to tell voters in minority districts to vote on Wednesday rather than Tuesday. There were direct efforts made to diminish minority voting. It exists today. And Congress is trying to take action in this area. I just urge you, because voting is so fundamental to our system, that when Congress acts to try to expand rights, the statements you've made about deference to the Congressional branch, I think are particularly important.

Let me move to—I just want to cover very quickly because I know *Citizens United* has been covered over and over again here. But to me it's a fundamental question because voting doesn't mean much unless you have fair and open elections. And President Lincoln said, over 100 years ago, "I see in the near future a crisis approaching that unnerves me. It causes me to tremble for the safety of my country. Corporations have been enthroned and an era of corruption in high places will follow. And the money power of the country will endeavor to prolong its reign by working upon the prejudices of people until the wealth is aggregated in a few hands and the republic is destroyed."

So I do worry about the impact of corporate contributions to the integrity of our election system. I chair the Helsinki Commission which monitors human rights internationally. One of our principal objectives is to make sure we have free and fair elections in Europe, North America, and Central Asia, while my colleagues are now monitoring U.S. elections. They want to make sure, as we have signed on to the accords, that our elections are free and fair. My point is that *Citizens United* to many of us is a step backwards. And once again Congress has acted in this area and there's legal precedent. And I know this is a case that's already been decided and we're taking action, but I just want to weigh in to say that I think it's critically important that we—that you follow, when you can, legal precedent and Congressional dictate.

Let me just change to a different subject that is on everyone's mind today and that's what's happening in the Gulf of Mexico. As a Senator from a coastal state of Maryland, I am deeply concerned about the damages that have been caused to our environment, to business, individuals, the loss of life in the Gulf of Mexico. Congress has passed environmental laws. Again, they weren't easy. We passed the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Safe Drinking Water Act, and SuperFund.

Senator Feinstein questioned you as to the legislative intent to have certain areas covered in our wetlands, in which the *Rapanos* Supreme Court case was a huge step backwards, again, rejecting Congressional intent.

Then in *Exxon v. Baker* we saw a restriction on the full coverage of damages in the Exxon Valdez matter. In my view the Court has

weakened environmental protections that were hard fought here in Congress.

Do you agree that the Federal Government working with the states has a unique role in protecting our environment and that the government must hold public lands and waters in trust for future generations? And will you give deference to Congress as we attempt to carry out that mandate?

Ms. KAGAN. Well, Congress certainly has as broad authority under the Constitution to enact legislation involving protection of the environment. And I think that when Congress enacts such legislation the job of the Courts is to construe it consistent with Congressional intent.

Senator CARDIN. Thank you. I also want to cover some employment cases because I think, again, we're seeing a chipping away of the rights. A couple of my colleagues have talked about the *Gross* case which the Court rejected the long-standing tests to deal with age discrimination in the workplace. I could also talk about the *Ledbetter* case in which the Court on gender discrimination took the test, which I find incredible to believe, that Lilly Ledbetter was supposed to know about her discrimination even though it was impossible to discover it and she was barred by Statute of Limitations.

Now, we've corrected the Lilly Ledbetter case by further Congressional action. But you talk about how we can make sure that every American gets a fair shake. How do I explain to a 50-some year old woman with a couple children who is fired after 25 years in the workforce because the employer wants to hire someone half her age and pay one-third the salary? How is she getting a fair shake when the Supreme Court changes the tests in order to avoid the current protections we thought we had in law against age discrimination?

Ms. KAGAN. Well, Senator Cardin, I've pretty consistently said that I don't want to, you know, grade, or give a thumbs-up or a thumbs-down on particular Supreme Court cases. I do think that with respect to any statute, discrimination statutes, or any other, that the job of the Court is to construe the legislation as Congress meant for the legislation to be construed. And that's difficult sometimes, but that's the goal is to make sure that the Court is not doing, you know, deciding a case in a way in which, you know, it would like the statute to read, that the Court is deciding the case according to the way Congress wanted the statute to be applied.

Senator CARDIN. Well, thank you. I think that was a pretty complete answer. And, by the way, I just really want to thank you for the complete answers you're giving us. In response to Senator Graham, you gave us high grade, I want to give you high grades on being responsive to the questions. I think you've been very direct where you can be and I thank you for that openness to the committee.

I want to cover one other area of inclusion on "we the people" including all. Right now in 30 states an individual can still be fired for their sexual orientation where he or she has no recourse. An alarming 39 percent of the self-identified LGBT workers in American have reported some form of workplace harassment or discrimination. And yet they have no legal recourse in nearly two-thirds of our states. This is contrary to the legal expectation of fairness, or

as you say, a fair shake for all Americans. And Congress has an obligation to stop this discrimination.

The state of Maryland has taken action and I congratulate our legislature and Governor for acting in this area. We have a similar effort pending in the Congress of the United States and it has the support of 202 cosponsors in the House of Representatives and 45 cosponsors in the Senate and I'm proud to be an original cosponsor that would provide protection in the workplace for LGBT.

My reason for bringing this up is that we expect to pass this bill. It's not going to be easy, but we expect to get this protection passed. I am certain there will be a legal challenge. We usually find that the case. Once, again, do you believe that to clarify the definition of "we the people" so that all Americans are included in that and have protection of law and, again, will you give deference to Congress as we try to create a more perfect union?

Ms. KAGAN. Well, the policy decision, Senator Cardin, is up to Congress. And the questions that might come before the Court are questions if they're statutory in nature, they would be appropriately addressed by the Court asking what Congress intended.

Senator CARDIN. Thank you. I wanted to save about 5 minutes at the end for somewhat easier rounds of questions so you can catch your breath a little bit. You've been going all day. So I want to talk about pro bono.

And I want to congratulate you for your work at Harvard in expanding clinical experiences for your students. But I want to tell you the challenges that we have. According to recent Legal Service Corporation studies, each legal aid attorney serves over 6,800 people. There is one private attorney for every 525 people in the nation. This is not equal justice under the law.

Recent studies have shown that for every person who receives free legal assistance at least one person is turned away due to lack of resources at the agencies. And this has only gotten worse as our economy has gotten worse. Many of the resources which legal aide bureaus depend upon are the IOLTA funds which, as you know, have become much more difficult for legal service agencies to get. So unfortunately today many low-income individuals are denied the opportunity for legal services, which is hardly equal justice under the law, which is what I think we all want to achieve.

And the type of cases they handle are like pregnant women who are being battered by their husbands, helping homeowners facing foreclosure by allowing them to stay in their homes, helping employees who are discriminated against in the workplace due to race or gender or religious preference, helping people with disabilities and those types of cases.

During my years I chaired the Maryland Legal Services Corporation and I helped to establish the clinical programs at Maryland Law School which I found to be very helpful in training new lawyers who are sensitive to public service but also providing a great deal of services for people who needed help. So now looking around the country, 36 law schools have pro bono or public service requirements.

As Dean Kagan, I know that you instituted major improvements of expansion in the law school clinics while at Harvard. Harvard law students must perform at least 40 hours of law-related public

interest work including working on behalf of people who cannot afford to pay for legal services. Can you tell us just briefly a little bit about your experiences at Harvard Law School to expand the number of students participating in clinical programs and what impact that had on providing help to people who otherwise would not have received adequate representation?

Ms. KAGAN. Senator Cardin, this is one of the things I worked hardest on at Harvard along with a great many other people. And I think we had some significant successes which is good because the need is so vast in this area that there is so much need for legal services, you know, of all different kinds. Of people who have housing problems or have employment problems, or who have problems accessing health care in ways that they need it, in all kinds of ways in which a lawyer can help them and, you know, in which this country should be able to work out a system in which such help can be provided.

And as you said, we very much expanded the clinical programs at Harvard during the time of my deanships. We also expanded the other kinds of pro bono opportunities open to Harvard Law School students. I think the numbers are more than double the number of clinical placements during the time that I was dean. And the pro bono work that was done by Harvard Law School students more than doubled during that time as well. So that 40-hour a week requirement that you mentioned—40-hour by graduation requirement that you mentioned, we had students who had performed 2,000 hours of pro bono by the time they graduated. And I think that the average amount of pro bono that was done by our students by the time they graduated was something like 500 hours, sort of ten times the amount that we required of them.

And I think that that's because what they discovered was this incredibly meaningful part of being a lawyer that you can provide real services to people who need them that you can make a difference in the world, that you can make a difference in the lives of ordinary human beings. And I think, you know, sometimes you can sit in the law school classroom and not know exactly how it all matters in the world. And then you get into one of these clinics and you do this kind of work and you see how it matters and you see how lawyers can truly benefit people.

Senator CARDIN. The University of Maryland, I believe, is attracting a much higher-level student today because of its clinical programs. Students want these opportunities. And I'm proud that you—I'm proud that we've instituted it in Maryland and I think what you have instituted at Harvard also gives you a better diversity of student body that will help in the mission at the law school.

One last question, just very briefly, the ABA requires, as part of our legal ethics, to participate in pro bono. How well do you think that we're doing as a legal profession on pro bono work and what can you do as a Justice to help advance these issues?

Ms. KAGAN. Well, we can surely do better. And I think the Justices—you know, the question of what the Justices say, and how the Justices approach these big questions about the legal profession is something that I would want to talk with my colleagues about if the Senate sees fit to confirm me. But I think that there's got to be a role for Supreme Court Justices given the positions that

they have, given the visibility that they have to try to work for appropriate—to try to make sure that the practice of law, the legal profession really lives up to the ideals that it has.

Senator Leahy. Thank you. Thank you, Senator Cardin.

Solicitor General Kagan, I've been involved in hearings either as a member or conducting them for 35 years of various judicial nominees. I can't remember when anybody's been asked such a wide variety of questions or answered them as forthrightly as you have. And I know it's been a long and tiring day. I think the best thing to do for us is to break now, come back—unless you want to override that?

Ms. KAGAN. No, that's good.

[Laughter.]

Senator Leahy. I was looking there, I was going to say, don't call my bluff right now, I want to go home too.

[Laughter.]

Senator Leahy. We will come back in here at 9 tomorrow morning. I've had a lot of discussions with Senator Sessions who is actually wonderful to work with. I mean, he has to protect, on his side, but we really do try to work on schedules. We, because of the death of Senator Byrd and the changes that's made, it's also making in changes in what we might do. It's one of the reasons why we went as late as we did. And I thank my colleagues on both sides of the aisle for being responsive to that.

So, please get a good night's rest. I'm going to try to do the same. Senator Sessions, I hope you can too. And we stand in recess.

[Whereupon, at 7:05 p.m., the Committee was recessed.]

THE NOMINATION OF ELENA KAGAN TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JUNE 30, 2010

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

The Committee met, pursuant to notice, at 9 a.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Specter, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

Chairman LEAHY. All right. Back to my day job.

[Laughter.]

Chairman LEAHY. Yesterday the nominee answered our questions over the course of 10 hours. This morning we will complete the first extended round of questioning in which all 19 members of the Committee, Republicans and Democrats, ask questions for 30 minutes each, and I would hope after that Senators and the American people have a better sense of the nominee. I know I do.

Yesterday we saw her demonstrate her knowledge of the law as well as her patience and good humor. She consistently spoke of judicial restraint, her respect for our democratic institutions, and deference showed to Congress and judicial precedent. So I urge Senators to consider what additional questions they may feel they need to do in a second round. I have had several Senators tell me they will not need their whole time, and I do appreciate that because we have a lot to do if we want to complete the nominee's testimony today. And I realize I have been pushing the schedule very hard. I appreciate the nominee's forbearance, but I also appreciate my good friend Jeff Sessions and his willingness to work on this, because we have the memorial services for Senator Byrd that are scheduled on Thursday, Friday, and Saturday, and we have to figure out how we take those into account.

Jeff, did you want to add anything?

Senator SESSIONS. Well, I know that you do have some challenges in working through the schedule. I want to work with you. We do not want to and cannot in any way curtail the essence of this hearing. But we will definitely do what we can to be accommodating, and I hope we can complete a full day about this in an effective way.

I do hope that we can learn more about the nominee. We see her gifts and graces in many different ways. Those are revealed, and her humor and her knowledge. But I think some of the critics who are saying, "Who is this nominee? Exactly what do you believe?" might find it from the testimony difficult to know, Ms. Kagan, whether you would be more like John Roberts or more like Ruth Bader Ginsburg.

So I think we need to know a little bit more what we can expect of you as a judge, and I hope today as we go forward maybe that will come through a little clearer.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Whitehouse, you are recognized for 30 minutes.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Ms. Kagan, good morning.

**STATEMENT OF ELENA KAGAN, TO BE AN ASSOCIATE JUSTICE
OF THE SUPREME COURT OF THE UNITED STATES**

Ms. KAGAN. Good morning.

Senator WHITEHOUSE. Welcome back.

Ms. KAGAN. Thank you.

Senator WHITEHOUSE. The questions that we ask judicial candidates usually begin with a description of what I view as the role of the judge, and I would ask you to agree or disagree, if you would. I think that a Justice of the Supreme Court, for instance, must decide cases on the law and the facts before them; that they must respect the role of Congress as the representative body representing the American people; that they must not prejudge any case but listen to every party that comes before them; and that they must respect precedent and limit themselves to the issues that the Court must decide.

Do you agree that those are the proper roles of a Justice of the Supreme Court?

Ms. KAGAN. I do agree with that, Senator Whitehouse. It is what I tried to express in my opening statement on Monday and in much of my testimony yesterday.

Senator WHITEHOUSE. And on this matter of precedent, does precedent have an institutional role in the Court in terms of the separation of powers and the balance of power in the Constitution? Is it a means by which the Court restricts itself from taking steps outside of proper bounds in areas best left to the more political branches of Government?

Ms. KAGAN. Senator Whitehouse, I think that is said very well. The doctrine of precedent is in large part a doctrine of constraint that ensures that improper considerations, improper factors will not come into judicial decisionmaking, that ensures that courts will decide every case on the law. It is also a doctrine of humility. It says that even if a particular Justice might think that a particular result is wrong, that that Justice actually should say to herself, "Maybe I am wrong," and maybe the greater wisdom is the one that has been built up through the years by many judges in many cases.

So precedent is a doctrine of humility, and it is very much what you said it is, a doctrine of constraint, a doctrine that binds courts and judges to the law.

Senator WHITEHOUSE. And important within our notion of separated powers, since the other branches operate under the check of the United States Supreme Court, that the United States Supreme Court as a court of final appeal has no check on itself. And the question who watches the watchman is very much pertinent to the Supreme Court or to any court of final appeal. And it is in that context, is it not, that respect for precedent takes on this limiting, separated powers, constraining function in the very structure of our democracy?

Ms. KAGAN. Senator Whitehouse, that is correct. Respect for precedent and judicial restraint more generally are necessary for the reason you said, that the courts themselves have not been elected by anybody. There is no political accountability from the American citizenry. And there are precious few ways in which the legislature and the President can or should interfere with their function. They ought to be independent. But that places on them a responsibility which is also to be restrained.

Senator WHITEHOUSE. So if you look at some of the big decisions that have been controversial and contentious—and I suppose one of the first would be *Brown v. Board of Education*, which created massive change across the country in our education system, directed to take place with all deliberate speed, long overdue by many measures, but certainly a massively important decision in the lives of people across the country, that was decided by a Court that was unanimous. *Roe v. Wade* has perhaps been the most controversial decision the Court has ever rendered. That was decided by a 7–2 Court. In both of those cases, Republican appointees and Democrat appointees joined the majority and supported the decision.

And yet when you get to the recent Court, you see a different posture emerging. If you look at the *Leegin* decision as an example of a statutory case, that was the one you talked about yesterday where the antitrust laws were changed by the Court. The law did not change at the time, nor did the precedent. Correct?

Ms. KAGAN. As far as I know, the precedent had not changed under *Leegin*, but, Senator Whitehouse, you will excuse me, I am not an antitrust expert, so I do not know whether there was any lead-up to *Leegin*.

Senator WHITEHOUSE. But your testimony was that a new economic theory yesterday—

Ms. KAGAN. I think that that is mostly—

Senator WHITEHOUSE.—had driven the change.

Ms. KAGAN.—what *Leegin* was based on.

Senator WHITEHOUSE. And I agree with that. I do not contest that. What is interesting, though, is that it threw out 96 years of precedent, and it did so 5–4 with that group of five Republican-appointed judges driving the 5–4. And, again, if you look at *Heller*, the Second Amendment had not changed. The precedent by definition had not changed. *Heller* changed the law, creating for the first time in 220 years a private right to bear arms that no previous Supreme Court had ever noticed. And, again, that decision was done

5-4 with Republican appointees only driving the law in a different direction by the narrowest possible margin.

So I guess I want to ask you what you think about all these 5-4 decisions and what effort the Court should make to return to a collegial environment at the Court where even these highly contentious decisions, like *Brown v. Board of Education* and *Roe v. Wade*, are driven either by unanimous or massive majorities of the Court rather than the slenderest possible majority and to try to reach across the partisan divide on the Court so it is not just Republican appointees acting together. Should there be any desire or motivation on the part of that group of five to reach their scope a little bit more broadly for the sake of the Court, for the sake of the country, for the sake of stability in the law, and not be so content with 5-4 decisions?

Ms. KAGAN. Senator Whitehouse, it is a hard question you pose because, on the one hand, every judge, every Justice has to do what he or she thinks is right on the law. You would not want the judicial process to become in any way a bargaining process or a log-rolling process. You would not want people to trade with each other, you know, "You vote this way, and I will vote that way, and then we can get some unanimous decisions."

Senator WHITEHOUSE. But on the other hand—

Ms. KAGAN. Every judge has to do what he or she thinks the law requires. But, on the other hand, there is no question, I think, that the Court is served best and our country is served best when people trust the Court as an entirely non-political body, when people look to the Court as doing what we know it ought to be doing, which is deciding cases that come before it on the best possible reading of the law. And I think—

Senator WHITEHOUSE. And the Court is capable of framing the decision that it makes in a narrower or more incremental way to attract a broader base of support on the Court without necessarily engaging in log-rolling or any of the behaviors that you think are inappropriate, and I do not contest that. But there are ways to get to a larger majority without engaging in those, are there not?

Ms. KAGAN. Well, one of the benefits of narrow decisions generally—and there are a number of them, but one of the benefits of narrow decisions is that they enable consensus to a greater degree than broad, far-reaching decisions. And that is generally a benefit for the judicial process and for the country as a whole to try to reach consensus on what it is possible to reach consensus on consistent with the law.

Senator WHITEHOUSE. By definition, if the Court were to reach beyond the group of five that has driven so many of these recent decisions, they would be less able to move the law as dramatically as they have. That is just obvious, is it not?

Ms. KAGAN. Senator Whitehouse, I want to make it clear that I am not agreeing to your characterizations of the current Court. I think that that would be inappropriate for me to do.

Senator WHITEHOUSE. I understand that.

Ms. KAGAN. And I am sure that everybody up there is acting in good faith. I do believe that one of the benefits of narrow decisions, of approaching one case at a time and in each case trying to think of the narrowest way to decide the case, is to enable consensus.

And consensus is in general a very good thing for the judicial process and for the country.

Senator WHITEHOUSE. And the reverse of that is also true, which is that if you reach for a larger base of support in the Court, you constrain yourself a little bit in how rapidly you are able to move the law in a particular direction. Correct?

Ms. KAGAN. And I think what a judge should do is not to think about—you know, “Over the long haul, I want the law to move in this direction.” I think what a judge should do is to take one case at a time and—

Senator WHITEHOUSE. I know that is what you think.

Ms. KAGAN. Well, I can only tell you what I think.

Senator WHITEHOUSE. That is right. But if you were looking for a signal from the Court over what its intentions are, one very practical signal is that over and over again it is a Court that is willing to make very important decisions by a 5–4 majority rather than roll its decisions back, be a little bit more modest in the way it goes in its direction, and reach for a broader consensus on the Court. That is simply factually true, isn’t it?

Ms. KAGAN. Senator Whitehouse, I am going to insist again, I am not characterizing the Court or any of the Justices on the Court, and just to say what I think is the right approach to judicial decisionmaking. And I think it is—the right approach is to take one case at a time, to not be looking down the road and trying to figure out in what direction the law generally should go and how that case is going to lead to another case or—

Senator WHITEHOUSE. But, hypothetically, if judges were there with a larger purpose or on a mission to direct the law in a particular direction, clearly one of the indications of that—or at least it would be consistent with that if there were a lot of 5–4 decisions, wouldn’t it? Just as a matter of logic.

Ms. KAGAN. Well, I do not think that—what I am most trying to make clear is that I do not think that any such agendas are the way anybody should conduct their business.

Senator WHITEHOUSE. And I agree.

Ms. KAGAN. And—

Senator WHITEHOUSE. Let me change the topic a little bit. What is the proper role of a court of appeal, a court of final appeal in particular, with respect to making findings of fact? Whose province is making findings of fact?

Ms. KAGAN. Well, findings of fact are usually made in the district court, in the trial court, or with respect to other kinds of cases, of course, fact finding can be done by Congress. But appellate courts do not make findings of fact, do not have the competence to make findings of fact, so for the most part rely on the findings of fact made in other institutions.

Senator WHITEHOUSE. That was my thought as well. I have spent some time doing appellate work, and my understanding was that particularly appellate courts do not do and particularly Supreme Courts do not do findings of fact. They have a record before them, and that is the record that they have to follow, and it is the courts below that make the findings of fact. So I was surprised in the *Citizens United* decision when the Court concluded that—and this is a quote—“independent expenditures, including those made by cor-

porations, do not give rise to corruption or the appearance of corruption.” And why do you suppose the Court was willing to engage in that finding of fact, which I think all of us who have had any political experience at all, not only find to be odd in the sense of it is a finding of fact being made by a Supreme Court, but also it is a finding of fact that in everybody’s experience who has been near an election is actually wrong?

Ms. KAGAN. Well, I talked before about my argument in *Citizens United*, and, of course, I approached that argument as an advocate for the U.S. Government, defending that statute and trying to defend it as vigorously as I possibly could. And certainly a large part of my argument was to urge the Court to defer to Congress’ very extensive fact finding on this subject. And it was extensive. It occurred over many years, and——

Senator WHITEHOUSE. And it ran exactly contrary to this particular finding of fact made by the Supreme Court, did it not?

Ms. KAGAN. I think that what the Court was saying on the other hand was that this was a case in which political speech, paramount speech entitled to paramount First Amendment protection was involved, and that the Government had failed to show that there was a compelling state interest that was narrowly tailored to the restriction——

Senator WHITEHOUSE. I understand that. That was the holding of the Court. But my focus is on this particular finding of fact that they made, which was, A, unusual and I think peculiar from a Supreme Court; B, factually wrong in everybody’s experience who has been around an election; and, C, actually, as you pointed out, directly contrary to the findings of fact that Congress had made in the 100,000-plus-page record that had been developed in prior cases.

So it is just interesting that they would make that finding of fact. Clearly it is the core—analytically the core finding of fact necessary to take the step that they made to say that Congress has no business limiting corporate spending in elections and corporations can spend as much as they please. If you want to go that way, this is the kind of finding of fact one would have to make.

So it concerns me that it is there, and I would hope that if you get to the Court you are more restrained in terms of making findings of fact at the Supreme Court level, particularly those that appear to diverge from the actual facts and from the Congressional record that is the ordinary way in which these facts get to the Court. And I assume that you would agree that to be modest with respect to findings of fact as well.

Ms. KAGAN. Senator Whitehouse, I do think Congressional fact finding is very important and that courts should defer to it. It does not mean that fact finding is either necessary or sufficient. Sometimes Congress can make no findings of fact at all, and the Court should still defer to Congress. And, on the other hand, sometimes Congressional fact finding cannot save a statute, but in very significant measure, the courts should defer to Congressional fact finding, and they should do so because they should realize that it is Congress rather than courts that has the competence to engage in that kind of fact finding, to develop evidence, to call witnesses——

Senator WHITEHOUSE. The rule, in fact, is nearly absolute. I mean, really the only time when it is OK for a court to make a finding of fact is when it goes to the point where a court can take judicial notice of something as a completely uncontested baseline fact. Isn't that the law on this?

Ms. KAGAN. Courts in general have neither the competence nor the legitimacy to do fact finding in the way that Congress can do fact finding.

Senator WHITEHOUSE. So to go back to my premise, which you do not accept—and, you know, I understand that that is the frame of our discussion—that there may be judges on the Court who have a particular mission right now and are selectively knocking out precedent that does not coincide with their ideological views, if one wished to continue to do that—assuming my premise to be true. I know you do not accept it, but assuming my premise to be true, if there were judges who had that point of view and were on a mission to move the law in a particular direction and wanted to continue to do it, it strikes me that one way that they would try to continue to do that would be to try to create an analytical method or analytical machinery that supported the continuing effort. And in that regard, I was interested in Chief Justice Roberts' concurring opinion in *Citizens United* where he talks about precedent that actually impedes—this is his quote—“actually impedes the stable and orderly adjudication of future cases.”

I think through the whole hearing we have had sort of a baseline premise in our discussions with you that precedent is what precedent is. It has been decided. You do not have an opinion as to whether you like it or not. It is the precedent and you are bound by it. But here is the Chief Justice saying that some precedent “actually impedes the stable and orderly adjudication of future cases.” And here is how you find out what that precedent is, according to the Chief Justice in his concurring opinion: when the precedent's validity is so hotly contested that it cannot reliably function as a basis for a decision in future cases.

Now, if that is a theory of precedent, does that not allow a determined group of judges on the Court to hotly contest precedent that they do not like and gradually undermine it until it reaches the point that it is so hotly contested that it cannot reliably function as a basis for a decision and they can now topple that precedent as impeding the stable and orderly adjudication of future cases? Analytically, setting aside the fact that you disagree with my premise, analytically isn't that the way that works?

Ms. KAGAN. Senator Whitehouse, I think that the Chief Justice was not the first in that opinion to make the argument that if a precedent is hotly contested, in his words, has been subject to very continuing disagreement and dispute, that that weakens it as a precedent.

Now, other courts at other times have said the opposite, that that should not function as a reason to weaken the precedent. So I think that there is—even prior to the Chief Justice's statements, I think that there are competing statements, competing views on this question.

I think—

Senator WHITEHOUSE. I understand that, but my point is that if you were a judge who wished to go out and selectively undermine and topple precedent that you did not agree with because you had a particular point that you wished to drive the law toward, isn't this a very useful doctrine because you are now in a position to hotly contest the precedent that you do not like and use your own disagreement with it to undermine it and take it down? Isn't it in that sense a doctrine that we should regard with some caution, given the role of precedent as a limiting factor in the separation of powers and the very balance of power of our Government?

Ms. KAGAN. I do believe, Senator Whitehouse, that it should be regarded with some caution. I think that the stronger reasons and the reasons that the Court more frequently relies upon to reverse precedent has to do with its workability and has to do with whether either legal doctrine or empirical facts have eroded the precedent. I do think that the Chief Justice made some points with respect to those issues as well in his concurring opinion. But in any event, I think that those are the two—the two more standard bases for deciding that a precedent really does have to be reversed.

Senator WHITEHOUSE. I think it was Senator Cornyn on the other side who said that, to use his words, "I think it would be a strange system indeed if our system allowed for precedent to be disrespected and become not binding any longer." And it strikes me that this system where judges on the Court can continue to hotly contest precedent they do not like, undermine it, and topple it meets that "strange system indeed" standard.

Let me turn to the question of the jury. I spoke about that in my opening remarks briefly. Again, back to the Constitution, if you set up the various institutions of Government, here we are the Senate, one of the institutions of Government, engaged in our advice and consent to a nomination by the President of the United States, another institution of Government, for a nominee to the Supreme Court, a third institution of Government. Another institution that is repeatedly referenced in the Constitution and Bill of Rights, three times total, is the jury.

Could you comment on the extent to which the jury was seen by the Founders as an institution of Government, as what de Tocqueville called a mode of the sovereignty of the people?

Ms. KAGAN. I think it was, Senator Whitehouse. You know, we learn about the separation of powers system and how the three branches of Government are designed to check each other. But the Framers also had a very strong view that there was another check in the system, and that check was the people and that the institution that the people often functioned as part of was the jury. And to the Framers, the jury was an extremely important mechanism in checking the other branches of Government.

Senator WHITEHOUSE. Because they had seen corrupt colonial Governors and were suspicious of executive power, were they not?

Ms. KAGAN. That is my understanding, Senator Whitehouse.

Senator WHITEHOUSE. And they had seen the power of the early legislatures. I think Thomas Jefferson said, "We have traded in one tyrant for 237," once he saw the Virginia Assembly begin to act, and that is why they had to go back and design the balanced system of powers. And they were sympathetic to press attacks, so they

could imagine an individual who the Governor was predisposed against, who was in the pockets of the enemy of this individual. They could imagine the individual being on the wrong side of the General Assembly or the legislature. They could imagine an individual who the owners of the paper had turned on and were marshalling public opinion against. And I believe that they wanted to create one last sanctuary where all of that money, power, influence, and public opinion would not hold sway. And that is why they established the jury, with regular citizens, and we protect it with laws that make tampering with a jury a crime. Do you agree?

Ms. KAGAN. I think, Senator Whitehouse, that the jury was an extremely important mechanism to the Framers, and it was a mechanism designed to check other institutions of Government.

Senator WHITEHOUSE. As sort of a last—when everybody else is gone, you can still get a fair hearing in court before the jury.

Ms. KAGAN. I think certainly the Framers believed in an independent judiciary generally, and there is no question that within the judicial branch they thought that the jury played a very significant role.

Senator WHITEHOUSE. So when the Supreme Court threw out the *Exxon* punitive damages award of \$5 billion, just 1 year's profits for Exxon, when they ran the tanker aground in Prince William Sound, and did so on the basis, in part, of predictability for corporations, there was a clear value judgment there with considerable history and constitutional law and original intent surrounding the jury on the one side of that equation and the convenience and predictability for corporations on the other side of that equation. Correct?

Ms. KAGAN. Well, I do think the Court in *Exxon* was struggling with values on both sides. I would agree with that.

Senator WHITEHOUSE. And in that particular case, the institution of the jury lost, and the predictability for corporations won.

Ms. KAGAN. In that particular case, the Court held under a kind of maritime common law that punitive damages could go—

Senator WHITEHOUSE. No higher than compensatory damages.

Ms. KAGAN—[continuing]. No higher than compensatory damages.

Senator WHITEHOUSE. Because, otherwise, it became unpredictable for corporations.

Ms. KAGAN. It became unpredictable that there was no civility in the system.

Senator WHITEHOUSE. Correct. Thank you for our time together. I wish you well. And I appreciate how well and with what good humor and how openly you have answered all of our questions through this long ordeal.

Ms. KAGAN. Thank you, Senator.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Whitehouse, and thank you for the time you have spent on this.

Senator KLOBUCHAR.

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

Solicitor General Kagan, you had an incredibly grueling day yesterday and did incredibly well, but I guess it means you missed the midnight debut of the third "Twilight" movie last night. We did not

miss it in our household, and it culminated in three 15-year-old girls sleeping over at 3 a.m. So I have this urge to ask you about the famous——

Ms. KAGAN. I did not see that.

Senator KLOBUCHAR. I just had a feeling. I keep wanting to ask you about the famous case of Edward versus Jacob or the vampire versus the werewolf.

Ms. KAGAN. I wish you wouldn't.

Senator KLOBUCHAR. I will refrain—well, I know you cannot comment on future cases, so I will leave that alone.

I read a few weeks ago this article that I thought was good in the Washington Post by Donald Ayer, who is the former Deputy Solicitor General in the Reagan administration, and he talks a lot about what he thinks these hearings should be about, but he also makes some references to the balls and strikes analogy. And as you know, when Chief Justice Roberts was nominated to the Supreme Court and sat in the seat you are currently in, he famously told this Committee that judges are like umpires. Umpires do not make the rules. They apply them. He said that it was his job to call balls and strikes. And I was wondering if you could just talk about that metaphor. Do you think the balls and strikes analogy is a useful one? And does it have its limits?

Ms. KAGAN. Senator Klobuchar, I think it is correct in several important respects, but like all metaphors, it does have its limits. So let me start with the ways in which I think it is an apt metaphor.

The first is kind of the most obvious, which is that you expect that the judge, as you expect the umpire not to have a team in the game—in other words, not to come onto the field rooting for one team or another. You know, if the umpire comes on and says, you know, I want every call to go to the Phillies, that is a bad umpire. Is that your team?

[Laughter.]

Senator KLOBUCHAR. Not exactly. The Twins.

Ms. KAGAN. I was pointing to Senator Kaufman. I am sorry.

And the same for the judge. So, you know, to the extent that what the umpire suggests that there has got to be neutrality, that there has got to be fairness to both parties, of course, that is right.

The second thing that I think is right about the metaphor—and I think that this is what the Chief Justice most had in mind, if I remember his testimony correctly—is that judges should realize that they are not the most important people in our democratic system of Government. They have an important role. Of course, they do. We live in a constitutional democracy, not a pure democracy. And judges have an important role in policing the constitutional boundaries of our system and ensuring that governmental actors, other governmental actors do not overstep their proper role. But judges should recognize that that is a limited role and that the policymakers of this country and the people who make the fundamental decisions for this country are the people and their elected representatives, whether in Congress or in the executive branch. And I think that that is right, too, as I have tried to say on many occasions throughout these hearings.

I suppose the way in which I think that the metaphor does have its limits—and I believe that this is in line with what Mr. Ayer was talking about—was that the metaphor might suggest to some people that law is a kind of robotic enterprise, that there is a kind of automatic quality to it, that it is easy, that we just sort of stand there and, you know, we go “ball” and “strike” and everything is clear-cut and that there is no judgment in the process. And I do think that that is not right, and it is especially not right at the Supreme Court level, where the hardest cases go and the cases that have been the subject of most disputes go.

As to that, I think that there is—judges do in many of these cases have to exercise judgment. They are not easy calls. That does not mean that they are doing anything other than applying the law. I said yesterday on a couple of different occasions it is law all the way down. You know, you are looking at the text, you are looking at structure, you are looking at history, you are looking at precedent. You are looking at law and only at law, not your political preferences, not your personal preferences. But we do know that not every case is decided 9–0, and that is not because anybody is acting in bad faith. It is because those legal judgments are ones in which reasonable people can reasonably disagree sometimes. So in that sense, law does require a kind of judgment, a kind of wisdom, and there are frequently clashes of constitutional values. Senator White House talked about one such clash, but there are many of them. And judges have to, you know, listen to both sides and cast each argument in the best possible light, but sometimes they are not going to agree.

Senator KLOBUCHAR. And one of the things he says in this article, he makes that point and talks about how these hearings should actually focus not on what he calls the simple cleverness and ability to score debater’s points, but of greater relevance when you look at the whole universe of trying to make decisions between plausible alternatives on different cases. He said, “The greatest relevance for a nominee is a demonstrated history of good judgment and prudence in life as in legal work.” And he makes the argument that that should be the focus of those hearings.

So along these lines, I am going to just ask some of your work experiences and how you think that they help you to be a better judge and what you bring to the bench because of that.

Senator Schumer had asked you about your work as Dean of Harvard Law School, and you said the thing you learned most from that was listening. And I wondered how will that experience beyond listening even—what will you bring from that experience to the bench? And what lessons have you learned that will make you a good Justice?

Ms. KAGAN. Senator Klobuchar, I guess I will start by just saying that that listening was the most important lesson. I was so struck when I read this statement by Justice Stevens about understanding before disagreeing, and he had said that about the Justice whom he clerked for. And I thought, you know, that is about the best thing that you can say about a person, that the person does listen and try to understand things from the other point of view before deciding to disagree, and, you know, maybe deciding not to disagree because of the listening and the understanding that has

taken place. So that is, I hope, something that I had to learn a little bit during my time as dean.

But I guess otherwise—you know, Mr. Ayer said prudence and judgment. I do think that when you run an institution with, you know, many, many employees, with a big budget, with just, you know, lots of the kinds of problems that—any person who runs a business or runs an organization just knows the wide variety of things that come across your plate every day, and, you know, you exercise a lot of muscles when you do something like that, and they are muscles that I had never exercised before, and it gave me grounding in a lot of things that I otherwise would not have had grounding in. And it made me, I think, you know, very aware of other people, I think, in a way that maybe I would not have been had I been just a professor all my life, because so many people come to your office with just life problems, and you get exposure to, you know, so many different sorts of issues that people are struggling with and that people are confronting in their lives, and it becomes a little bit your life, too. And, you know, I hope that that made me a better person.

Senator KLOBUCHAR. You know, as the Solicitor General, you got to actually argue cases before the Supreme Court. How has that experience informed your appreciation for oral argument and what you think are good oral arguments, bad, what techniques do you think work?

Ms. KAGAN. Well, first I will say that it has very much deepened my appreciation of the Court itself, and I hope that this was something that I conveyed in my opening statement, is that you go up there and you get to the podium, and there are nine people, and every single one of them is so prepared to talk about the case, so into the case, so engaged, obviously so smart, and so, I think, trying to get it right. And so I have developed a real appreciation for the Court through those oral arguments.

What do I think is a good oral argument? I think you have to answer the judge's questions. I think they are impatient when people try to give speeches or when people go up to the podium and just try to make their points. I have four points I want to make; I am going to make those points again and again and again. And the Justices, I think, they have your briefs, they have read your briefs, and, you know, the striking thing is that they really have read your briefs. They know your briefs. So they do not want to hear you repeat your briefs. What they want to hear you do is respond to their questions, and I think good advocates know that, and they know that even if it means going down a road that—you know, their great points are in some other direction, but it makes sense to go down the road that the Court wants you to go down, because that is what the Court is interested in, and it is only if you address the Justices' real concerns that you are going to win your case.

Senator KLOBUCHAR. So if you are confirmed, then we will consider those tips for those that go before you.

The other thing I wanted to get to, back to this judicial philosophy piece of what we are talking about here, and that is this back to the master's thesis you wrote—know it was before you were in law school—that you and Senator Grassley discussed. But in that

thesis, you wrote that, "Supreme Court Justices live in the knowledge that they have the authority either to command or to block great social, political, and economic change. At times, the temptation to wield this power becomes irresistible."

What in your character or your experience will help you deal with this temptation when you are on the bench?

Ms. KAGAN. Well, I again want to say what I said yesterday, is that let us just throw that piece of work in the trash, why don't we? You know, that it was something that I wrote before I went to law school and did not know much, did not understand much about law, and certainly about the way judges should work.

I just think every judge just has to be committed to the kind of principles of restraint that I have tried to talk about in this hearing, and every judge has to realize that the people of this country get to make the fundamental decisions about this country. And I do think that my experience working in other branches of Government, in the executive, and working a good deal with Congress, will remind me of that if anything were needed to remind me of that, because what I did take away from those experiences was really a profound respect for the political process and for how policy decisions are made. And not every single one of them looks pretty, and, of course, no single person is going to agree with every result that comes out of Congress or any other political institution. But I do believe that there is real wisdom in the American people, and that wisdom gets channeled through institutions like this one, and that in the main we are well served by our political institutions, and that even when we are not, it is just not up to courts to correct that.

So, you know, I think that the experiences that I have had in government are good reminders of just the importance of the democratic branches of our Government in making the fundamental policy decisions that affect our country.

Senator KLOBUCHAR. Very good. The other part of your job will be to write opinions, and in a 1996 article on the First Amendment you discussed a case actually from my State, *RAV v. City of St. Paul*, and you noted that Justice Stevens criticized part of the Supreme Court's approach in that case, characterizing it as "an adventure in a doctrinal wonderland."

How as Justice Stevens' successor would you work to make sure the Supreme Court's opinions are both well grounded and accessible to the general public?

Ms. KAGAN. Senator Klobuchar, I should say it is an important question, but I will just say I think in the end I disagreed with Justice Stevens more than I agreed with him in that opinion.

Senator KLOBUCHAR. Right.

Ms. KAGAN. But I do think it is sometimes a fair criticism, the criticism that Justice Stevens made, and it suggests something about maybe some decisions' lack of connectedness to sort of facts on the ground. And I would say two things about that.

The first is that courts have to be really attentive to the facts of a case, that courts cannot be sort of spinning legal doctrine irrespective of the facts in a case that have been presented to them, because the whole idea of courts in our system is that the courts are not deciding abstract legal questions. They are not just sort of

philosophizing about proper legal approaches. They are deciding actual cases and controversies. And what it means to decide an actual case or controversy is to think about the application of law to facts, and what that requires is that you really understand the facts, that you really—that you delve through the record, that you get your absolute best sense of what the actual conditions and circumstances of the parties are. So that would be the first point I would make.

I guess the second thing is actually that even going beyond that, that it is often an important part of principled judicial decision-making to take into account the actual consequences of a legal rule. And this appears in a number of different areas. I will give you one, which is procedural due process, the 14th Amendment. We are more used to talking in these hearings about the substantive due process aspect of the 14th Amendment, but the procedural due process aspect is very important. It is the set of requirements that say when an individual comes and challenges the Government, says the Government has denied me some benefit that the Government owes me. The question is what procedures is that person entitled to to make that challenge. And the test the Court uses is a very practical one. It says, well, if we gave you more procedures, how much would that increase the accuracy of our determinations? And, also, if you were wrongly deprived of some benefit, how much would that hurt you? And, also, what is the burden that these procedures are likely to impose on the Government? What is the actual cost that the Government is going to have to incur? And it balances those things, and that is an example of how in some areas the Court has, and I think appropriately, looked to the real world, the practical effects of a particular legal rule.

Senator KLOBUCHAR. All right. So you are not talking about driving a result; you are talking about how the results, knowing what the results could be, should be considered.

Ms. KAGAN. Yes. You are totally not talking about driving the results. This is anything but a results orientation in the way people sort of think, oh, I want this side rather than that side to win. That is inappropriate in every and all circumstance. But there are places in which the legal doctrine and even the constitutional doctrine does take into account practical effects.

Just another quick example is Fourth Amendment search and seizure cases, where the Constitution speaks of unreasonable searches and seizures. And one of the things that the Court takes into account in deciding what is a reasonable search and seizure and what is an unreasonable search and seizure is some practical impacts on the people who are searched, but also very much on the police. You know, how can we create a set of—you know, how can we create a doctrine that the police will find to be workable so that they will know when to search and when not to search, when they have to get a warrant and when they do not have to get a warrant.

Senator KLOBUCHAR. Well, along those lines, last year the Supreme Court decided, as you know, *Melendez-Diaz v. Massachusetts*, a case about the Confrontation Clause in the Sixth Amendment. And the Court held that it violated the Confrontation Clause for a prosecutor to submit a chemical drug test report without the testimony of a forensic scientist. It was a 5–4 decision. It did not

split along ideological lines. And I was concerned about the decision just because, again, of the practicality of how all this would work for prosecutors, and, actually, this year the Supreme Court had another case, *Briscoe v. Virginia*, which raised the same question. And I was hopeful that the Court might limit *Melendez-Diaz*. Twenty-six Attorneys General, including the Attorney General of Minnesota, chimed in, explaining that it was already negatively affecting drug prosecutions in some States. And actually as Solicitor General in the *Briscoe* case, you submitted an amicus brief that supported the position of the State. And I thought you could discuss this, elaborate on the position and why you think it is important, if you look—because I figure you are not going to be able to get involved in this case if you are a Justice, but just if you could talk about the results and what could happen with a case like this.

Ms. KAGAN. Well, I will not be able to get involved in this case. I am sure that there are other issues that will be coming down the road about the Confrontation Clause. I will try to steer clear of that.

As you say, Senator Klobuchar, the U.S. Government did file a brief in that case, and it supported, whatever it was, 26 or 27 States which were concerned about the effects of the Court's prior ruling on law enforcement and particularly were concerned about the ability of governments to present evidence—this was evidence of drug testing—without going to great expense and burden to get every lab analyst into the courtroom.

Senator KLOBUCHAR. Right. I think in Virginia the statute said they could bring them in if there was a question, if it was disputed. But if it was not disputed, they did not have to bring the lab analyst in. And the Supreme Court decided not even to go into that and say, well, that would be fine.

Ms. KAGAN. Yes. I think the Court just remanded the case back to the lower courts to decide it, and decided, you know, not to say anything more about this issue in that case. The Government had urged them to do so because of the kinds of practical issues you raise.

I think the Court's analysis now in this area does not focus on those practical questions. The Court's analysis simply asks, says, Is the evidence in question testimonial, which an affidavit from a drug analyst would be? And if it is testimonial, the only way in which it can be admitted in court is if the person who has made the affidavit, who has written the affidavit is unavailable and was previously subject to cross-examination. So it is a pretty bright-line rule, and it has had the effects on States that you mentioned. But it is—the approach is now settled law, and I will say—I will say one thing about this. I think it sort of suggests something different about the judicial process that is a point I have been trying to emphasize.

I think that the Justice who has been primarily responsible for this understanding of the Confrontation Clause. And it is an understanding of the Confrontation Clause, you know, that works well for criminal defendants.

Senator KLOBUCHAR. That is a nice way of saying it.

Ms. KAGAN. Criminal defendants love this rule. Prosecutors do not like this rule.

The person who has been most responsible for this approach is, I think, Justice Scalia, and I do not think that Justice Scalia is any great fan of—you know, if you gave him a criminal defendant and gave him a prosecutor and said, “Choose,” I do not—you know, I think we would know which way he would choose. It is actually a good example of where a person’s view of the law comes out a different way from, you know, which party they might want to have win. And that is a great thing for a judge to do. All judges, that should happen in their lives, that their view of the law leads them in a direction which, you know, if they were a legislator or if they—you know, they would not come out that way.

Senator KLOBUCHAR. Well, I just hope you will take to heart one of the comments written about Justice O’Connor when she retired. Someone said, “On an attentive reading, many of the Justice’s opinions were infused with a keen sense of what it felt like to live inside the shoes of affected litigants and ordinary citizens and with an almost urgent need to make certain that the outcome of the case, while doctrinally sound, was also workable.” And they went on to talk about her approach and a focus on pragmatism.

And when I think about this *Melendez-Diaz* case and some of the other ones before the Court, in addition to some of the other issues my colleagues have raised—and this is not an ideological argument. It is just a practical argument of having someone that will go in there and think about the effect that some of these decisions have on ordinary citizens. So I hope you will take that to heart.

The last thing I wanted to ask as the daughter of a former reporter is just about—there has been a lot of talk about the First Amendment as it relates to political speech, but I just want to talk for a minute on *New York Times v. Sullivan*. And in 1993, you wrote a book review and you discussed the Supreme Court’s decision in that case, which, as you know, was a critically important decision for libel law and for the First Amendment specifically. And your 1993 piece recognized how important the *Sullivan* decision was for First Amendment jurisprudence, but discussed the fact that the actual malice standard had been applied in libel cases that differed a great deal from those facts in *Sullivan* back in the 1960s with the civil rights movement.

You wrote in that review, “The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy.” And you wondered, “Is an uninhibited defamatory comment an unambiguous social good? That is, does it truly enhance public discourse?” you asked. And I wondered if you agreed with your past comments on *Sullivan* and whether or not your last few months going through the media focus with your confirmation hearing has changed your opinion or strengthened it in any way, Solicitor General?

Ms. KAGAN. OK. I think people should be able to write anything that they want about me, and I do not think that I should be able to sue them for libel.

[Laughter.]

Senator KLOBUCHAR. Very good. But how about the case itself and with the changing Internet and other, you know, more social media and bloggers? I mean, does that affect anything? And how

about your past comments? Do you want to add to those from the book review?

Ms. KAGAN. It has been a long time since I read that book review, but I think that the point that the book review was making was, on the one hand, what an iconic decision *New York Times v. Sullivan* is, how important it has been to the development of our First Amendment law, how vital it is to a system of free expression to have newspapers and other people who speak—it is not just newspapers, as you suggest. I mean, given the way the media has developed, there are so many different ways to express thoughts in our world now. And to have these speakers insulated from libel suits by people who are in this public sphere, who are public officials or who are public figures, and to have an extremely, extremely high bar before those people can recover for any libel that may have been done them.

I guess the question that I was asking in that review—and I continue to think it is a real question—is how far should that go in the sense of—we should understand that libel can harm people, that reputational harm is real harm, and that people can suffer great damage from their reputations being inaccurately besmirched through utterly false statements.

And I guess the question that I asked was whether there were some contexts where the person had not put themselves into the public sphere in any real way, where the person was, you know, a private actor trying to mind his or her own business and sort of became dragged into the spotlight and something terrible was said about that person in a way that had harmed that person. The law actually does treat that person somewhat differently in libel law, but the question I was asking was whether the balance had been struck appropriately in that sort of case, where the values of the First Amendment in uninhibited political speech are not so much evident, and where the personal harm can be great.

It has been so many years since I read that article, I am not exactly sure how I came out on that question. But I think it is a real question, and even as we understand the absolute necessity for a kind of *New York Times v. Sullivan* sort of rule and for protection of speakers from libel suits, from defamation suits, even as we understand that, you know, we should also appreciate that people who did nothing to ask for trouble, who did not put themselves into the public sphere, can be greatly harmed by—when something goes around the Internet and everybody believes something false about a person, that is a real harm, and the legal system should not pretend that it is not.

Senator KLOBUCHAR. Well, thank you very much, and thank you for putting yourself in the public sphere today. And as I said at the beginning, you have done a very good job. I appreciate it.

Ms. KAGAN. Thank you.

Chairman LEAHY. Thank you very much, Senator Klobuchar.

Senator Kaufman, thank you for being here.

Senator KAUFMAN. Thank you, Mr. Chairman.

Good news. When you get to Senator Franken and me, you are at the end of the road.

Ms. KAGAN. That is not what they tell me, you know.

Chairman LEAHY. On the first round.

Senator KAUFMAN. The first round.

Some of my colleagues have suggested that you are too political because of your service on the Domestic Policy Council. Can you talk a little bit about the difference between serving on the Domestic Policy Council as opposed to serving on the Supreme Court?

Ms. KAGAN. There is a huge difference, Senator Kaufman. In the Domestic Policy Council, I was an aide to President Clinton. I was carrying out—helping President Clinton to carry out his domestic policy goals and objectives. As you know, I worked on a variety of issues. I worked on education. I worked on public health, particularly tobacco. I worked on anti-crime measures. I worked on the measures involved in ending the old welfare system. I worked on a number of things. I am very proud of my service there. I think I contributed to doing some good things for people across this country. But it is an entirely different role. I was, you know, not primarily looking—there was a period of time in the White House where I was also a lawyer, but when I was a policy aide, I was not primarily looking at things as a lawyer. And even as a White House lawyer, you are a lawyer for a particular administration's perspective and a lawyer for a President who is trying to achieve a certain set of goals.

As a judge, you are on nobody's team. As a judge, you are an independent actor, and your job is simply to evaluate the law and evaluate the facts and apply the one to the other as best, as most prudently, as most wisely as you can.

You know, the greatness of our judicial system lies in its independence, and that means when you get on the bench, when you put on the robe, your only master is the rule of law. And, you know, regardless what political administration you might have worked for in the past—and there are many Justices on the Court who have worked for—either for Congress or for the Executive, but just like all of them have, I would, if I am fortunate enough to be confirmed, you know, put on that robe and be independent and not favor any political party.

Senator KAUFMAN. I mean, some of them—Sandra Day O'Connor even was an elected official herself.

Ms. KAGAN. Sandra Day O'Connor was an elected official herself. That is true. I will give you another example. It is a great example. He is actually one of my favorite figures in Supreme Court history, who is Robert Jackson. Robert Jackson was such an executive branch man. He had had a series of positions in the executive branch, including in my role, including as Solicitor General and Attorney General, and he was also in a way that very few Justices—well, a few, but he was very close personally to Franklin Roosevelt. Even before he had occupied this set of positions, they were real friends. And Justice Jackson, you know, he got to the Court, and the executive branch never counted on his vote. Quite the opposite, that he was as independent as they come. And, you know, the case that everybody knows about, of course—and it is kind of the iconic case—is what he did in *Youngstown*, where President Truman closes the steel mills and says that this is vital for the national security of the country, and the question comes to the Court. And I think for sure President Truman must have thought, Oh, well, you know, Robert Jackson will vote with me. And Robert Jackson did

nothing of the sort. Robert Jackson voted against the ability of the Executive to take an action like that and wrote one of the—I think probably the strongest opinion ever written on the subject of executive power.

So, you know, that is the kind of independence that I think a judge has to show, and I think—I think it is sort of a natural consequence of assuming that position.

Senator KAUFMAN. I want to talk a little about *Leegin*. It has been talked about in a number of different places, and both sides—everyone on the Committee, I think, practically, has talked about precedent and stare decisis at least once in the last two or three Supreme Court hearings. So I think it an important case because it overturned 96 years of precedent.

Now, the one point that—if Congress, you know, whether Congress has the right to make the facts or Congress has the right to make the rules, during this 96 years Congress could have changed this rule if they came up with a new economic theory, anytime they wanted to. Correct?

Ms. KAGAN. That is true, Senator Kaufman. I will push back a little bit, though, and say that the antitrust area is a kind of special area with respect to statutory interpretation that courts have been considered to have more common law power in this area because of the breadth with which and the generality with which the antitrust statutes are framed.

Senator KAUFMAN. Right, but this is a new—a new economic theory is different than a new set of facts or new things we learn about as we go along. I am just making the point that Congress could have stepped in at any time during those 96 years if they thought there was a new economic theory that was relevant and changed the law.

Ms. KAGAN. Congress surely could have stepped in at any point and, indeed, could do so now.

Senator KAUFMAN. Right. And in *Illinois Brick*, another Supreme Court antitrust case, Justice White wrote, and I quote, “In considering whether to overturn precedent, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction where Congress is free to change this Court’s interpretation of its legislation.”

Do you agree with Justice White on that?

Ms. KAGAN. I think it is a longstanding principle, a very well accepted one, and I do agree with it, that stare decisis is at its highest in the area of statutory interpretation. And the answer is what you just gave, that, look, if the Court got it wrong, Congress can change it. And if Congress has not changed it, it suggests something, at least, about whether the Court got it wrong. And that is a very different kind of situation than when the Court makes a constitutional ruling, where the Court makes a constitutional ruling and everybody has to live with it and abide by it regardless whether it is wrong. Nobody can change it. So if it is really wrong or really unworkable, it is up to the courts. Not so with respect to statutes.

Senator KAUFMAN. And Justice Roberts was right when he said stare decisis is not always the only consideration, just like you said

in constitutional cases and other cases stare decisis does not overrule everything. But it is a major consideration.

Ms. KAGAN. Stare decisis is a major consideration, and it is at its height where statutes are concerned.

Senator KAUFMAN. Right. I am concerned about *Leegin* because it seems to me an example—and this has been talked about by a number of my colleagues on both sides of the aisle, where you have results-oriented decisionmaking, and it just seemed to me five Justices decided to overturn precedent simply because they did not like the outcome that precedent dictated or the economic theory embodied, no matter what the Congress did. I mean, that just seems clear to me.

Without regard to your views on *Leegin*, please tell us, if confirmed, what factors do you consider when you are asking to overturn a settled issue of statutory construction?

Ms. KAGAN. Well, I think that the factors would be the same as in a constitutional case, but then there would be—you would really, really, really have to find those factors. So the factors would be the workability of the precedent. If the precedent has just proved unworkable in the sense that courts struggle to apply the test and come up with widely differing results, it produces a kind of erraticism and instability in the law. That would be one.

Another is if the precedent has been eroded over time, and that might be because it is eroded by other doctrinal change. Let us say one precedent is relied on in three other cases, and then two of those other cases have been reversed themselves, so the precedent is standing on nothing in the way of doctrine. That is an important consideration.

Still a third is if the facts change such that a precedent becomes sort of silly, and the best example I can give you of that is in the search and seizure context. There used to be a rule that said something was only a search if there was an actual trespass on physical property. And then a case came along—it was the *Katz* case—which involved surveillance issues. And the Court said, well, wait a minute, why should we require a physical trespass on property? We have all these new technological ways of essentially invading people's privacy and searching them without doing the trespass, the sort of technology has overtaken the precedent, and that would be a situation in which the Court might reverse a precedent.

So those are generally the circumstances in which that happens—lack of workability or a kind of erosion because of doctrinal change or because of change in factual circumstances in the world.

But as I indicated before, you really, really have to be sure that one of those things exists, even more than in the constitutional context, when you are dealing in the statutory realm.

Senator KAUFMAN. And how about the length of precedent? Would that be a factor—

Ms. KAGAN. I think it generally is. I think it generally is, just in the sense that it is at least true that the more times that a precedent is affirmed and reaffirmed and reaffirmed and nobody has found anything wrong with it, and to the contrary, maybe people have specifically reconsidered the precedent and said, yes, we think that this is a good precedent, that would be a factor.

Senator KAUFMAN. I want to talk—another case that has been talked about—about *Citizens United*, and I hope I am going to be dealing with new ground based on what I have heard from the other questioners. But I think both *Leegin*, *Citizens United*, *Exxon*, these are all cases that everyone has been talking about in terms of where the Court has gone, and so I would just ask you: In the *Citizens United* case, there were two rounds of briefing and second oral argument in that case, right?

Ms. KAGAN. That is correct.

Senator KAUFMAN. And who asked for the second round of briefing and oral argument?

Ms. KAGAN. Well, the Court did.

Senator KAUFMAN. Right. So it was not the parties that asked for the thing. What question did the Court direct the parties to brief and argue?

Ms. KAGAN. I do not remember the exact phrasing, Senator Kaufman.

Senator KAUFMAN. No, just in general.

Ms. KAGAN. The question of whether *Austin* and a part of *McConnell* should be reversed.

Senator KAUFMAN. In your experience, is it unusual after briefing and argument for the Court to then direct the parties to brief and argue a different question, one drafted by the Court itself?

Ms. KAGAN. Well, it is unusual. It is not unheard of. It has happened in other cases as well.

Senator KAUFMAN. But it is unusual?

Ms. KAGAN. It is unusual.

Senator KAUFMAN. Is it fair to describe the question posed by the Court as a broader question of constitutional interpretation compared to questions first presented by the parties?

Ms. KAGAN. I think that the question that the Court posed had been in the initial complaint but had then been abandoned by the party's in the case. In the briefs that had been filed in the Court, the question and the argument came back in a few paragraphs, but that it was not the focus of the party's argument.

Senator KAUFMAN. Without regard to this case—and just to go a little more into something you talked about with Senator Whitehouse, your view about judges choosing pretty narrow statutory ground for decision and broad constitutional ground for decision, can you just kind of sum up your feeling about that?

Ms. KAGAN. Well, I think that there is a longstanding rule—it is a sensible rule; it is a good rule for the judicial system—that to the extent one can, one should avoid constitutional questions, and that means that if one can, one should decide a case on statutory grounds.

Now, that is not always possible.

Senator KAUFMAN. Right.

Ms. KAGAN. Sometimes the statute does not allow it. You cannot make up a statute or recast a statute to make it mean something that it obviously does not mean just in order to avoid a constitutional question. But to the extent that it is reasonable to construe a statute in a way that avoids a constitutional question, it is, I think, a longstanding practice of judicial restraint to do so.

Senator KAUFMAN. And is it fair to say that the ultimate ruling in *Citizens United* was not consistent with prior decisions based on corporate election expenditures?

Ms. KAGAN. Well, it certainly was not consistent with *Austin* or with the part of *McConnell* that was reversed. There was clearly an argument in the case as to what the other precedents held—

Senator KAUFMAN. Right.

Ms. KAGAN—[continuing]. Whether those precedents were themselves anomalous or whether they were a part of a longstanding tradition. The Government had argued the latter.

Senator KAUFMAN. To me it goes back to the same thing as *Leegin*. I think it is something that I have heard, again, from both sides of the aisle, kind of results-oriented judging, kind of reaching a decision, and then trying to figure out how to make it happen where you take a result and then you figure out how to manipulate it. I am not going to ask for your assessment on *Citizens United* and whether it was results-oriented judging. But talk a little bit about results-oriented judging.

Ms. KAGAN. Well, I think results-oriented judging is pretty much the worst kind of judging there is. I mean, the worst thing that you can say about a judge is that he or she is results-oriented. It suggests that a judge is kind of picking sides irrespective of what the law requires and that that is the absolute antithesis of what a judge should be doing, that the judge should be trying to figure out as best she can what the law does require and not going in and saying, you know, I do not really care about the law, you know, this side should win.

So to be a results-oriented judge is the worst kind of judge you can be.

Senator KAUFMAN. So, I mean, we have these issues, like results-oriented judging, precedent, *stare decisis*, where everybody on the Committee seems to agree. It is kind of remarkable how, when we look at individual cases, they are not taken into account. And I am not going to ask you to comment on that.

Senator Hatch was concerned yesterday, I believe, that small business owners would not be able to express themselves politically without *Citizens United*. But under McCain-Feingold, there would not be any barrier for a small business person—most of these like S corporations are just individuals. They could still give themselves a dividend, take the money and go out and spend it in political campaigns. Correct?

Ms. KAGAN. Senator Kaufman, in fact, this question did come up at the oral argument in the case, and I was asked a question about it, and I responded in a similar kind of way, that they could not do it through the—they could not spend through the corporation itself, but that they could spend individually.

Senator KAUFMAN. The main thrust of this decision and all the discussion about this decision were corporations and labor unions with massive assets that they could then invest into a campaign without any Government supervision, not part of any kind of legislation, just spend whatever they wanted on that, and that was clear precedent that was not what we want in this country.

Ms. KAGAN. Well, it is certainly the way—when I argued the case—that I understood the Congressional Record, that when I

looked at the Congressional Record and tried to portray to the Court what the Congressional Record was all about, that it was all about larger corporations and trade unions and the way in which they could inject money into the political system, and thereby change the outcomes of the political system.

Senator KAUFMAN. Because really these institutions have massive amounts of money. I mean, this is not just—we are not talking about some little corporation. These people—these large institutions could spend hundreds of millions of dollars if they decided it was in their interest to do so and that that would completely overtake whatever individual expenditures we could have in this country.

Ms. KAGAN. Senator Kaufman, the argument that the Government made, which was based on Congress' own record, suggested that there was significant potential for corrupting influence in that way.

Senator KAUFMAN. And the other thing that is key, I think, in this is it was not just corruption; it was the appearance of corruption. I am not one that thinks there is that much corruption—

Ms. KAGAN. Yes, and the appearance of corruption, and that has been something that the Court's decisions, *Buckley v. Valeo* has made clear is a compelling governmental interest, preventing either corruption or the appearance of corruption.

Now, you know, the *Citizens United* Court found that the Government had not proved its case sufficiently and it had not shown to the high level that is necessary in the political speech context that these dangers would exist. And that is settled precedent going forward.

Senator KAUFMAN. Right, and it really is quite extraordinary because I have not met anyone in the last 20 years who does not think there is at least the appearance of corruption in the way we finance our campaigns. Not a single person. I mean, as soon as people find out that I teach about this or I worked here, they start talking about the appearance—they go more than the appearance, most people. So the idea that the Court could rule that there was not the appearance of corruption is really quite extraordinary.

Let me talk a little bit about *Exxon v. Baker*. In *Exxon v. Baker*, the Court limited punitive damages in admiralty cases to no more than the amount of compensatory damages. That would mean Exxon ended up paying \$2 billion less to victims than it otherwise would have. Right? Because of the ruling, they did not have to pay \$2 billion in punitive damages.

Ms. KAGAN. Got it. Yes.

Senator KAUFMAN. And because Justice Alito did not participate, it is also fair to say that four members of the Court voted completely to ban punitive damages, and if Justice Alito had voted the same way, that would have been no more punitive damages. Is that correct?

Ms. KAGAN. In this class of maritime suit, yes, I believe that that is right.

Senator KAUFMAN. Which is kind of extraordinary, again, to me. I mean, I think that my experience has been—and I worked in corporations and the rest of it—that when you are trying to make a decision about safety or any other thing, kind of what the cost

could be has to be a factor in your decision. And so I just wonder with the lack of punitive damages, if it had ruled in *Exxon v. Baker*, what kind of impact that would have in the gulf or what kind of decision has with British Petroleum or any other company trying to decide whether they are going to put in the necessary safety requirements to avoid a potential spill with liabilities, not just cost liabilities but also punitive liabilities.

Let me talk about regulatory reform authority. As I said in my opening statement, I am concerned that in business cases the current Supreme Court too often seems to disregard settled law and Congressional policy choices, and you talked about that. And Congress is about to enact, we hope, an improved financial regulatory system. I want to make sure that the system is not undermined by judges who may have a different view of the proper role of Government regulation.

Without asking you about that legislation, do you believe as a general matter Congress has the constitutional authority to regulate financial markets?

Ms. KAGAN. Congress has broad authority under the Commerce Clause, and certainly most regulation of financial markets that I could think of would substantially affect interstate commerce. It does not mean to say that there could not be something unconstitutional in this area as in any other, but the standard test is whether activity substantially affects interstate commerce. There are limits on non-economic activity, but presumably the regulation of financial markets would not be that.

Senator KAUFMAN. Can you talk a little bit about what the judge's idea of the wisdom of a statute should play in the judge's decision?

Ms. KAGAN. I do not think it should at all, and I think—I guess I talked yesterday about Oliver Wendell Holmes, who was the Justice who in the early 20th century was most adamant that the Court was going down the wrong road in striking down a whole series of pieces of economic legislation. And what most people, I think, do not know about Justice Holmes is that he thought all this economic legislation was dumb. I mean, he was not in favor of these various pieces of progressive legislation for the most part, and, you know, notwithstanding that, he said, look, I might think that this legislation is unwise, but this is a choice for the American people; and, you know, if I am right and it turns out that they have done unwise things, they will correct it.

And I think that that is what the attitude of judicial restraint—judicial deference to the democratic process really is. It does not matter whether you like the legislation or not. Not to say that courts do not have an important role. Courts do have an important role in policing those constitutional boundaries. But in fulfilling that role, you know, courts should realize that they are not the principal players in the game.

Senator KAUFMAN. Let me talk about dean at Harvard. When you were dean at Harvard, what did you do to promote public service?

Ms. KAGAN. Well, I tried to do a lot because I think it is one of those things that, you know, public service—it is one of those things that, on the one hand, what our students find is that they

do good for other people and that they also create meaningful professional lives for themselves. So working with quite a large number of people at Harvard, I think some of whom are here in the rows behind me, we tried to very much increase clinical opportunities to give people a sense of what it actually meant to do public service. I tried to use, you know, the bully pulpit whenever I could to talk about the importance of these issues. And I think we had good results, that the number of students who did clinical work in the law school went up very dramatically, that the number of students—I was speaking with Senator Cardin yesterday about our pro bono requirement, which says you have to do 40 hours of work in public service kind of activities, helping people who cannot afford legal services to get necessary legal services. You have to do 40 hours a week—excuse me, 40 hours by the time you graduate. Forty hours by the time you graduate. And students were doing an average of 500-some hours, so 10 times what they had to do. And I think that that was because they found it meaningful for themselves to see how their legal profession—how their legal training could be used to help real people solve real problems, and I think it was great for the surrounding community. Harvard Law School is now the second largest provider of legal services in the State of Massachusetts, and I think that that is something that the school can legitimately be proud of.

Senator KAUFMAN. Let me ask you—you know, large modern corporations are great, they are what make America great, and they provide jobs. But they also have vast resources at their disposal. What is the role of the Supreme Court in making sure that there is a level playing field between major corporations and the individual American?

Ms. KAGAN. Well, Senator Kaufman, I think that the role of the Court is to provide a level playing field for all Americans, and this is what I tried to convey in my opening statement, that the greatness of the Court and the greatness of the Court historically has been that no matter who you are, your arguments are considered with the same kind of respect, your arguments are given the same kind of attention, and if you are right on the law—and you have to be right on the law. But if you are right on the law, it does not matter that your opponent has a great deal more wealth or more power than you do.

And one of the things that I found remarkable in my time as Solicitor General is I walk into that Court and I represent the Government. And people might think that the Government is kind of favored in the Court, but anything but. You know, the Government is given just as hard a time as every other litigant. In fact, I think some Justices actually think it is okay to give the Government a harder time. And I think that that is fine because the Government does have, you know, a lot of resources and a lot of ability up there.

And so every single person who comes before the Court has to be treated equally, and every single claim has to be considered fairly, and whether you are a rich person or a poor person, whatever your race, whatever your religion, whatever your belief, you are entitled to the same kind of respect. And I think that the greatness of our court system historically has been that you have generally gotten it.

Senator KAUFMAN. You spoke yesterday with reverence about Justice Marshall's reverence of the American judicial system. You have also written about it. I would like to read you one of your quotes. "In Justice Marshall's view, constitutional interpretation demanded above all else one thing from the courts. It demanded that the courts show a special solicitude for the despised and disadvantaged. It is the role of the courts in interpreting the Constitution to protect the people who went unprotected by every other organ of Government, to safeguard the interest of people who had no other champion. The Court existed primarily to fulfill this mission."

Some of my colleagues have used this statement to attack Justice Marshall. Could you elaborate on what you said in that tribute and what it means to you as a nominee to the Supreme Court?

Ms. KAGAN. Well, what I was trying to say, Senator Kaufman, is really what I just said to you, that Justice Marshall lived in a time and he lived in a world and he lawyered in a world in which many doors were closed to him. And as he was trying to eradicate Jim Crow segregation, he was not met with much—you know, you could walk into the State houses and you could walk into Congress and you could walk into the White House, and there were not a whole lot of people who were willing to listen to the kinds of claims he was making, just claims for racial equality.

And I think what he—the reason he revered the courts was that step by step by step over the years he did find success in the courts because the courts were willing to listen to those claims in a way that nobody else in the governmental system was. And he made great progress and did great justice of going to the courts and arguing his cases there and expecting no more—expecting no more than that the courts would rule on him if he was right on the law and on the meaning of the Constitution, but step by step by step, succeeding in that mission.

Senator KAUFMAN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Kaufman.

We were just discussing the schedule up here. We will have Senator Franken's questions, and then we are going to take a very short break. There is a vote, I am told, at noon on General Petraeus. We have a couple people who will vote at the desk when it starts because we will not stop the hearing for the vote. People will go back and forth and vote and keep the hearing going. Then we will take a lunch break at an appropriate time.

Senator Franken, you are on, and then we will take a break.

Senator FRANKEN. Thank you, Mr. Chairman.

General Kagan, I really liked something you said yesterday in your conversation with Senator Kyl. You said that "one of the glorious things about courts is they provide a level playing field in all circumstances." And that we need to "make sure that every single person gets the opportunity to come before the Court and gets the opportunity to make his best case and gets a fair shake."

I want to discuss something that is denying more and more working Americans that precious day in court, that fair shake—and that is mandatory arbitration. Now, arbitration has its place, but I am talking about mandatory arbitration.

Chances are if you have a cell phone or a credit card or if you work, you are likely to have signed a contract with a mandatory arbitration clause. These clauses basically say if we violate your rights, you cannot take us to court. You have to take it to an arbitrator. But then the fine print essentially says an arbitrator that we pay, who depends on us for work, and who makes decisions in secret.

So a lot of people are denied their opportunity to come before the court. Unfortunately, we have seen a series of decisions from the Supreme Court that have made it even harder for people to get that fair shake, as you put it.

In 2001, in a case called *Circuit City*, the Court was asked to decide whether workers' employment contracts could be subject to mandatory arbitration. This really should have been a no-brainer because the Federal Arbitration Act of 1925, the law that says which arbitration agreements should be enforced, specifically exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Organized labor had asked for this specific language to be included to make sure the Act would not apply to workers' employment contracts. In fact, then-Commerce Secretary Herbert Hoover said during a Senate hearing, "If the objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating that nothing herein contained shall apply to the contracts of employment of seamen, railroad, employees, or any other class of workers engaged in interstate commerce."

Secretary Hoover was saying that if Congress wanted to make clear that the Federal Arbitration Act did not apply to employment contracts, Congress should put this language in the statute. So Congress put the language in the statute.

But when Justice Kennedy wrote the majority opinion in *Circuit City*, he ignored the history. He wrote, and I quote, "We need not assess the legislative history of the exclusion provision."

Let me repeat that. "We need not assess the legislative history of the exclusion provision."

And based on a strained reading of the law, he decided that the exception only applied to workers in the transportation business, not any class of workers. This means that instead of all workers getting their day in court like Congress clearly intended, only transportation workers would get it, and that excludes the vast majority of American workers.

General Kagan, I really disagree with this case and the way the Court ignored Congress' intent. That is why I was glad to hear your response to one of Senator Schumer's questions about how the Court should interpret statutes. You said that, among other things, "I think a judge should look to the history of the statute in order to determine Congress' will."

General Kagan, we spend a lot of time in hearings and on the floor debating legislation. How much weight do you think a judge should give to the deliberations of Congress and the reasons why we passed the law in the first place?

Ms. KAGAN. Well, Senator Franken, the most important thing in interpreting any statute—in fact, the only thing that matters in in-

interpreting any statute is Congress' intent. Congress gets to make the laws under Article I of the Constitution, and what the Court should be doing in applying those laws is trying to figure out what Congress meant and how Congress wanted the laws to be applied. And that is the only thing that the Court should be doing.

Now, sometimes that can be a difficult task. New situations come up. The statutory language, it is not clear how the statutory language applies to those new situations. Or sometimes Congress might simply not have thought of particular situations. Language is by necessity inexact. And so there are going to be cases which—

Senator FRANKEN. Do you agree with Justice Kennedy we need not assess the legislative history of something?

Ms. KAGAN. Well, I would say this. I would say where the text is clear a court should go with the text. Where the text clearly covers some situation, the Court should do that. The Court should not rewrite the law.

Senator FRANKEN. But shouldn't the Court assess that, make an assessment there?

Ms. KAGAN. Well, I think if the text is clear, Congress should not—the Court should not rewrite the law. But where the text is ambiguous, which often happens—

Senator FRANKEN. And wouldn't you have to assess whether it is ambiguous?

Ms. KAGAN. Yes. I mean, the first step—

Senator FRANKEN. So what Justice Kennedy said does not quite stand up to that, does it?

Let me move on on that. We in Congress, we want to make sure, all of us, that our intentions are clear so that 75 years from now the Supreme Court does not just ignore the purpose behind the laws we are passing. How can we do that? How do we do that? How do we make it clear to future Justices?

Ms. KAGAN. Well, the Court surely would be helped if Congress spoke as precisely and exactly and as comprehensively as it could in all situations. You know, there are some instances where the Court just has legitimate difficulty trying to figure out what Congress intended, and where judges—all of whom agree that what they should be doing is doing what Congress intended—have difficulty determining that or disagree about what that means. And certainly to the extent that Congress can make its intentions clear in legislation and can specifically spell out how it intends for the law to operate, Congress ought to do so.

And, of course, you know, to the extent that the Court gets something wrong with respect to a statute—and this has happened, you know, many times in recent years and in prior years as well. To the extent that the Court gets something wrong, of course, Congress can come back and change it and make it clear that the Court got it wrong and also use it as an opportunity even to make clear its intentions with respect to a general area of law.

Senator FRANKEN. OK. It is hard to do 78 years from now, but we will try.

Circuit City was a Rehnquist Court decision. Just last week, the Roberts Court did *Circuit City* one better in helping employers keep their workers out of court and into arbitration. It happened

in a case called *Rent-A-Center v. Jackson*, which Senator Feingold noted yesterday. Rent-A-Center had 21,000 workers and hundreds of millions of dollars in annual profits. It also forces its workers to sign a mandatory arbitration agreement as a condition of employment.

Antonio Jackson, an African-American account manager in Nevada, had been working for Rent-A-Center for years, but he was frustrated because he watched his company pass him over for promotions again and again. Instead, they promoted workers who had less experience and who were not black. Although Jackson signed an employment contract agreeing to arbitrate all employment claims, this seemed blatantly unfair, and he sued Rent-A-Center.

But the company argued that only the arbitrator could decide whether the arbitration clause was unfair.

Let me repeat that: Rent-A-Center argued that only the arbitrator could decide whether the arbitration clause was unfair.

Last week, the Roberts Court sided with Rent-A-Center. Talk about not getting your day in court. Now you cannot get your day in court to get your day in court.

Now, General Kagan, I know I probably cannot ask you about whether you think this case—well, I can ask you, but you will not answer—whether this case was correctly decided, but I would like to ask do you still agree with what you said yesterday to Senator Kyl, that “one of the glorious things about courts is that they provide a level playing field in all circumstances.” And that we need to “make sure that every single person gets the opportunity to come before the court and gets the opportunity to make his best case and gets a fair shake”?

Ms. KAGAN. Well, I do agree with that very strongly, Senator Franken, and if I might, if I might just return to this question of statutory interpretation that you started off with, because I did want to make clear that when a text is ambiguous, which, you know, frequently happens—which frequently happens—that I think that the job of the courts is to use whatever evidence is at hand to understand Congress’ intent. And that includes exploration of Congress’ purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted and in what circumstances, and by way of looking at legislative history.

Now, I think courts have to be careful about looking at legislative history and make sure that what they are looking to is reliable. But courts should not at all exclude signs of congressional intent and should really search hard for congressional intent when the text of the statute itself is unclear.

Senator FRANKEN. Good. Then I think you and I agree that Justice Kennedy may have been in error when he said that the Court does not have to assess the legislative history.

Ms. KAGAN. Well, I suspect that—I do not know the case very well. I suspect that Justice Kennedy may have meant that he thought that the text was clear and, therefore, the legislative history was not something that should appropriately be explored. But I am just guessing on that.

Senator FRANKEN. OK. I think you are guessing wrong.

Ms. KAGAN. OK.

[Laughter.]

Senator FRANKEN. General Kagan, you have gotten a lot of questions about——

Ms. KAGAN. It is not the first time in my life.

Senator FRANKEN. Nor the last. We all guess wrong.

You have gotten a lot of questions about *Citizens United*. I am going to try to bore down a little deeper on this. First I want to make it totally clear that a full 80 percent of Americans that hear about this case just think it is a bad idea. The first problem is the impact it is going to have on our communities and our ability to run those communities, because the potential for corporate influence on our elections under *Citizens United* is going to dwarf what it is today and may very well totally drown out individual citizens.

Before *Citizens United*, if a corporation wanted to run an ad that said “Vote for Joe,” it could only use money from its political action committee, or PAC. Those PACs relied on donations from employees and executives, individuals in those corporations. In the 2008 cycle, all Federal PACs combined spent a total of \$1.2 billion. Now, after *Citizens United*, if a corporation wants to run an ad that says “Vote for Joe,” it can use all of its money—its treasury funds, its revenues, all of its money. In the 2008 cycle, the combined gross revenue for Fortune 100 companies was \$13.1 trillion. Now, obviously, they are not going to spend all that money on ads or all of it on just any election. They would spend a lot—but they can spend billions. They could have spent under this law billions when we tried—when we passed the law that took the lead out of gasoline, when we passed the law that required seat belts, and they are going to spend it when we try to protect against oil drilling in deep water when we do not have safety precautions or Wall Street fraud. They are going to spend their money against the consumer and environmental laws that protect our families and our homes.

General Kagan, this is one of the last things that Justice Stevens said in his dissent: “At bottom, the Court’s opinion is a rejection of the common sense of the American people who have recognized the need to prevent corporations from undermining self-government since the founding.”

What do you think that means, General Kagan?

Ms. KAGAN. Well, Senator Franken, when I argued the case, I thought that the strongest argument of the Government was the very substantial record that Congress puts together, which I think reflected the sense of the American people that these monies from these actors spent in this form could have substantial corrupting effect on the political process. And that is the argument that the Government made to the Court.

Now, as I have indicated before, I approach this case as an advocate, not as a judge, and there are certainly strong arguments on the other side as well. And in particular, there is the fact that political speech is the highest form of speech under the First Amendment entitled to the greatest protection, and that the courts should be wary of Congress regulating in this area in such a way as to protect incumbents to help themselves. And I think that those are strong arguments.

The argument that the Government made in defense of the statute as against that was really an argument about the strength of

the governmental interest involved in this case in preventing corruption from this kind of expenditure of money.

Senator FRANKEN. General Kagan, another problem with *Citizens United* was how it was decided, because it was decided in a manner that was really unfair to the American people, and let me explain.

When you go to trial, you make arguments and you introduce evidence to back up those arguments. Now, you cannot introduce evidence after trial, so if you appeal, you cannot just come up with a new argument because the appeals court does not have any evidence to decide it on.

This is why there is an old rule that the Supreme Court should not answer questions they are not asked. Or as Justice Scalia said to you in your first oral argument on this, "We are not a self-starting institution. We only disapprove of something when somebody asks us to."

If the Court expands the scope of the question before it—this is me now—it will not have the evidence it needs to decide that question. But that is the opposite of what the Court did in *Citizens United*. In *Citizens United*, the plaintiff argued and presented evidence on this question: Should a certain part of McCain-Feingold apply to certain kinds of nonprofits? And that is not the question that the Roberts Court answered.

This is how the Roberts Court answered: No, McCain-Feingold should not apply to nonprofits or for-profits or unions, and neither should a different law that Congress passed 40 years ago. In fact, both of those laws are unconstitutional for everyone.

Because the Roberts Court answered a question it was not asked, it never got evidence on how McCain-Feingold was actually affecting most nonprofits or any for-profit corporation or union.

This is what you said in the case, in your argument—or this is what you said actually here in the hearing: "What the Government tried to argue in *Citizens United* was that Congress had compiled a very extensive record about the effects of these expenditures by corporations and unions on the political process. And what the Congress had found was that these corporations and unions had a kind of access to Congressmen, had a kind of influence over Congressmen that changed outcomes and that was a corrupting influence on Congress. That was a many, many thousand page record."

So this finding of fact was ignored because it had to be. As Justice Stevens said, "the record is not simply incomplete or unsatisfactory. It is non-existent."

General Kagan, you were criticized at the beginning of this for being outcome-or results-oriented, especially in your bench memos to Justice Marshall. How is this for guaranteeing an outcome? You wait until the case is out of the trial court. You wait until it is too late to submit evidence. You wait until the institution that wrote the law can no longer submit evidence. You wait until the appeal has been argued in the circuit court. You wait until the oral argument before the Supreme Court—you wait until the argument, oral argument before the Supreme Court. And then you change the issue under consideration to get the outcome you want. If that is not outcome-oriented, I do not know what is.

I would love to ask you if you agree, but, you know, I do not want to force you to criticize your future colleagues. So instead let me see if you agree with some general statements of law.

In general, do you agree with Justice Scalia that the Supreme Court is not a self-starting institution that should only disapprove of something when somebody asks it to?

Ms. KAGAN. That is certainly true. It is a basic postulate of the way we run our judicial system that the Court does not issue advisory opinions, that the Court does not issue opinions on anything except what is necessary to decide a concrete case or controversy before it.

Senator FRANKEN. OK. How about this? Here is something that Chief Justice Roberts said when he was a circuit court judge. He said, "If it is not necessary to decide more, it is necessary not to decide more." Do you agree with that?

Ms. KAGAN. I do agree with that, Senator Franken. That, too, is a basic principle of our legal system. It is a requirement of—or it is a foundation stone of judicial restraint.

Senator FRANKEN. Well, I am glad you agree with that.

Do you agree with Chief Justice Roberts that courts should decide matters as narrowly as possible?

Ms. KAGAN. Yes, I do, Senator Franken, in part for the reasons I was discussing with Senator Whitehouse, that this leads to a kind of restrained decisionmaking in which consensus can be most easily achieved and appropriate and restrained outcomes most easily reached.

Senator FRANKEN. OK. I would be the last person to draw conclusions from your answers. But—

[Laughter.]

Senator FRANKEN. To be honest, in *Citizens United* I do not think Justice Stevens—I am sorry, Justice Scalia or Chief Justice Roberts adhered to their own principles. I think they were legislating from the bench.

I want to talk about—a lot of people talked about *Exxon*, but there are a couple of other Supreme Court decisions that dramatically weakened our ability to protect the environment. Senator Feinstein asked you about one of those cases yesterday, the *Rapanos* case, and you said that you were not familiar with it. So let me just summarize it very quickly.

In *Rapanos*, the Supreme Court looked at what kinds of wetlands are protected in the Clean Water Act. After Congress passed the Act in 1972, the EPA and the Army Corps of Engineers passed regulations to enforce it. Basically, the Act said that it covered navigable waters. But the Army Corps realized that to protect those navigable waters, it also had to protect the wetlands and streams that fed into or were near those navigable waters, you know, because it is water. And so they did.

The Corps extended coverage to those waters, too, but in *Rapanos* the Court struck down these regulations because it said they were too broad even though they had been placed for up to 30 years and were actually necessary to protect America's water. And this water is what people drink, people catch fish in, and that our kids swim in.

Thanks to this case and a similar case known as SWANCC, the Clean Water Act now does not cover half of the nation's largest polluters, and thanks to these cases, a lot of western Minnesota is outside the protection of the Clean Water Act, and so is a large part of the Gulf Coast.

Yesterday you discussed the *Chevron* doctrine with Senator Feinstein. As you explained, *Chevron* says that the courts should generally defer to agencies and their regulations because "Congress would have wanted that the entity with political accountability and expertise to make the decision rather than the courts."

So let me ask you a few questions. General Kagan, can you tell me how many of the Supreme Court Justices have a degree in the environmental sciences?

Ms. KAGAN. Well, gosh, I do not know, Senator Franken.

Senator FRANKEN. I do not either. I think it is none.

Ms. KAGAN. Okay.

[Laughter.]

Senator FRANKEN. Can you tell me do they have a degree in public health? We are going to both guess together.

Ms. KAGAN. I will guess none.

Senator FRANKEN. That is what I would guess, too.

Now, of course, the Court has to make decisions in areas where they do not have expertise or personal knowledge. But when they rewrote the Army Corps of Engineer regulations on wetlands, the Roberts Court did not have any special subject matter expertise on that issue.

General Kagan, what does *Chevron* protect if it does not protect regulations issued 30 years ago that were never questioned by Congress and were enforced repeatedly during that period?

Ms. KAGAN. Well, Senator Franken, *Chevron* says that where there is ambiguity in a Congressional statute—where there is not ambiguity, you just go with what the statute says; but where there is ambiguity, that an agency's interpretation of what Congress intended for a statute to mean should receive deference from the courts. And the idea really is that the agency is better able to clarify that ambiguity because it has a kind of expertise in the area and also because it has real political accountability through the President, and the courts have neither expertise in one of these various technical subjects, nor do the courts have electoral legitimacy. The courts are by design cut off from the people.

So for both competence reasons and legitimacy reasons, *Chevron* says, as between courts and agencies in interpreting unclear statutes, you should give the nudge to agencies, that courts should defer to their decisions. It is actually a Justice Stevens opinion. I think it is one of the most cited cases, maybe the most cited case in Supreme Court history.

Senator FRANKEN. And yet in this case, the Court did not give deference to that, did it?

Ms. KAGAN. Senator Franken, as I indicated to Senator Feinstein, I have not read this opinion ever. I think that, you know, this might be one where—

Senator FRANKEN. If you trust me on my description of it, which is—oh, never mind. Why would you do that?

[Laughter.]

Senator FRANKEN. OK. Let us say my description was accurate. Does it strike you that maybe they did not give proper deference—I know it is a hypothetical, but my description would be accurate.

Ms. KAGAN. You know, I have been an administrative law professor, and *Chevron* is actually something that I have written a good deal about, and I think I have written about it in a—beyond the fact that *Chevron* is obviously settled law, going forward, I have to say if you look at my writings on administrative law, you know that I am a sympathizer with *Chevron* for the kinds of reasons that I just suggested.

Senator FRANKEN. Thank you. Thank you for your indulgence, and I have a minute and 15 left. You know what? I am going to yield that time.

[Laughter.]

Ms. KAGAN. That is very good of you.

Chairman LEAHY. We have talked a great deal about precedent here, Senator Franken. I hope that is a precedent others will follow.

You know, I am one of these people who is always hopeful. Sometimes my hopes are dashed. But, in any event, we will take a very brief break, and then we will come back.

[Recess 11:01 a.m. to 11:24 a.m.]

[AFTER RECESS]

Chairman LEAHY. We'll have the nominee back and we will—now Senators will have up to—up to—20 minutes to ask questions in the second round. I emphasize the “up to”, and I hope any Senator who feels that they don't—especially as most questions have been asked—I realize not everybody's asked them—if they don't feel that it's necessary to go and repeat some things, they might not use all their time. But we're doing this so we can finish with the nominee today, and then we have outside witnesses.

Both Republicans and Democrats have outside witnesses. We have to figure out when we can use them. All of this, because of the change in the schedule with the Byrd memorial. We've been asked not to hold hearings from 10 a.m. to 4 p.m. tomorrow when he's lying in repose in the Senate chamber, then of course on Saturday, or Friday and Saturday, there are memorial services. So I will reserve my time and I yield to Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Solicitor General Kagan, I enjoyed our conversation yesterday, but was disappointed a bit with regard to how you describe the situation at Harvard and the blocking to the military to have full and equal access to the recruiting offices, as required by law.

I think that the White House has been spinning that story inaccurately, and I believe your testimony was too consistent with an inaccurate spin and didn't, frankly, set forth what you did. I was a bit disappointed at that.

I'd like to follow up and go in a little different direction today. Ironically, and almost amazingly, it fell on your lot as Solicitor General to defend that very law, the law of the United States, the “don't ask/don't tell” law that you opposed so much there.

Let me focus on your responsibility and how you handled it. During your confirmation process, you stated that your “role as Solicitor General, however, would be to advance not my own views, but

the interests of the United States”, and that you were “fully convinced that you could represent all of these interests with vigor, even when they conflict with my own opinions.” I think that was the right position, the only position, you could take if you were to assume that office.

And because of your widely publicized opposition to the “don’t ask/don’t tell” law and to the Solomon Amendment, you were specifically asked at the hearing if you would be able to defend those statutes as Solicitor General and you said that you would. You said that your approach “to cases involving challenges to the statute involving don’t ask/don’t tell “policy would be the same, and that you would “apply the usual strong presumption of constitutionality” as reinforced by the “doctrine of judicial deference to legislation “involving military matters.”

Now, during your time as Solicitor General, two cases came before you challenging “don’t ask/don’t tell.” They came up from the Federal Courts of Appeals. One case was from the First Circuit in Boston, your circuit, filed by 12 plaintiffs, individual different plaintiffs. The ACLU and your former colleague, Lawrence Tribe, represented that group.

A second case, *Witt v. Department of Air Force*, came out of the Ninth Circuit. It was filed by a single plaintiff, and the ACLU was the attorney in that case, or one of the attorneys in that case.

So in both cases the plaintiff argued that the Supreme Court’s recent decision in *Lawrence v. Texas* meant that the “don’t ask/don’t tell” law, which says that people who are openly homosexual may not serve in the Armed Forces, should be struck down as unconstitutional. In the First Circuit case the court upheld “don’t ask/don’t tell.” The Plaintiff said the law was unconstitutional as applied to them. The court agreed that *Lawrence v. Texas* called for elevated scrutiny, but upheld the statute at that time.

But the Ninth Circuit did not approach it in that way. They did not apply the traditional deference to military issues, as did the First. The Ninth Circuit invented a new standard of review for the substantive due process challenge, requiring the government to make detailed individual findings in these cases.

Most importantly, unlike the First Circuit, the Ninth Circuit failed to acknowledge the need for uniformity in military policies, and so the court held that the plaintiff was entitled to a full trial, and that every plaintiff, apparently, would be entitled to a full trial, something that the military had been resisting steadfastly for a number of years.

And so in the First Circuit case, interestingly, 11 of the 12 plaintiffs didn’t ask for review, even though they had lost the case. I can only assume it’s because they were concerned they may lose the case if the Supreme Court took it and had a clear view of the law. They had, as you know, upheld the *Solomon Amendment* eight to nothing, and I think, based on their history, we could expect the Supreme Court to affirm that statute, in my personal judgment.

So you told the Supreme Court they should not take the case up. One plaintiff did ask that it go up. And you contended that the Ninth Circuit was a better vehicle, and the Ninth Circuit case, shortly before that moment, had already been remanded to the trial court to conduct a significant trial that was contrary to the

position that the Department of Defense had been taking. Indeed, it would be difficult, if not impossible, to enforce the “don’t ask/don’t tell” law if you have to have an individual trial in all of these cases.

So it was a severe, damaging blow to the Department of Defense, and the Ninth Circuit law would control 40 percent of America. It’s the biggest circuit of all. So the result was, neither case was appealed on the law and the position which was contrary to the consistent position of the military, and it undermined their ability to have, I think, an effective enforcement, and even and fair enforcement, of the policy.

So I guess I would ask you why you made that decision. It means it’s important to me, based on your representation to the court, that I’ll understand that you were fully committed to vigorously defending that law, because I think that was your responsibility. It was an oath you took.

I’m having a difficult time of understanding why, even though it would have been an interlocutory appeal—I know it would have been—but it was an interlocutory appeal of the Third Circuit case that the Supreme Court took and promptly reversed their decision. So I guess I’d just like to hear you state, in as much specificity as you can, why you felt it necessary not to appeal either one of these cases.

Ms. KAGAN. Sure, Senator Sessions. I think that we have acted, I have acted, in the Solicitor General’s Office consistently with the responsibility, which I agree with you very much that I have, to vigorously defend all statutes, including the statute that embodies the don’t ask/don’t tell policy.

So let’s take the *Pietrangelo* case first, which was the First Circuit case, where the First Circuit upheld the don’t ask/don’t tell policy. Mr. Pietrangelo brought a challenge to that decision. The question was, you know, he was challenging a decision that the government very much approved of, which was a decision that upheld the don’t ask/don’t tell policy. And we told the court in no uncertain terms not to take the case, and we defended the statute vigorously. We told the court not to take the case because the statute was constitutional.

So in that *Pietrangelo* brief that I filed, and it’s a brief on which I’m counsel of record, the—the argument is made vigorously that the don’t ask/don’t tell statute is fully constitutional given the appropriate standard of review, and particularly given the deference that courts properly owe to the military.

So the *Pietrangelo* brief is a brief—and again, I’m counsel of record on that brief—in which the U.S. Government vigorously defended the don’t ask/don’t tell policy—and statute, more importantly -and told the court not to take a case which challenged a decision upholding that statute.

Now, as to the second matter, the *Witt* matter, as—as—as you said, the *Witt* matter is interlocutory in nature. And what that means, for people who aren’t familiar with these legal terms, is that it means that the case is in the middle and that the government can, after remand at a later stage, continue to defend the don’t ask/don’t tell statute in this very case.

Now, we engaged in very serious discussions with the Department of Defense about the appropriate approach here in order to defend the don't ask/don't tell statute, because I agree with you, Senator Sessions, that the Ninth Circuit decision undercuts that statute. It makes it harder for the government to carry out its policies under that statute.

And the question that we had to decide was whether to challenge that Ninth Circuit decision, which I think does—is in real tension with the don't ask/don't tell statute. Whether—the question we had to decide was whether to challenge that Ninth Circuit decision at an early stage or at a late stage of the case. It was a matter of timing. And we talked a good deal about this, of course, amongst ourselves, but also with the Department of Defense, and we decided that the better course was actually to wait on it and to accept the court's remand. The case is not at all closed. Instead, the case is on remand in the—in the District Court to take that remand, and in the event that we didn't win the case on remand or in the Ninth Circuit again, in that event, then have the option to, and presumably would, take the case to the Supreme Court to challenge the Ninth Circuit's holding.

And when we did this, we wrote a letter to the Judiciary Committee. It's called a 530 D letter, which is a letter which the Justice Department writes whenever there's a moment at which it does not—does—does not contest a decision that is inconsistent with a Federal statute. We wrote a 530 D letter to the Senate Judiciary Committee and we basically laid out this explanation.

We basically said, we still have the opportunity to approach the court and ask the court to take certiorari in this case, and we presume that we will use this opportunity if we don't get the case dismissed in the District Court, but that we think it's actually better to go to the District Court, to take the remand, and then to come back to the Supreme Court if it's necessary to do so.

And the reason that that approach was chosen was because we thought that it was—it would be better to go to the Supreme Court with a fuller record, and with a fuller record about the particular party involved, maybe more importantly, with a record that would show exactly what the Ninth Circuit was demanding that the government do.

Because what the Ninth Circuit was demanding that the government do was, in the government's view and particularly in DoD's view, a kind of strange thing where the government would have to show, in each particular case, that a particular separation caused the military harm rather than to view it in general across the statute.

One reason we thought that the remand would actually strengthen the case in the Supreme Court was because the remand would enable us to show what this inquiry would look like, what the Ninth Circuit's—the inquiry that the Ninth Circuit demanded would look like, and to suggest to the Supreme Court, using the best evidence there was, how it was that this inquiry really would disrupt military operations.

So that was our decision-making process. It was, as I say, a decision-making process that we wrote about to Congress when it occurred, and stated specifically that this was a timing issue for us,

that we were not going to the Supreme Court at the earliest possible moment, but instead waiting.

And I should just put one other factor into the mix which I left out along the way, which is that there is a Supreme Court presumption that cases should not be taken in an interlocutory posture, that instead the Supreme Court ought to—that the Supreme Court ought to wait and that parties ought to wait before asking the Supreme Court to take a case until the case is sort of well and truly over, when it's not in the middle of things.

Now, I don't want to overstate that. That's a presumption. It's not a flat rule. It's a presumption against interlocutory review, but it was something that we weighed in the balance. Here we had a presumption against interlocutory review and we had some good reasons for thinking that our case would be made stronger if we did not take the case in an interlocutory posture, but instead waited for the remand to be completed before we went to the court and asked the court to review the Ninth Circuit decision.

Senator SESSIONS. Well, I appreciate that position. I will look at it and review it. It does appear, however, that your position was in harmony with the position that the ACLU took, who was on the other side of the case. And I see no harm in taking and attempting an interlocutory appeal. I do note that they took it in the Third Circuit Solomon Amendment case and promptly reversed—you know, rendered a decision consistent with the government's position.

I think the last refuge of a big government scoundrel is the Commerce Clause, it seems. Everything, when you have no other peg to hang your hat on, you claim that it impacts commerce. You cited yesterday the *Lopez* and *Morrison* case a number of times, which seems to defend legitimate—say that legitimate regulations defended under the commerce clause must, wonder of wonders, deal with economic commercial-type matters.

I guess, first, have you ever commented—and you cited that—to Senator Coburn, I think, and to others, that this could have an impact on his question, which dealt with, could you tell an individual American how many vegetables they should have for lunch every day, or something to that effect.

What's your view? Have you expressed any opinions previously on *Lopez* and *Morrison*? They were very controversial at the time. And do you agree with those 5–4 decisions?

Ms. KAGAN. Gosh, I don't think that I've expressed any views in my academic writing or anything I can think of on *Lopez* and *Morrison*. You know, I've given a lot of speeches in my life, but, you know, I can't think of any place where I specifically addressed those issues. I think that they are settled law, that they are part of the jurisprudence of the Commerce Clause going forward.

Senator SESSIONS. Could I ask you about that? You've said that it's settled law with regard to the gun case, *Chicago*, McDonald, and *Heller*. Those were 5–4 cases. Does your definition of settled law mean anything more than the normal precedent you would give to any of those kinds of 5–4 cases?

Ms. KAGAN. I think I've actually used that phrase with respect to a number of cases which people have asked me about. Those are a couple, but there are—

Senator SESSIONS. I thought you used the phrase interchangeably: precedent, which has a certain amount of power, and then you've thrown out settled law. To the layman, it seems to be a more firm acknowledgement of the power of that ruling. But I want to know, do you mean any difference when you use those two phrases?

Ms. KAGAN. I don't mean any difference. What I mean to say when I use those phrases is, these are decisions of the court. They are decisions of the court that are entitled to all the weight that any decision of the court has as precedent going forward, that I have no thought, no agenda, no purpose, no—you know, remotely no plan to—to—to think about reversing any of them, that these are cases that I accept as decisions of the court going forward.

Senator SESSIONS. All right.

Justice Sotomayor said a similar thing about the *Heller* case, and it didn't bother her one bit being the dissent in the *McDonald* case Monday. So you're not saying that you're binding yourself to be a 6-3 vote with now six members of the Supreme Court on the gun cases, and you're not binding yourself and suggesting you feel bound by *Lopez* and *Morrison*, are you?

Ms. KAGAN. Senator Sessions, it wouldn't be appropriate for me to bind myself with respect to any future case that came before me. It wouldn't be appropriate for me in any case to say, oh, I promise that I'm going to take a case like that and do X, Y, Z with it. That wouldn't be appropriate.

Senator SESSIONS. Well, I think that's what I expected. I think any—I think you'll go to the court free to vote either way on any of those cases, and we should fully understand it.

Thank you.

The Chairman. Thank you very much. I'm still withholding my time, but I will take a minute of my time to put into the record a letter sent to Senator Sessions and myself, letters of support for the Solicitor General. We got this from First Lieutenant David Tressler, who's currently deployed with the U.S. Army Reserve in the coast region province in Afghanistan. First Lieutenant Tressler is a 2006 Harvard Law School graduate. He was recruited by the military during Solicitor General Kagan's tenure as dean, enlisted in the Army Reserve after his graduate. He's now employed at a combat outpost in Afghanistan.

Senator Graham has been in that area, as I have, and several others know it. He writes, "There was a legitimate legal debate taking place in the courts over the Solomon Amendment. When court decisions allowed in 2004, Kagan made a decision to uphold the school's anti-discrimination policy. Military recruiters were never banned from the campus. During the brief period when recruiters were not given access to students officially through the law at the school's Office of Career Services, they still had access to students on campus through other means.

Immediately following this period in 2005, more graduating students joined the military—more graduating students joined the military in any year this decade. "Her", meaning you, "position on the issue was not anti-military and did not discriminate against members or potential recruits of the military, nor do I believe that they denied the military much-needed recruits in a time of war."

He continues, "I've heard the Solicitor General Elena Kagan speak several times about this issue. She always expressed her support for those who serve in the military and encouraged students to consider military service. It was clear she was trying to balance the institution's values underlying its anti-discrimination policy, whether genuine support for those who serve or are considering service in the military. Indeed, her sense of DATT injustice seems to grow out of her belief in the importance of military—importance and value of military service. I remember that she repeatedly said such while dean."

Then he concludes his letter—remember, this is addressed to Senator Sessions and myself—"I urge you to maintain that focus for the remainder of the hearings and refrain from further hyperbole questioning of Ms. Kagan's support for the men and women of the U.S. military. I believe that while dean of Harvard Law School she adequately proved her support for those who had served, who are currently serving, and all those who felt called to serve, including those like me who joined upon graduation, as well as those patriots who are not permitted to do so under the policy of don't ask/don't tell."

I'll put that letter in the record and I reserve the balance of my time.

Senator Hatch, it's over to you.

Senator HATCH. Well, thank you, Mr. Chairman. Welcome again. Happy to see you. Let me just say, some of my colleagues and my friends on the other side are really taken aback by some of the arguments on *Citizens United* and some of the other cases. I'd just like to kind of set the record straight on some of those, the Democrats' efforts to paint the Roberts court as a conservative activist court.

I think those efforts fall short of even the most basic factual scrutiny. The rulings in question were firmly grounded in the law, the Constitution, and relevant precedent. In fact, some of the so-called examples of "conservative activist" opinions pointed to by Democrats were joined by some of the most liberal members of the court. In the most oft-cited case, *Citizens United*, the ACLU sided with the conservatives on the court.

Take the *Exxon Shipping Company v. Baker* case. This decision was written by none other than Justice David Souter. Anita Totenberg of National Public Radio called David "a full-fledged member of the court's unabashedly liberal caucus." In that case, the court merely held that under maritime law, which we all know is largely judge-made, punitive damages cannot exceed actual damages of \$1 billion. You know, I see a lot of beating the breast on these things.

Let's just take the *Citizens United* case—it's an important case—*v. Federal Election Commission*. The case is usually cited in Democrat critiques of the court. This is the only one in which the court actually struck down an act of Congress. They did so for a simple reason: the law passed by Congress violated fundamental law, the First Amendment of the United States of America, the U.S. Congress—or Constitution, excuse me. The law in question prohibited the broadcast of political speech critical of politicians in the run-up to an election.

In defending the law, I might add, Solicitor General Kagan and her office argued that the government had the authority to prevent the publication of movies and other forms of political speech, such as even books or pamphlets—although General Kagan did limit her critique to pamphlets at the time—those movies, books or pamphlets that advocated for or against candidates. Even the liberal American Civil Liberties Union filed a brief arguing that the law was facially unconstitutional and a poorly conceived effort to restrict political speech should be struck down.

Now, faced with a law through which Congress exceeded its authority, the courts applied the Constitution and struck down the law. The majority's opinion in *Citizens United* was not an act of judicial activism, it was an act of correction, overruling a 20-year-old case erroneously decided by five justices who clearly substituted their policy views on how elections should be conducted to the dictates of the First Amendment.

Now, the court simply returned the doctrine it espoused in the 1976 case of *Buckley v. Vallejo*, which said that, "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

Now, this is an important point I think just has to be pointed out. Democrats claims that *Citizens United* overruled 100 years of precedent are simply untrue. The 100 years claim points to the Tillman Act passed in 1907, which barred contributions, namely given to candidates. *Citizens United* was about expenditures, money spent on independent advertising.

The first Federal law limiting corporate and labor union expenditures was not passed until 1947 and was not addressed by the Supreme Court until the 1970s. Plus, they put out there at least 25 cases that were precedential that *Citizens United* basically backed.

Now, to get to you, General Kagan, let me just say this. I also want to look briefly at another free speech case, and that's *United States v. Stevens*. The defendant argued that the Federal statute prohibiting the sale of depictions of animal cruelty was unconstitutional. In your brief defending the statute you made this argument: "Whether a given category or speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal cost."

Now, in his opinion for the court, Chief Justice Roberts responded to your theory this way: "As a free-floating test for First Amendment coverage, that sentence wherein you stated that whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs", he said that "as a free-floating test, he said, for First Amendment coverage, that sentence is startling and dangerous."

Now, I know you were representing your client, the United States, in this case, but you certainly did not have to make that unusual argument. Now, here's what I'm concerned about. It sounds a lot like other subjective theories that give judges a lot of power that you have discussed in your law journal activities.

Whether it is focusing on hidden subjective motives rather than actual objective effects, imposing restrictions based on the identity

of the speaker, or here, basing freedom of speech on an assessment of value and cost, I'm really troubled by how much power your arguments and theories appear to give to judges. Now, am I wrong to be concerned about this?

Ms. KAGAN. Senator Hatch, I think you are wrong to be concerned about it. Let me first talk about the *United States v. Stevens* brief. It's as hard case. Congress had passed a statute and it was a statute designed to deal with horrific acts of animal cruelty, including these things that I didn't know existed, these crush videos.

Senator HATCH. That none of us would like, that's for sure.

Ms. KAGAN. But it was—it was a statute that was—I hesitate to criticize Congress' work, but it was a statute that was not drafted with the kind of precision that made it easy to defend from a First Amendment challenge. And we thought that our best argument, really the only argument that we had, was to analogize the statute to other categories of expressive activity that the court had held were simply not protected by the First Amendment.

And most notably, the two categories that we used in that—in that brief were obscenity and child pornography, and those are categories where I think the court has done this kind of categorical balancing that I spoke of—that, you know, we spoke of in the brief, where the court has said, look, when it comes to obscenity or child pornography—child pornography is—is an especially apt example because the harm that Congress was trying to get at here—what Congress was trying to do was to turn off the spigot of distribution so that these materials would not be made in the first place. That was the theory that the court used to say that child pornography could be regulated under the First Amendment, that if we shut down the mechanisms of distributing and—and this material, nobody would produce this material. That's what Congress—that was clearly Congress' focus in passing this animal cruelty statute.

So what we tried to do, was to analogize this statute to the child pornography laws that the court had upheld in *Ferber*, and to say that the court should uphold this statute for the identical reason that it upheld the child pornography laws, that the court should realize the extraordinary harms of this—of this speech and should realize the way in which this regulation was really aimed at stopping the initial production, the initial horrific acts that went into the production of this speech.

That was—that was the government's view. It was a view that was accepted by Justice Alito in the case. He was the only vote we got, but he essentially accepted that theory. I think it was a very hard case because it was—again, I hesitate to criticize Congress' work, but another statute would have been easier to defend on First Amendment grounds, but we tried to do the best we could with it.

Senator HATCH. You and I agree on that.

I still have just a couple of questions about the military recruiting issue. You said yesterday that “the only thing that was at issue was essentially the sponsoring organizations, whether it was the Office of Career Services, or instead the Student Veterans Organization.” Now, it seems to me, though, that in addition to who sponsored the recruiters, the real question was what they were able to offer.

Ms. KAGAN. I'm sorry. What they were able?

Senator HATCH. What they were able to offer. The law, after all, says nothing about sponsors and it says nothing about whether recruiting goes up or down in a particular time period. The law requires the same access to campus and students for the military as other employers received. The Harvard Law School Veterans Association said that they had a tiny membership, meager budget, and no office space. All they could do was facilitate a few student-initiated contacts with military recruiters. All they could do was establish an e-mail account to receive inquiries from students.

Now, is this what you referred to yesterday as "full and complete access to our students", and did you believe that this was an equal substitute for what the Office of Career Services provided for all other employers, all other legal employers?

Ms. KAGAN. Senator Hatch, I did believe that it was an equally effective substitute, that what our Office of Career Services does, they do a good job, but what they do is basically no more than to ensure that students know when a military—excuse me, when an employer of any kind is coming and to enable a student and the employer to hook up with each other. And that's what our Office of Career Services do. They have upwards of 700–800 employers that come to our campus every year, and what the Office of Career Services does, is to make sure that students know when those 700–800 employers are coming and where they're going to be.

Senator HATCH. But you have—

Ms. KAGAN. And to make sure—

Senator HATCH. You have to admit that the facilities weren't as available to the military, to the recruiters, that they would have been with the office that you're describing. I mean, let me make that point a little bit more clearly, maybe. Yesterday you also said that "the military, at all times during my deanship, had full and good access."

Now, the Judge Advocate General's Office, however, stated that without access to the Office of Career Services, we are relegated to wandering the halls in hopes that someone will stop and talk to us. It is our view that denying access to the Career Services office is tantamount to chaining and locking the front door of the law school, as it has the same impact on our recruiting efforts."

Again, I'm not asking whether recruiting went up or down or whether there was some access to something at all times. The law requires the same access for the military as other employers, not access that the dean may consider good. Do you disagree with this description of the situation by the Office of the Judge Advocate General?

Ms. KAGAN. Senator Hatch, I appreciate that reasonable people can disagree about this issue, but I do think that the military, at all times, regardless whether it was—whether the Office of Career Services was sponsoring or the Veterans Association was sponsoring, had excellent access to our students. And over many years prior to my deanship, the Veterans Association had sponsored.

The Department of Defense had thought that that sponsorship was fully adequate to their needs, and I think that there are other documents in those records which suggest that, which suggest the Department of Defense going in and saying, we met with a lot of

people and it was great, and we very much appreciate the access that we were getting.

The Office of Career Services really exists as a kind of—it makes sure that students know that employers are coming and it makes sure that students have the opportunity to talk with those employers. The Veterans Association did a fabulous job of doing the same thing. So I do think that the military recruiters had excellent access either way, and in fact that semester in my deanship, the one period of 12 in which the Veterans Association did sponsor the interviews in that year, military recruiting did go up. I do think that the effects in some sense speak for themselves.

Senator HATCH. OK. Well, let me switch topics again, this time to abortion. When Congress debated the ban on partial birth abortion, one issue was whether this particularly gruesome abortion method was medically necessary. The American College of Obstetricians and Gynecologists, or ACOG, they call it, is a natural source of medical opinion on this subject.

According to the documents we received, you wrote a memo to your superiors in the Clinton White House about this. You noted that the American College of Obstetricians and Gynecologists was considering a statement that its experts' panel found no circumstances under which partial birth abortion was the only option for saving the life or preserving the health of the woman. You wrote, "This, of course, would be disaster."

That's something that does bother me because "it would be a disaster", you wrote, because ACOG opposed the ban on partial birth abortion. If anyone ever found out and you wrote that it could leak even if ACOG did not officially release its original statement, it could have negative political consequences. So you drafted alternative language that would say that partial birth abortion "may be the best and most appropriate procedure and in particular circumstances save the life or preserve the health of the woman." Now, that's a very different spin, and obviously a more politically useful spin.

The ACOG executive board copied your language verbatim into its final statement. Your language played an enormous role in both legal and political fights over banning partial birth abortion. The Supreme Court relied on it when striking down the Nebraska ban in *Stenberg v. Carhart*. Now, I'm really stunned by what appears to be a real politicization of science. The political objective of keeping partial birth abortion legal appears to have trumped what a medical organization originally wrote and left to its own scientific inquiry, and that they had concluded. Did you write that memo?

Ms. KAGAN. Senator, with respect, I don't think that that's what happened here.

Senator HATCH. Well, I'm happy to have you clarify it. That's my question: did you write that memo?

Ms. KAGAN. I'm sorry. The memo which is?

Senator HATCH. The memo that basically caused them to go back to the language of "medically necessary" that was the big issue to begin with.

Ms. KAGAN. Yes. Well, I've seen the document and the document is——

Senator HATCH. But did you write it?

Ms. KAGAN. Is——

Senator HATCH. Is that your memo?

Ms. KAGAN. The document is certainly in my handwriting. I don't know whether the document was a product of a conversation that I had had with them.

Senator HATCH. So it's yours.

Ms. KAGAN. If I could just go back, Senator Hatch.

Senator HATCH. OK.

Ms. KAGAN. This was an incredibly difficult issue for everybody who was associated with it, for obvious reasons. President Clinton had strong views on this issue, and what he thought was that this procedure should be banned in all cases except where the procedure was necessary to save the life or to prevent serious health consequences to the woman. Those were always his principles.

We tried, over the course of the period of time when this statute was being considered, actually twice, to get him absolutely the best medical evidence on this subject possible. And it was not easy because, as everybody in Congress knows, different people said different things about this. There was conflicting evidence. And we tried to do our best to bring all the evidence, all the conflicting views to his attention.

In the course of that, we did indeed speak with ACOG. ACOG had an interest in this statute and ACOG had views about the statute. What ACOG thought and always conveyed to us was two things. What ACOG thought was that, on the one hand, they couldn't think of a circumstance in which this procedure was the absolutely only procedure that could be used in a given case. But second, on the other hand, that they could think of circumstances in which it was the medically best or medically most appropriate procedure, that it was the procedure with the least risk attached to it in terms of preventing harm to the women's health.

And so we knew that ACOG thought both of these things. We informed the President, President Clinton, of that fact. There did come a time when we saw a draft statement that stated the first of these things which we knew ACOG to believe, but not the second, which we also knew ACOG to believe. And I had some discussions with ACOG about that draft.

Senator HATCH. OK. My time is about up. Let me just ask that question again: did you write "this, of course, would be a disaster"? It's your handwriting.

Ms. KAGAN. The——

Senator HATCH. You didn't get that from——

Ms. KAGAN. No, no, no. You're exactly right. I'm sorry. I didn't realize you were referring——

Senator HATCH. That's what I wanted to know.

Ms. KAGAN. Yes. Yes. No, that's exactly right. And—and the disaster would be, if the statement did not accurately reflect all of what ACOG thought, both—I mean, that there were two parts of what ACOG thought. And I recall generally, not with any great specificity but recall generally, talking to ACOG about that statement and about whether that statement was consistent with the views that we knew it had because they had stated them, that there was both, not the only procedure, but also that it was in some circumstances the medically best procedure.

And in their final statement, that—that sentence that it was not the only procedure, of course, remained because that is what they thought. But we did have some discussions about clarifying the second aspect of what they also thought, which was that it was in some circumstances the medically most appropriate procedure. And so I think that this was all done in order to present both to President—both to the President and to Congress the most accurate understanding of what this important organization of doctors believed with respect to this issue.

Senator HATCH. Mr. Chairman, I just have one or two sentences I'd like to say and then I'll finish.

Chairman LEAHY. I'll give you extra time.

Senator HATCH. Thank you, Mr. Chairman.

Well, I'll tell you, this bothers me a lot, because I know that there were plenty of doctors in ACOG who did not believe that partial birth abortion was an essential procedure and who believed that it was really a brutal procedure, and it was a constant conflict there. And as you know, many in Congress came to the conclusion it was a brutal procedure too, that really was unjustified. That bothers me that you intervened in that particular area in that way. Well, that's all I'll say about it, but I just wanted you to be aware that that bothers me.

Ms. KAGAN. Senator Hatch, there was no way in which I would have, or could have, intervened with ACOG, which is a respected body of physicians, to get it to change its medical views on the question. The only question that we were talking about was whether this statement that they were going to issue accurately reflected the views that they had expressed to the President, to the President's staff, to Congress, and to the American public.

I do agree with you, this was an enormously hard issue. President Clinton found it so, and thought that the procedure should not be used except in cases where it was necessary for life or health purposes. And we tried to get him the best information we could about the medical need for this procedure, something that was not always easy, and tried to, in all the statements that he made, to make sure and—and any statements—other statements that we were aware of to make sure that that information was accurately conveyed to the American public.

Senator HATCH. One of the things I did as an attorney was represent doctors, including some obstetricians and gynecologists. I had a lot of experience with them. I hardly ever met anybody who thought that was a fair or good procedure. But be that as it may, I just want you to know I'm troubled by it, even though I care a great deal for you and respect you.

Thank you, Mr. Chairman.

Chairman LEAHY. As the Senator knows, because we are going to finish this afternoon, I did want to give him extra time on that.

On my time, I would—and I would ask Senator Hatch to stay for this for a moment. I would like to put into the record a letter of strong support for Elena Kagan's nomination the Committee received from Professor Michael McConnell. He is now director of the Constitutional Law Center at Stanford Law School. Until recently, he was a Federal Appeals Court judge, appointed by President George W. Bush to the Tenth Circuit, strongly backed by Senator

Hatch. When President Bush nominated Professor McConnell, he was widely regarded as a brilliant law professor. He appeared before our Committee. He was championed by Senator Hatch.

Despite his provocative writings including staunch advocacy for reexamining the First Amendment jurisprudence, strong opposition to *Roe v. Wade*, strong opposition to the clinic access law, and his testimony before Congress that he believed the Violence Against Women Act was unconstitutional, I was assured by his response to our questions he understood the difference between his role as a teacher and advocate and his future role as a judge. He assured us he respected the doctrine of stare decisis and would be bound to follow Supreme Court precedent. I supported his confirmation, as did other Democratic Senators. He was confirmed.

Professor McConnell's approach to the law is thoughtful, but also staunchly conservative. That's why I carefully read his letter to the Committee in which he analyzed Solicitor General Kagan's legal philosophy in a number of areas Professor McConnell views as "important to those who adhere to a generally conservative understanding of the role of the Supreme Court, interpreting the Constitution and the laws of the United States."

Professor McConnell concludes, "On a significant number of important and controversial matters, Elena Kagan has taken positions associated with the conservative side of the legal academy. This demonstrates an openness to diversity of ideas, as well as a lack of partisanship that bodes well for service on the court."

Professor McConnell concludes his letter, "In Elena Kagan's service in the executive branch and her time as dean, she skillfully navigated political waters, but she's also demonstrated another quality. Publicly and privately in scholarly work and in her argument that we have for the United States, Elena Kagan has demonstrated fidelity to legal principle, even when it means crossing her political ideological allies. This is an admirable and essential quality in a judge."

Senator HATCH. Mr. Chairman?

Chairman LEAHY. Just as my fellow conservatives asked us to accept that Professor McConnell would be—would uphold the law and asked us, as Senator Hatch did, to vote for him, as they did, I would note that Professor McConnell concluded that "Solicitor General Kagan deserves not a grudging acquiescence, but an enthusiastic confirmation as an associate justice of the United States Supreme Court. I would hope that the same credibility that we gave him will be given to her."

Senator HATCH. Mr. Chairman, if I could just add, that's high praise, indeed, because I think Michael McConnell is about as good a constitutional expert and lawyer as we have in this country, and certainly a great teacher. By the way, just to correct the record, even though he thought the Violence Against Women Act was unconstitutional, I was the prime co-sponsor, along with—

Chairman LEAHY. I know you were. But that was his position, and I voted for him just the same.

Senator HATCH. So I understand there can be differences.

Chairman LEAHY. We have about 4 minutes left in the vote.

Senator HATCH. Thank you, Mr. Chairman.

Chairman LEAHY. I would yield to Senator Feinstein.

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

General Kagan, good afternoon. I know this has been a long hearing for you. I have just one question, and then a brief statement I'd like to make.

My question is on the Establishment Clause. I believe our Nation was founded on the principle that the United States would never be a place for religious persecution, and therefore that religion and the government would remain separate and independent of each other. I think that's part of what makes us a strong Nation, and it also protects us from religious discrimination.

Here is the question, and let me put it all into one: what will be your approach to interpreting the Establishment Clause of the Constitution, and how do you believe it works with the Free Exercise Clause? And then if you could respond also on the question of standing to sue, the ability to bring a case in the Federal court.

In the case of *Hein v. Freedom From Religion Foundation*, the court held that taxpayers no longer have constitutional standing to bring challenges to executive branch expenditures on the grounds that they violate the Establishment Clause. The problem is if taxpayers don't have the ability to bring a case, who does have the ability to bring a case and challenge whether the executive branch is complying with the Constitution? That's three things at one time, but I think you're probably able to handle them.

Ms. KAGAN. OK, Senator Feinstein, I'll try. I guess I'll start with the question of the two clauses, because both are very important to our constitutional system and neither should be subordinated to the other. There are times when they are in some tension with each other. Now, I think it's important to recognize that there are many times when that's not so, where they in fact go hand in hand and function perfectly well together. But there are some times when they may be in tension and it can cut in either direction.

So suppose that a State—a State government decides to give what is called a voluntary accommodation to some religious person, essentially a voluntary exemption of that person from an otherwise generally applicable law, and does that because the law would impose some substantial burdens on that person's religious practice, and the State thinks, you know what? In those circumstances we think that the person should be exempted from the law so that the person can follow the dictates of her conscience.

But then somebody else comes in and says, well, what do you mean? You're giving that exemption but you're not giving me an exemption, and—and—and why are you making that sort of special accommodation to this—to this person? That special accommodation must count as an establishment of religion, and so there you get a claim where there is an accommodation to religious—the free exercise of religion, but then there's a claim that that violates the Establishment Clause part of the First Amendment. And that's the kind of way in which there might be tension.

But what the court has said with respect to this issue, and there seems to me great virtue in this approach, is that in order to prevent that from happening or to prevent it the other way, where the State does something in order to—to advance Establishment Clause values and then somebody comes in and makes a free exercise claim, either way, what the court has—has stated is that there

needs to be some play in the joints, there needs to be some freedom for government to act in this area without being subject to a claim from the other side, some freedom for government to make religious accommodations without being subject to Establishment Clause challenges and some freedom on government's part to enforce the values of the Establishment Clause without being subject to free exercise claims.

That's not to say how any particular case should come out because sometimes the State goes too far, but that in general there needs to be a little bit of play in the joints in order to prevent the State from sort of not being able to do anything, from being hamstrung in this area.

As to—as to what Establishment Clause tests I would use, that is a hard, hard question. Right now, there are a multitude of such tests. The—the—the most established one, the oldest one, is the *Lemon v. Kurtzman* test, which is a three-part test focusing on the purpose of a governmental action, the effect of a governmental action, whether the governmental action has the effect—has the primary effect of inhibiting or advancing religion, and the third part of the test focuses on entanglement between the government and the religious entity.

And many, many justices have tried to kill this test. I think that there have been six individual justices who at least have expressed some skepticism about it. But it—it continues on. It has not been reversed. It—it's—and—and it's—it's usually the test that the lower courts apply. It's sometimes applied and sometimes not applied by the Supreme Court, very much depending on the circumstances, but it continues to be the—the—the test—the primary test of the court. Now, other justices have had different ways of approaching this issue.

Justice O'Connor famously asked about whether particular actions would be seen by reasonable observers as endorsements of religion. Some of the justices have used a kind of coercion test, asking whether a governmental action coerces a person in the exercise of religion. Justice Breyer has recently talked about religious divisiveness as a way to approach Establishment Clause inquiries.

And I think that the reason why there are so many tests, and I don't think that I've mentioned all of them even, I think that the reason is that the Establishment Clause can arise in a very wide variety of contexts with a very wide variety of factual situations and circumstances.

Sometimes one test might seem the appropriate way to analyze the problem and sometimes another, and it's very hard to say, kind of in the abstract, which is appropriate, that it's a more—it's a matter of sort of situation sense, if you will. It's a more contextual inquiry as to what's the approach to use that would make sense.

In general, I think what the—both First Amendment clauses are designed to do, and this is the way in which they work hand-in-hand with each other, what they're both designed to do is to ensure that you have full rights as an American citizen. You are a part of this country no matter what your religion is. And—and to—to ensure that religion just never functions as a way to put people, because of their religious belief or because of their religious practice, at some disadvantage with respect to any of the rights of

American citizenship. So I think that that's the sort of overall purpose of both parts of the amendment.

As to the matter of taxpayer standing, I want to be very careful here because there is a taxpayer standing issue, as I understand it, that will be before the court next term. The—the court has stated that taxpayers generally have standing to make certain kinds of Establishment Clause claims, specifically claims against Congressional legislation when—when—that a taxpayer, by virtue of being a taxpayer, can sue to contest governmental actions taken under Congress' power to appropriate money, but that a taxpayer may not have standing to contest executive action just by virtue of being a taxpayer.

Now, that doesn't mean that some—that there may not be somebody who has standing to contest such action. I think what the court has suggested is just that the sort of normal injury that Article 3 requires has to be shown, the injury can't come just by virtue of being a taxpayer but has to come from something else in addition. But there is, I think, a case on the docket.

Senator FEINSTEIN. Such as the individual being actually affected.

Ms. KAGAN. Yes. Exactly right.

Senator FEINSTEIN. Thank you. You know, I think even the other side would have to admit that you have a wonderfully well-ordered mind, and I've watched you over these days. When I haven't been right here and I've been able to look at television, I've watched you. I think your knowledge of the law and your ability to order your answers is really very impressive, and I just want you to know that.

Now I want to say something. If you are confirmed, and I believe you're going to be, you will be only the fourth female justice in history and the Supreme Court will have three women serving concurrently for the first time ever. As the first female dean of Harvard, the first woman to serve as Solicitor General, you've certainly broken several glass ceilings.

However, the fact is, many institutions still do not reflect the diversity of our society and the Federal courts, I'm sorry to say, are one of them. As of last month, only 48 of the country's 163 active Federal Appeals Court judges were women, and women comprised only 191 of 794 District Court judges.

According to the American Community Survey, a college-educated woman makes approximately \$20,000 less than her similarly educated male counterpart, and the average woman is paid only 77 cents for every dollar a man makes. I remember when it was 56 cents, so I know there's been progress. And this is not to say that progress hasn't been made. Women today make up nearly half of all law students, 30 percent of all lawyers, and when I first joined the Senate there were only two women serving in this institution, and today there are 17 of us. So we're making progress, but every advance, it seems to me, has really been hard-fought.

And I want to say one thing about the *Ledbetter* case now that it's history. I found it just shocking that the court would hold to a technicality when a woman couldn't possibly have known during the time that the tolling was taking place that she was disadvan-

taged, and when she learned she was disadvantaged it was too late.

For such a substantial time, she had been doing the same work as a man and not being paid for it. So I think, as more women are on the highest court, I really believe that once you cross that threshold and the doors open, it remains open for all time and others will follow.

I said this to Justice Sotomayor as well. You're a wonderful role model for women. And we'll forget whether you're a Democrat or a Republican, you know, you're reasoned, you have a commitment, you have a dedication and a staying power. You do us all well, and that's what I wanted to say. So, thank you very much.

Now I'll recognize Senator Grassley.

Senator GRASSLEY. Do I get to use your unused 6 minutes?

Senator FEINSTEIN. You want to use my 6 minutes? You can.

Senator GRASSLEY. I'm joking. Thank you very much.

I want to start with private property. The Takings Clause of the Fifth Amendment states, ". . . nor shall private property be taken for public use, without just compensation."

The plain language of the Constitution says an individual's property shall not be taken for "public use," yet the majority of the Supreme Court in *Kelo* wrote that the government could take a person's private property for a "public purpose," not using the word "use," which they determined included private redevelopment of land.

Do you believe that the Supreme Court correctly decided the *Kelo* case or do you believe that the Supreme Court improperly undermined constitutionally protected private property rights?

Ms. KAGAN. Senator Grassley, it was obviously a very controversial decision that has inspired a great deal of—of action in the State legislatures. I've not commented on particular cases. I've not graded cases. But a few thoughts about *Kelo*. Of course, what—what the—what the court in *Kelo* did was to say that the question of public use was not necessarily use by the public, but instead was use for a public purpose.

The court said that in the context of a taking of property that was done pursuant to a broad-scale urban development plan, so I think it—it remains an open question whether that public purpose test would apply in any other context without such a broad-scale urban development plan.

You know, one of the things that you learn in your first year of law school in your property class is *Cutler v. Bull*. The principle of *Cutler v. Bull* is that the government can't take the property of A just to give it to B. Here, what the—what the court said was that that principle did not apply, but it was very much dependent on this overall urban redevelopment plan. The question of—of whether the public purpose doctrine would apply outside of that context is, I think, an open question.

It's also true—it's also true that in some sense what the—what the—what the court did in this area when it said this was to kick the question back into the political process. In other words, the court didn't say, of course, that the government had to make—to do such takings. What the government said was that a State was permitted to do so.

And what States have done in the wake of that decision, in a—in a very striking manner, I think, is to say thanks, but no thanks, you know. We don't want that power, we don't want to be—we don't want to do this. We think doing this, taking property from one person to give it to another person, even in the context of a broad redevelopment plan, is not appropriate public policy.

So a number of States, I know—I don't know the exact number, but quite a number—have passed these kinds of anti-*Kelo* legislation, which makes sure that the—that the question never arises because the State government doesn't try to effect such a taking in the first instance.

Senator GRASSLEY. Are there any limits on the “public benefits” doctrine in *Kelo*?

Ms. KAGAN. Well, I—I—I do think that that *Kelo* only talked about that doctrine in the context of this urban development plan, so I think that the limits are the limits suggested by the *Kelo* facts themselves. I don't think that the court went beyond those facts in its decision.

Senator GRASSLEY. Under *Kelo*, the Court said that “pretextual” takings are still unconstitutional and a violation of the “public use” doctrine. Could you give me an example of a condemnation that is an unconstitutional pretextual taking?

Ms. KAGAN. Gosh, you know, I don't remember that exact line from *Kelo*, so I'm a little bit guessing as to the context. But I—I think probably what the court meant was a taking that the government does not truly to serve a public purpose, but instead more to give the property to another individual person, the kind of *Cutler v. Bull* scenario, take property from A, give it to B under the guise of a public purpose. So I would think that that's what the court meant, although I don't recall that exact statement. And I think that that also would provide a limit of—of the kind you're speaking about on—the doctrine.

Senator GRASSLEY. Can you think of any areas where, in your opinion, the Supreme Court has failed to provide adequate protection of constitutional property rights? And if you can think of any, then I'd like to know examples, or an example.

Ms. KAGAN. Well, you know, I've—I've—I've tried very hard, Senator Grassley, not to suggest where I see deficiencies in—in the court's handling of cases, so I think I won't answer that question with that degree of specificity. I mean, it is quite clear that the Constitution does in various ways, and most notably by the Takings Clause, protect property rights and that the job of the courts, with respect to those rights as any other, is to ensure that government does not overstep its proper bounds.

Senator GRASSLEY. The President who appointed you, in *The Audacity of Hope*, his book, said, “Our Constitution places the ownership of private property at the very heart of our system of liberty.” Do you agree with that statement?

Ms. KAGAN. Well, I—I do think that property rights are a foundation stone of liberty, that the two are intimately connected to each other in our society and in our history.

Senator GRASSLEY. I want to bring up the Second Amendment again. In *Prince v. U.S.*, the Supreme Court held that Congress

could not order State and local chief law enforcement officers to conduct Federal background checks on handgun purchasers.

In a March 1997 memo, Dennis Burke wrote that, based upon a suggestion from you, he asked the Departments of Treasury and Justice to provide options on what the President could do in this area by executive action. As an example, he cites your suggestion that the President, by Executive Order, might—might—be able to prohibit a federal firearms dealer from selling a handgun without local law enforcement certification. In other words, the President could prohibit handgun sales by licensed dealers, even if the Congress could not force the States to do so.

So this raises a fundamental issue not only in terms of the Second Amendment and the Tenth Amendment, but suggests that the President has the power to make law on his own. Was it your position that the President has the authority, by Executive Order, to prohibit federal firearms dealers from selling handguns without local law enforcement certification?

Ms. KAGAN. That was not my position, Senator Grassley. And if we could just step back a moment.

Senator GRASSLEY. I have a memo down that I want to bring to your attention, although I accept what you say. But the final paragraph of a memo to Michelle Crisci says, “Based on Elena’s suggestion, I have also asked both Treasury and Justice to give us options on what POTUS could do by executive action—for example, could he, by executive order, prohibit a FFL from selling a handgun without a CLEO certification? We will continue to pursue.”

Ms. KAGAN. Right. So let me just step back for a moment. This was, of course—President Clinton was very committed to the Brady law, which was a way of ensuring that guns were kept out of the hands of criminals, were kept out of the hands of insane people, by doing background checks on people before they could receive access to guns. It was a law, of course, with very wide support in Congress and across the country. It remains in effect today.

The court, in *Prince*—there was a system, a Federal system that enabled gun dealers to do those background checks, but it had not yet come into effect. I think it came into effect in 1998, and there we were in 1994 or 1995 or 1996, or something like that. And in the interim, before the Federal system was ready to operate in order to implement the Brady law, what had—what had happened was that the Brady law had required States to themselves do the background checks.

The CLEOs, the Chief Law Enforcement Officers of each jurisdiction, were required to do the background checks. And the court, in *Prince*, held that system unconstitutional, said that that was a violation of the Tenth Amendment because it inappropriately commandeered State officials for Federal purposes. And what that meant was that there was a kind of gap. The Congress could not require the State officials to do the background checks, but the Federal system—it’s called the—I think it’s the Insta-Check System, or something like that. The Federal system had not come into effect.

So the question was what to do in that period of, I don’t know, it was like 18 months or 2 years to ensure that background checks could be done consistent with the Brady law. What I suggested to

Mr. Burke in that memo was to say, let's see if there are any ways in which the President can take executive action to put in place some kind of interim system. That executive—to do background checks. Again, that executive action, of course, had to be consistent with the law, of course had to be consistent with any statutes that Congress had passed, Brady or anything else, and had to be consistent with the Constitution as well.

As I recall, and it's many moons ago, obviously, we didn't find any way to do that. I'm trying to think of exactly what did happen in that interim period. I think for the most part, States voluntarily did what they had been doing until the Federal system came into play and sort of mooted out the whole inquiry.

Senator GRASSLEY. You didn't have any predilections that the President could do that, that only Congress can do that? I think that's what you just told me.

Ms. KAGAN. Yes. The President could only do it if Congress—if legislation authorized him to do it. If legislation did, you know, that's fine. If there was no legislative authorization, then he couldn't do it.

Senator GRASSLEY. I think my last question in this area is obvious, but let me ask it anyway. In light of both *Heller* and *McDonald*, do you still believe that the Executive Branch has the power to—well, I shouldn't use the word still because I think you've cleared that up for us, but do you believe that the Executive Branch has the power to prohibit the sale of firearms without legislative authorization?

Ms. KAGAN. As I said, I never believed that the President had the power to prohibit that without legislative authorization, so in fact that's one that *Heller* and *McDonald* don't affect, that the President didn't have that power before and doesn't have that power after.

Senator GRASSLEY. OK. On the Second Amendment, dealing with self-defense, the historical background surrounding the Second Amendment strongly supports the concept that self-defense is a preexisting, fundamental right. William Blackstone, who the Supreme Court has called “the preeminent authority on English law for the founding generation”, cited the arms provision as “one of the fundamental rights of Englishmen”, calling it “the natural right of resistance and self-preservation—the right of having and using arms for self-preservation and defense.”

During her confirmation hearings, Justice Sotomayor testified that she couldn't think of a constitutional right to self-defense; rather, it is defined in criminal statutes by State laws. So, question: is self-defense a preexisting fundamental right? Or is it a notion created in the law as an affirmative defense in criminal statutes?

Ms. KAGAN. Senator Grassley, I've never had occasion to look into the history of this matter. What I do know is that *Heller* has stated very specifically that self-defense is the core of the Second Amendment right, which *Heller* has held confers an individual right to bear arms. The majority opinion in *Heller* really does speak of self-defense as the central element of that right.

Senator GRASSLEY. Yes. And let me introduce here the quote specifically: “deeply rooted in this Nation’s history and traditions”, from *Heller*.

Ms. KAGAN. Right. And that is, you know, a central part of the rationale of *Heller* and is settled law in the ways that I’ve expressed going forward.

Senator GRASSLEY. Okay. I’ll move on. Marriage is a State issue. Do you believe that marriage is a question reserved for the States to decide? And I’m only seeking your opinion because I know there might be cases coming down the road. Do you believe that marriage is a question reserved for States to decide?

Ms. KAGAN. Senator Grassley, there is, of course, a case coming down the road and I want to be extremely careful about this question and not to in any way prejudge any case that might come before me.

Senator GRASSLEY. That’s your right. So you don’t want to say any more, is that what you’re saying?

Ms. KAGAN. I think I’ll leave it there, given the——

Senator GRASSLEY. OK. Well, then let me follow up. Do you agree that the Supreme Court’s decision in *Baker v. Nelson* in 1972, holding that the Federal courts lacked jurisdiction to hear challenges to State marriage laws “for want of a substantial Federal question”? Do you agree with that decision? Why or why not? Is it settled law, in other words?

Ms. KAGAN. So I think that that—my best understanding is that that decision has some precedential weight, but not the weight of a “normal” decision. What that decision was, it was done under the court’s then-mandatory appellate jurisdiction and it dismissed the case, for want of a substantial Federal question. It dismissed it summarily without hearing arguments or reading briefs or whatever, just saying it was not going to accept the case under its then-jurisdictional powers.

My understanding is that there’s actually a question about what kind of precedential weight such a decision is entitled to, and arguments on both sides of that. I think, you know, probably the better view or the view that most people hold, I think, is that it’s entitled to some precedential weight but not the weight that would be given to a fully argued, fully briefed decision.

Senator GRASSLEY. So based on *Baker v. Nelson*, using your words, it’s not really settled law, even though a one-sentence statement as precedent, it says “the appeal is dismissed for want of a substantial Federal question.” That’s a pretty simple decision to be based on the Supreme Court. But you’re saying that this may not be settled law?

Ms. KAGAN. My understanding is that there is sort of a question about the precedential effect of those kinds of summary dispositions. My—what I—what I think is true, is that most people think that those kinds of summary dispositions have some precedential weight, but not the precedential weight that’s given to a fully argued and fully briefed decision.

Senator GRASSLEY. Well, the decision involved the Fourteenth Amendment that was ratified, as you know, back in 1868, and the case was decided in 1972. What has changed in the Fourteenth Amendment since then to warrant a new review under the Four-

teenth Amendment that this might not be a Federal question or that this is not a Federal question?

Ms. KAGAN. Senator Grassley, I think that the—that the task for a court is—is, you know, to decide a case that comes before it. A case might come before it or might not come before it. If it does come before it, the question will be to—you know, to consider the facts, to consider the arguments that are made, to hear the—to read the briefs.

Senator GRASSLEY. In regard to that and stare decisis, what weight would you give to *Baker v. Nelson*?

Ms. KAGAN. Well, as I suggested, Senator Grassley, first, I think that there was a question about the precedential weight to be given to summary dispositions, and I would very much want to hear argument and hear briefing about that question and talk to my colleagues about that question. My—my best understanding is that what most people think is that these summary dispositions get some precedential weight, but they—and—but they don't get the full weight that a fully briefed, fully argued decision gets.

There is—you can see why people might think that, because part of the reason that a decision counts as precedent is because it really has been fully considered, that the briefs have been read, that the arguments have been heard, that the judges have had a chance to talk with each other, and the question is whether a summary disposition, because it's done kind of, you know, without all that process, gets the full precedential weight.

As I've said, this is—this is—this is not a question on which I've thought deeply. I'm sort of expressing to you my best understanding of what I take to be kind of the consensus position on this, but it's—obviously the question on the precedential weight of that summary disposition is itself a question for the court to consider and—and I would do so in the usual way.

Senator GRASSLEY. I would only say that I'm disappointed that you didn't use the word "settled law" in the same definitive manner in regard to *Baker v. Nelson* as you have so many other times in the last 2 days. And—well, that's it.

Chairman LEAHY. Well, actually, the answer she gave was basic Hornbook law, that generally accepted—totally accepted Hornbook law.

But did you have another question you wanted to ask?

Senator GRASSLEY. No.

Chairman LEAHY. Because—then Senator Specter. And then after Senator Specter finishes—and again, I'd urge Senators, if you don't feel you need the whole 20 minutes—I've allowed some Republican Senators to go over the 20 minutes because—so they could finish up their questions, but if you don't need the whole 20 minutes, it will not hurt my feelings or the nominee's feelings if you don't use it. But we will then break for lunch immediately when Senator Specter finishes.

Senator SPECTER. Thank you, Mr. Chairman. I believe that I can finish in less than the 20 minutes and yield back some time. When I finished my first round, Solicitor General Kagan, I was asking you about what cases the court would take, what you would do to grant certiorari.

I went through a number of matters where the power of Congress had been curtailed when the court took over the fact-finding position, but a great deal of what the court decides is on the cases they decline to take up. I want to talk to you initially about two cases, the Holocaust survivors and the survivors or victims of 9/11, two cases that you are intimately familiar with because you worked upon them as Solicitor General, and I raised these with you in our informal meeting, and again by letters which I sent you.

And here I am not asking how you would decide a case, but only whether you would vote to take the case up for decision by the court. The Congress, as I've mentioned briefly earlier, has the power to direct the court to take certain cases, as the Congress did with McKay and Feingold, the flag burning case, the Fair Labor Standards Act.

The Holocaust issue was one where Holocaust victims who suffered terribly brought lawsuits against an Italian insurance company, and the administration took the position that the Supreme Court should not hear the decision by the Court of Appeals for the Second Circuit, which decided that the claims were preempted by an executive branch foreign policy favoring the resolution of such claims through an international commission.

Well, that seems like a wrong decision to make. You have an insurance policy. If an insurance company won't pay on the claim, you ought to be able to go to court and sue them and not to have the governments of the two countries decide what you can sue.

But in any event, it is a different issue as to taking the case. Without asking you how you would decide it, would you vote to have the Supreme Court consider that case?

Ms. KAGAN. Senator Specter, this is difficult for me because, as I understand this, this is a live case and I continue to represent one of the parties in this case. In other words, there may very well be a petition for certiorari in this case, but I continue to be Solicitor General and—and would head the office that would have to respond to that petition. And I think that—

Senator SPECTER. If you were on the court you would recuse yourself. This would be one of those cases, wouldn't it?

Ms. KAGAN. That is—that is true, Senator Specter. But—but I don't want to count my chickens before I am confirmed. I still am Solicitor General and I'm the counsel of—

Senator SPECTER. Ms. Kagan, you're counting your chickens right now. I'm one of your chickens, potentially.

[Laughter.]

Chairman LEAHY. It reminds me of the Churchill speech to Canada, "Some neck, some chicken."

Ms. KAGAN. I think I remain Solicitor General unless and until this body confirms me, and that means I remain a party in this very case that you're—that you're asking me about.

Senator SPECTER. Ms. Kagan, I'm asking you how you would decide a case, how you—what you would decide on taking a case. Would you hear this case or not?

Ms. KAGAN. I—I think I'm going to be responsible for responding to the petition for certiorari in this case as Solicitor General, unless I'm confirmed to the court, and while I'm Solicitor General I don't

think that I can say how I would vote on a—on a cert response that the Solicitor General will be filing.

Senator SPECTER. Well, Ms. Kagan, I don't see why not, but the clock is running and I'm going to move on.

The next identical question involves the lawsuit brought by the survivors or the victims of 9/11, and there the Court of Appeals for the Second Circuit said that the foreign immunity statute, which excluded tortious conduct, like flying a plane into a building, did not apply. Congress had spoken that a country like Saudi Arabia should be liable for this kind of tortious conduct.

And the Second Circuit said no because the Kingdom of Saudi Arabia had not been placed on the terrorist list. Well, it had nothing to do with the statute. Then as Solicitor General, you said that the Second Circuit was wrong, but the Supreme Court ought not to hear the case because the conduct by the Saudis was outside the country, but the impact was inside the country. The question is, would you think that case ought to have been heard by the Supreme Court? As a justice, would you vote to take that kind of a case?

Ms. KAGAN. Senator Specter, the government did argue, based on very extensive consultations, that the Supreme Court ought not to take that case, and that continues to be the government's position. You know, I don't think it would be right for me to undermine the position that we took in that way by suggesting that it was wrong.

It was, in fact, a position of the U.S. Government, in line with the interests of the U.S. Government, that I authorized and that I thought was appropriate for a number of reasons, which—which I'm happy to talk about with you. But—but I—I can't say—I mean, I've not said with respect to any of—I think that the decisions that I made as Solicitor General on behalf of the U.S. Government as my client are ones that I can't undermine in this—in this hearing room.

Senator SPECTER. Ms. Kagan, candidly, I don't think that is any reason not to respond to my question, but I'm going to move on.

We didn't quite finish my question to you of the same nature about whether, if confirmed, you would vote to take the case involving the Detroit Federal court decision on the Terrorist Surveillance Program, which the Sixth Circuit ducked on standing grounds with a powerful dissent. The Supreme Court denied cert. Would you have voted to take that case? You gave me three categories of cases. But I understand your three categories of cases, but again, that doesn't answer the question: would you vote to take that kind of a case?

Ms. KAGAN. Well, Senator Specter, I do think that this is a case that, as I understand it, generally falls within the third category of case, a case which presents an extremely important Federal issue as to whether the executive has overstepped its appropriate authority and has essentially flouted legislation in the area. The sort of curlicue on this case does have to do with the standing question, with the question whether the court has jurisdiction and could reach the merits question, which is of such importance. Now—

Senator SPECTER. You said all of that yesterday. Would you take the case?

Ms. KAGAN. Senator Specter, I've—I've not read the petitions, I've not read the briefs in the way that I would as a judge. I do think that the standing issue itself is of some real importance, and it's of some real importance because it goes to the question, who does have standing to—challenge surveillance policies when the very notion of those surveillance policies—when—when those surveillance policies are confidential and you don't know whether you're being surveilled.

And if nobody does have the ability to come in and say, look, I have reasonable grounds to believe that I'm being surveilled, if instead one has to show that one absolutely has been surveilled, that really does—you know, that very much detracts from the ability to ever reach the merits question of whether the surveillance is appropriate. So I think for that reason, you know, the standing issue is of significant importance as well.

Senator SPECTER. May I move along? You've had a lot of time to take a look at that. We met weeks ago. I sent you a letter. But apparently I'm not going to get an answer there either.

Let me come back to a question which ought to fall squarely within the Kagan doctrine of answering the substantive question. None of these other reasons would apply. We have the rational basis test for deciding whether a record is adequate, *Maryland v. Wirtz*, which I talked to you about—Justice Harlan. You have a congruence in proportionality standard. Those don't involve specific cases as to what you would decide, they involve standards. And certainly that comes within your ambit of answering a substantive question: which would you apply, if confirmed?

Ms. KAGAN. Senator Specter, as I understand it, the congruence and proportionality test is currently the law of the court, and not withstanding that it's been subjected to significant criticism and not withstanding that it's produced some extremely erratic results. And I can't, you know, sit at this table without briefing, without argument, without discussion with my colleagues and say, well, I just don't approve of that test, I would reverse it.

What I can say is that I understand the criticisms that have been leveled against that test. There seems to me real force in the notion that a test in this area dealing with Congress' Section 5 powers really needs to provide clear guideposts to Congress so that Congress knows what it can do and knows what it can't do, and so the goalposts don't keep changing and so Congress can do what—can pass legislation, confident in the knowledge that that legislation will be valid. And I think that that those concerns are a very significant weight, and—and the question for the future on the court will be whether those concerns can be met under the test that's now in existence.

Senator SPECTER. Ms. Kagan, if you have to discuss with your colleagues the kinds of questions that we're raising, that I have just raised, you wouldn't answer anything, and perhaps you haven't answered anything.

Ms. KAGAN. Well, Senator Specter, I certainly do have to rebrief and—

Senator SPECTER. Perhaps you haven't answered much of anything.

Ms. KAGAN. Senator Specter, I—I do have to read briefs and listen to arguments and discuss——

Senator SPECTER. Why do you have to read briefs on a standard? This is not a specific case, this is——

Ms. KAGAN. This is——

Senator SPECTER. This is a standard as to whether the rational basis is sufficient or whether you're going to have congruence and proportionality.

Ms. KAGAN. Senator Specter, the congruence and proportionality test has been a standard that's been adopted by the court that is precedent going forward, and you shouldn't want a judge who will sit at this table and who will tell you that she will reverse a decision without listening to arguments and without reading briefs and without talking to colleagues, notwithstanding that that person knows that that test has been subject to serious criticism.

Senator SPECTER. Well, Solicitor General Kagan, I think the commentaries in the media are accurate. We started off with the standards that you articulated at the University of Chicago Law School about substantive discussions, and they say we haven't had them here and I'm inclined to agree with them. The question is where we go from here. You have followed the pattern which has been invoked since Burke, and you quoted me in your Law Review article, that "some day the Senate would stand up on its hind legs."

It would be my hope that we could find some place between voting no and having some sort of substantive answers. But I don't know that it would be useful to pursue these questions any further. But I think we are searching for a way how Senators can succeed in getting substantive answers, as you advocated in the Chicago Law Review, short of voting no.

The other issue which I discussed with you at some length—and I'm going to wrap up and yield back some time here in a minute or so—and that is what, if anything, can be done about nominees who drastically abandon positions taken at the confirmation hearings. There, I'm pleased with your response on television. Brandeis and the famous article he wrote in 1913 talks about publicity and that is why I think television would be so good to tell the public what is going on.

I would like to put into the record the questioning that I made of Chief Justice Roberts, which took 28 of my 30 minutes, and his concurring opinion in *Citizens United*, which is an apology, a, really, repudiation of everything he testified to, just diametrically opposed. That concurring opinion goes into great detail as to why stare decisis ought not to be followed. I'd like to have that in the record, Mr. Chairman.

Chairman LEAHY. Without objection, it's part of the record.

[The information appears as a submission for the record.]

Senator SPECTER. I again acknowledge, it's a big difference between appearing here at a nomination proceeding as opposed to deciding a case in controversy. And I don't challenge Chief Justice Roberts' good faith, but it does leave us perplexed as to—as to where we head.

Mr. Chairman, I—thank you Solicitor General Kagan. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman LEAHY. I thank you.

We will—we will recess. It's now 1:10. Let's be back here about 2:10. Thank you. We stand in recess.

[Recess 1:10 p.m. to 2:09 p.m.]

Chairman LEAHY. I welcome everyone back. I couldn't help but notice that General Pontier Kennedy is in the second row, the first woman to achieve the rank of three star general in the United States Army. And the whole thing will be put in the record. But I appreciate very much, General, what you wrote. And I'll just read one paragraph of it.

General Kennedy said, "I commanded both intelligence and recruiting units in my career in the military. Based on my experience in military recruiting, I am completely confident that Elena Kagan is a strong supporter of our men and women in uniform and appropriately handled military recruiting policies at Harvard Law School by ensuring they had full access to the student body during her tenure. I am pleased to be here today to lend my support to her confirmation." We will hear more later, but that will be part of the record.

I believe, Senator Kyl, you're——

Senator KYL. Once again we play to a packed crowd here.

Senator LEAHY. Well, that's because I think everybody has asked most of the questions. But somebody has a "few" more.

Senator KYL. Well, Mr. Chairman——

Senator LEAHY. Notice the emphasis on "a few"——

Senator KYL. I've actually got some different questions and because of the limited time, I will ask you, please be as succinct as you can and I may interrupt you if I feel we have to move on.

Let me first of all ask you about a letter that Senator Graham raised with you but did not ask the two questions I have.

November 14th, 2005, this related to an amendment that he and I and Senator Cornyn had filed to limit the jurisdiction of the courts on habeas petitions by aliens held Guantanamo.

Now, first I have to tell you, I considered your language injudicious when you compared our actions to, and I'm quoting now, "the fundamentally lawless actions of dictatorships" and I wonder why you felt—obviously you felt strongly about this, or you wouldn't have used those words, but why did you feel it necessary to describe what we were proposing in those terms?

Ms. KAGAN. Senator Kyl, I don't think we did, or at the very least we did not mean to compare you to dictators. The only thing that the letter was meant to say was that we should hold ourselves to very high standards, at least as high, or higher, than the standards that we would apply to dictatorships. And those were the standards that we were urging Congress to hold itself to in considering this legislation. And Congress in fact did. I mean, within a matter of day Congress came together, 84 to 15, a remarkable act of bipartisanship and passed a very good piece of legislation which did provide our Article 3 review of——

Senator KYL. Excuse me.

Ms. KAGAN—[continuing]. Determinations.

Senator KYL. There was more to it than that though. You suggested in the letter that the habeas rights of which you were speaking should apply beyond Guantanamo to foreign theaters of war. You wrote it, I'm quoting now, "We cannot imagine a more in-

appropriate moment to remove scrutiny” and the scrutiny means is equivalent here to habeas jurisdiction “of executive branch treatment of non-citizen detainees. We are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions, and the abuse of prisoners in Guantanamo, Iraq, and Afghanistan.”

Now, abuses existed in all three places. The obvious import of the argument was that the reach of habeas should extend to Guantanamo, Iraq, and Afghanistan.”

Ms. KAGAN. Senator, I think that the focus of the letter as the focus of everybody’s attention at that time was on the Guantanamo detainees. And as you know I, as Solicitor General, I’ve advocated strongly and I’ve made sure that my name appeared as counsel of record on the U.S. Government’s Bagram brief because I believed that the United States has very strong interests in this in the—

Senator KYL. Here’s my question. That is the position you took as Solicitor General dealing with the rights of habeas Bagram. You expressed a personal opinion before that. This issue could well be presented to the Court and what I want to know is whether or not it will be the position you argued on behalf of a client, the United States, where what was personally in your heart and caused you to write with such passion to members of the Senate here?

Ms. KAGAN. Well, the letter, I do think, was focusing on Guantanamo detainees and was focusing on two questions—

Senator KYL. But it wasn’t limited and you specifically went out of your way to include also Iraq and Afghanistan in the same clause.

Ms. KAGAN. I think we can argue about the letter, the legislation and what every—

Senator KYL. What is your personal view then, that it would not apply to Bagram just to use a very specific example?

Ms. KAGAN. The—

Senator KYL. As you argued in the McCala case?

Ms. KAGAN. Senator Kyl, I’m Solicitor General. The view that I have advocated, and I have advocated it strongly, including by signing my name on a Court of Appeals brief, which the Solicitor General almost never does, is that habeas should not extend to Bagram.

Now, I couldn’t comment, I would be recused from that case that I signed my name on. This decision might come to the Court—excuse me, this question—

Senator KYL. If I could just interrupt. You understand what I’m asking you. If a case similar to that came to the Court and you didn’t recuse yourself, I don’t know whether you take the position that you argued on behalf of a client or you take the position that was apparently on your heart when you wrote this letter to us.

Ms. KAGAN. Well, Senator Kyl, I don’t think that that letter expresses view on the question of habeas rights at Bagram. I think that that letter was focused on the Guantanamo issue.

Senator KYL. Well, then it was gratuitous that you included the phrase, “we are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions, and the abuse of prisoners in Guantanamo, Iraq and Afghanistan.”

Ms. KAGAN. I think that that’s just a description of what we were aware of. But the focus of the letter—

Senator KYL. You also said in the letter, and I'm quoting now, "unfortunately the Graham Amendment would prohibit"

Senator LEAHY. You'll have extra time if need be, but let her answer the question.

Senator KYL. I'm happy to do that, but we don't have a lot of time and I'm going to pretend like I'm a Supreme Court Justice for 14 minutes and you're still the Solicitor General and I will interrupt you if I think we need to move on.

In the letter you said, "unfortunately the Graham Amendment would prohibit challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment."

It's pretty clear you were saying that habeas should be available to challenge all aspects relating to detainees including their treatment or conditions of confinement. Neither the Bagram case nor the MC authorized habeas claims to challenge conditions of confinement or treatment. Do you believe that the treatment of prisoners should be a subject of habeas in these cases?

Ms. KAGAN. Senator Kyl, I don't believe that that is a question that has come before the Courts. And given that—

Senator KYL. It has not, you're right.

Ms. KAGAN.—I would not want to suggest how I would decide that question ?

Senator KYL. But you have suggested how you would decide it by saying, "unfortunately the Graham Amendment would prohibit challenges to detention practices, treatment of prisoners" and so on. So you've expressed a personal opinion about that. And why shouldn't I assume that you would bring that personal opinion to the bench?

Ms. KAGAN. Senator Kyl, what we expressed in that letter was opposition to the totality of the initial Graham Amendment, not the Graham/Kyl/Levin Amendment that eventually passed. There were a number of things about that amendment that we thought went too far. I think we were stating the full extent of the amendment's effect. But I don't think that that letter can fairly be read to express a legal view as to each of the particular—

Senator KYL. I absolutely disagree with you about that. I dealt with habeas to challenge the detention practices, treatment of prisoner, adjudications of their guilt, and their punishment. That's what the letter specifically said. I quoted it accurately here.

Ms. KAGAN. Senator Kyl—

Senator KYL. Now we later changed the amendment to only relate to the determination of guilt and punishment. We left out the treatment of prisoner aspects of it because as you know that brings in a whole host of huge problems for the Courts. And if we were to bring that in to our military justice system it could grind it to a halt. Go ahead.

Ms. KAGAN. Senator Kyl, my view of that letter or my view of just my current state of mind is that I have no preexisting views on the way I would approach, as a judge, the sort of questions that you are asking me about.

Now, you know, I am perfectly happy to go back to that letter and to try to parse it as carefully as you are parsing it, and to see whether it expressed a point of view—expressed a view as to a particular legal issue that might come before me. And if I think that

the letter does express a very particular point of view on a particular issue that might come before me, as in all such cases, I will certainly consider that fact, talk to my colleagues about that fact in determining whether recusal is appropriate.

Senator KYL. I think that's appropriate. And I may offer something else to you. And I invite you to do this. I'll probably have a couple of questions for the record anyway. Take a look at the record, and if you want to expand in any way on what you've commented on here, or make any other point to that, please do that in writing and that way you'll have the full time to think about it and comment on it in whatever way you would like to.

Let me switch subjects here. During the Solicitor General hearing—the hearing for your nomination as SOMETHING, you said in response to question by Senator Cornyn, quote, “There is no Federal constitutional right to same-sex marriage.” Now, to me that means the Constitution cannot properly be read to include such a right. Is that what you meant to say?

Ms. KAGAN. Senator Kyl, that question was asked me in my role as Solicitor General. The question came to me from Senator Cornyn because Senator Cornyn acknowledged and stated what is true which is that I had opposed and stated opposition to the “don't ask, don't tell” policy and Senator Cornyn asked me, given that stated opposition, could you perform the role of Solicitor General and particularly, I think, could you with appropriate vigor defend the constitutionality *Doma*?

And my answer was meant to say, yes, I absolutely could defend vigorously the constitutionality of *Doma*, that I understood what the state of the law was and that I understood what my professional responsibilities were. And if that case had come to the Supreme Court this year, I certainly would have been at the podium——

Senator KYL. With all due respect, *Doma*'s constitutionality is a different question than your statement. And there were no qualifications on it, you said, “there is no Federal constitutional right to same-sex marriage” period. Now, are you qualifying that now? Are you saying that you meant something different by those clear words that you expressed to Senator Cornyn? And I didn't take it out of context.

Ms. KAGAN. I was absolutely saying that I understood the state of the law and that I accepted the state of the law——

Senator KYL. So you're only saying then that as of right now the Court hasn't declared there to be a Federal constitutional right; is that all you're saying?

Ms. KAGAN. I am saying that I very much understood, accepted the state of the law and that I was going to perform all my obligations as Solicitor General consistent with that understanding and consistent with that acceptance.

Senator KYL. So you wouldn't tell us today then whether you believe that the Constitution could be properly read to include such a right?

Ms. KAGAN. I don't think that that would be appropriate. As Senator Grassley and I talked about, there is a case that's pending, the case may or some other case might come before the Court, and so I couldn't go any further than that.

Senator KYL. So then when you said, “there is no Federal constitutional right to same-sex marriage” what you meant by that was the Court has not held that there is a Federal constitutional right to same-sex marriage?

Ms. KAGAN. The question was, could I perform my responsibilities as Solicitor General? Did I understand the law, did I accept the state of the law? And the answer was yes as to both.

Senator KYL. The two Arizona—or the Arizona case I was talking to you about before our last questioning concluded, the *Chamber of Commerce v. Candalaria* case, I wanted to ask some more questions. But let me just ask you one case—or one question about that case. And then also another case called *Lopez Rodriguez v. Holder*, you might remember this was a 9th Circuit case that applied the exclusionary rule to civil immigration proceedings. And you declined on behalf of the government to ask the Court to take that case.

What I wondered is—and I found that rather remarkable since there was a split in the circuit. The Supreme Court had already spoken on it, there was a significant constitutional issue involved, obviously a question of significant political importance and yet you chose not to suggest that the Court should take that case, but rather to suggest the Court take the Arizona case which didn’t involve any of those considerations.

Nonetheless, my question is this, were either of those cases that were your decision to take them influenced by any political considerations? And I say that broadly, meaning, for example, any contact from the White House or officials at the Executive Office of the President or contacts of that sort in either of those two cases?

Ms. KAGAN. Senator Kyl, I’m persuaded that we made the correct decision on the law in both of those cases. I don’t think that I can talk about internal deliberations of the Solicitor General’s office whether with respect to the White House or otherwise.

Senator KYL. So you cannot tell the Committee whether or not there was any contact irrespective of the content of the contact?

Ms. KAGAN. Senator Kyl, I don’t think it would be right for me to talk about, you know, particular contacts and particular cases. That that counts as sort of internal deliberations. I do think that we made the right decision on the law for the United States’ interests in both of those cases.

Senator KYL. I think that there wouldn’t be anything wrong with the Committee understanding whether or not your decision was based on considerations other than purely legal, especially if it came in the form of requests by the White House or people within the White House because of the rather political nature of these two cases. I mean, it wouldn’t be surprising, in a way, that there would be a lot of political interest in this. It would be surprising if the Solicitor General’s office became involved in cases or took positions in cases based upon the political advice or efforts. You don’t think that that wouldn’t be an appropriate inquiry for us?

Ms. KAGAN. Senator Kyl, the Solicitor General’s office does, from time to time, and I think that this is true in every administration, have some communications with members of the White House with respect to particular cases. That is not a surprising thing and I think it’s true in every administration. But I don’t think it would

be right to talk about internal deliberations in any particular case and I do think that as to both of those cases that you mentioned the Solicitor General's office made the correct decision on the law, on the legal principles that were involved for the United States as a client.

Senator KYL. I'm sure you can defend your position. You do that admirably. But, it seems to me that simply noting whether or not there were such contacts would not be an inappropriate thing for you to provide to the Committee.

Let me ask you one more time about foreign law because there have been several different iterations of this. Senator Grassley asked you and I have an exaction quotation of what you said in response to that, you said, "while you were in favor of good ideas coming from wherever you can get them, the judges shouldn't be bound by foreign legal precedent." Now, that's a—and you closed by saying, "fundamentally we have an American Constitution and our Constitution is our own."

I've seen that formulation before and I'm troubled by it. Because it suggests that you could turn to foreign law to get good ideas, but that, of course, you wouldn't be bound by foreign legal precedent. I doubt that anybody who uses foreign law would suggest that they are bound by foreign legal precedent, but it hasn't stopped them from using foreign precedents legal and otherwise.

And so I'm back to the question of whether you believe that decisions of foreign courts or laws enacted by foreign legislators—legislatures should have any bearing on U.S. court interpretation of the U.S. Constitution?

Ms. KAGAN. Senator Kyl, I do believe that this is an American Constitution. That one interprets it by looking at the structure, our own history, and our own precedents. And that foreign law does not have precedential weight.

Now, in the same way that a judge can read a Law Review article and say, well, that's an interesting perspective or I learned something from it, I think that so too a judge may read a foreign judicial decision and say, well, that's an interesting perspective, I learned something from it. Suppose, you know, we have a Fourth Amendment exclusionary rule—suppose that—

Senator KYL. Excuse me. Of what relevance is that to the U.S. Constitution? We have many things other countries don't because we have a unique Constitution.

Ms. KAGAN. I'm just trying to suggest that it's of the same kind of relevance that it would be if you read a Law Review article about a similar subject.

Senator KYL. OK. What you are telling me is then that you would look to foreign law, you might relate it to the issues in the case, would you cite it in an opinion as an interesting idea, not legally binding, of course, but supportive of your position?

Ms. KAGAN. I said yesterday when I talked about the subject, I said that—I used as an example a brief that the Solicitor General's office had filed on the Foreign Sovereign Immunities Act. When we filed that brief we talked about what some other countries had done on the Foreign Sovereign—

Senator KYL. Because you thought it might appeal to some of the members of the Court?

Ms. KAGAN. Because——

Senator KYL. Right or not?

Ms. KAGAN.—the question of how one should look to the Foreign Sovereign Immunities Act and whether officials should be held liable is a question that a number of nations have tried to deal with. And in the same way that one might point to Law Review articles on the subject. I don't think that foreign opinions should be out of bounds in that way. But I do think that they do not have any kind of precedential weight. That they are not any kind of ground—indeed independent ground for making a decision——

Senator KYL. I just wondered why you take the space then to include them in an opinion.

Let me ask you one final question. And, by the way, this is thanks—you might have caught George Will's column June 28th in the Washington Post suggesting some questions for Elena Kagan. I don't know if you saw that or not. This is one that I didn't tell you that I would ask you and I apologize. But I'm just going to quote from one question.

He said, "Some persons argue that our Nation has a living Constitution. The Court has spoken of the evolving standards of decency that mark the progress of a maturing society. But Justice Anton Scalia speaking against changeability and stressing that the whole anti-evolutionary purpose of the Constitution says its whole purpose is to prevent change to embed certain rights in such a manner that future generations cannot readily take them away. The society that adopts a bill of rights is skeptical that evolving standards of decency always mark progress and that societies always mature as opposed to rot." Is he wrong; George Will and I ask?

Ms. KAGAN. I think we have a Constitution and it's the same Constitution that we've always had putting aside the Article 5 Amendment process. And that it is meant to endure for the ages. The Constitution does not change, but it is—it is asked to apply and Courts must apply it to changing circumstances and to changing conditions. And in the course of that application there is development in constitutional law. The Constitution itself is fixed and the Constitution itself is binding.

Senator KYL. Thank you.

Mr. Chairman, since I think you've indicated that you would like to conclude the Solicitor General's testimony at the end of this round, I'll pose a couple of other questions including one relating to the reach of the commerce clause in questions for the record.

Senator SESSIONS. Mr. Chairman, are you suggesting Senator Kyl that—I was a few moments late, was there an agreement that——

Senator KYL. No, no agreement.

Senator SESSIONS.—not have a third round and just finish with this round?

Senator LEAHY. How much longer would you need to ask your questions?

Senator KYL. Well, I just really had the one other question, but I don't want to take my colleague's time.

Senator SESSIONS. OK. I just didn't know——

Senator KYL. I'd be happy to take the time when they're done, Mr. Chairman.

Senator LEAHY. Well, if you want, rather than have to have you come back. I did mention earlier before you came in on a specific time, but because things have changed so much because of the situation with basically 3 days of funerals. So if you have a further question ask it.

[Simultaneous conversation.]

Senator KYL. Let me just throw it out—and I know that at least Senator Coburn and Senator Cornyn have had the same question. In response to some of the other questions it appears to me that what you were saying about the commerce clause is that essentially if there is sufficient commerce—effect on interstate commerce, that it's not the Court's job to look behind a Congressional act. That's the test. If that test is satisfied and it's a reliance on the commerce clause, then that's it.

And it seems to me that that's overly broad because the whole point of the Court's rule is to interpret what is permitted under the Constitution and that, of course, the Court could say precisely what I just articulated as the test. As long as you can show some degree of interstate commerce then you have a right to legislate in that area.

My question is, though, whether that really would be an abdication by the Court of its responsibility to interpret that article of the—that part of the Constitution and whether you see any limit on the application of the interstate commerce clause other than a degree of sufficient commerce.

Ms. KAGAN. Well, the Court has interpreted the commerce clause broadly, not in an unlimited way, but broadly. I agree with you, Senator Kyl, that the Court has an important role to play in this as in any area in order to ensure the government does not overstep its proper authority.

We live in a government of limited and enumerated powers. The government cannot exercise authority beyond—excuse me, the Federal Government, Congress, cannot exercise its powers beyond the authority that the Constitution provides. The commerce clause has been understood to give Congress wide authority in this area. The general view has been that regulations affecting interstate commerce primarily are the prerogative of Congress and not of the Courts. The Courts ought to defer.

Defer does not mean abdicate and there remains an important role to play. The limits that have been set and that exist currently are the limits that appear in the *Morrison* and the *Lopez* case which separates out non-economic activity from economic activity and talks as well about areas which are traditionally the prerogative of the states. Those are the limitations that the Court's current doctrine imposes. I treat those limits as precedent going forward and for sure would not think that it's appropriate to abdicate in this are but do think that deference is generally correct with respect to economic legislation.

Senator KYL. I appreciate your answer. Thank you.

Senator LEAHY. Incidentally, I have a quote here, there are other legal issues that come up in which I think it's legitimate to look to foreign law. For example, if a question comes up concerning the

interpretation of a treaty that has been entered into by many countries, I don't see anything wrong with seeing the way the treaty has been interpreted in other countries and other—look at their foreign law. I wouldn't say that's controlling, but it's something that's useful to look to. That's what Justice Salito said in his confirmation hearing. I don't recall anybody disagreeing with him. Do you disagree with that?

Ms. KAGAN. No, that sounds right.

Senator LEAHY. Thank you.

Senator GRAHAM.

Senator GRAHAM. Thank you, Mr. Chairman.

I don't think I'll need a third round, but I would ask maybe a little bit of indulgence to go over—if we can't get through it all very quickly. Are you familiar with *Plessy v. Ferguson*?

Ms. KAGAN. Yes, sir.

Senator GRAHAM. I think most people are. It's an 1896 case and it interpreted the equal protection clause how? What did it say?

Ms. KAGAN. It said that separate but equal facilities were consistent with the equal protection clause.

Senator GRAHAM. OK. Now, that's in 1896. And do you know—are you familiar with Justice Henry Billings Brown?

Ms. KAGAN. I feel as though I should be, but I'm going to say no.

Senator GRAHAM. Well, you don't want him to be your hero, trust me. Here's what he said in 1896. “We consider the underlying fallacy of the plaintiff's argument too consistent in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the Act, but solely because the colored race chooses to put that construction on it.”

Now, that was the majority holding, one of the holdings, and it didn't change until 1954. So, to conservatives and liberals alike who believe that precedent can never change a case, this is a good example where I think we're all glad the case change. Because this is what happened in 1954–55.

Justice Warren: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.”

So, if you could, this could be a little bit of a teaching moment, nothing changed in the Constitution word-wise, did it?

Ms. KAGAN. It did not.

Senator GRAHAM. So it's the same words, looked at 50-something years apart with a different conclusion. How could the Court do that and be consistent with strict constructionism?

Ms. KAGAN. Well, Senator Graham, I guess a couple of things. The words of the Constitution did not change. But two things did change. The precedents changed and understandings and circumstances in the world changed. So the precedents clearly did change. Brown was not a thunderbolt from the blue.

Senator GRAHAM. It was the last in a line of decisions; right?

Ms. KAGAN. It was the last in a long line of decisions. And one of Justice Thurgood Marshall's—his greatest accomplishment was to lead up to *Brown*, step by step, by step, case by case, by case. As an advocate, of course, you can have a strategy like that, and he did. And by the time the Court got to *Brown*, upholding *Plessy* actually would have been inconsistent with a series of other holdings that it had reached over the years. And I do think that that sometimes happens in constitutional interpretation. It also happens—I mean, we've talked a lot about the doctrine of precedent and about one reason to reverse a decision is when its doctrinal support has been completely eroded. And I think that that is what happened in *Brown*. By the time the Court reached *Brown*?

Senator GRAHAM. And I think most Americans if not universal as close to universal as we'll ever get as a nation are glad it happened in this case.

Now, there's another Court decision called *Roe v. Wade* that's being changed over time, being interpreted differently over time. The Court basically held that before viability the right to have an abortion was—of a state imposed limitations on abortion was almost non-existent. After viability it was sort of the balancing test. Is that a general statement of *Roe v. Wade* over time?

There's a difference between viability and post-viability in the eyes of the Court.

Ms. KAGAN. As I understand the law after *Casey*, it's that after viability the state can regulate as it pleases except for situations where the woman's life or health interests are at issue. Before viability the question is whether there is an undue burden—

Senator GRAHAM. Right.

Ms. KAGAN.—on the woman's ability to have an abortion.

Senator GRAHAM. Right. Is it fair for the Court to consider scientific changes when a fetus becomes viable as medical science evolves?

Ms. KAGAN. Senator Graham, I do think that in every area that it is fair to consider scientific changes. I've talked in the past about how different forms of technology influence the evolution of the Court's Fourth Amendment jurisprudence.

Senator GRAHAM. I'm glad to hear you say that because just a sit would have been wrong to not consider the changes of how society had evolved versus segregation of young children based on race. I hope the Court would consider the modern concept of the viability in the 21st century and whatever protection you could give the unborn would be much appreciated on my part by considering science, not your personal feelings, because I think it's appropriate for the Court to do so.

Now, let's talk about Harvard. It's a great institution, someplace I couldn't have got in, so that makes it, you know, special because if you'd let me in it wouldn't be special.

Ms. KAGAN. I would have taken you.

[Laughter.]

Senator GRAHAM. Not with my SAT scores, I couldn't even play football at Harvard.

[Laughter.]

Senator GRAHAM. Now, this “don't ask, don't tell” policy you thought to be unwise and unjust. Is that—you said, that, I believe?

Ms. KAGAN. I did, Senator Graham.

Senator GRAHAM. And you know what, I think a lot of Americans agree with you; some do and some don't. So the fact that you have political opinions different than mine is absolutely OK and I hope the Committee will in the future let that concept work both ways.

I think the problem that Senator Sessions has—it's one thing to have strong feelings, the policy was not set by the military it was a Congressional enactment which you thought to be unwise and unjust. Now, I don't doubt your affinity and admiration for the military. You can disagree with the don't ask, don't tell policy and still respect the military. I believe that about you and about a lot of other people. The problem I have is it was the law of the land. Did other schools at Harvard prevent military recruiters from coming to interview their students, or was it just the law school?

Ms. KAGAN. Senator Graham, I honestly don't know the answer to that. I don't know what other schools, you know, have employers come and how they do it and I don't know whether any other schools have particular policies respecting this.

Senator GRAHAM. You don't know if it was—obviously it wasn't a campus-wide ban because the recruiters did meet with law students somewhere else on campus; is that correct?

Ms. KAGAN. Senator Graham, the recruiters could have met on campus as well.

Senator GRAHAM. That's what I'm saying, it wasn't a ban, it was just—they couldn't come to the law school?

Ms. KAGAN. And could have met on the law school campus. The only restriction that we put on was that the Office of Career Services couldn't provide assistance.

Senator GRAHAM. Which is the place where most students met employers?

Ms. KAGAN. No, it's just an office, really. I mean, most—95 percent of interviews from employers at Harvard Law School—

Senator GRAHAM. Well, here's the point, it's clearly not just an office. It was a political statement that you were making, I think. Maybe I'm wrong, but it seems to me you were making a political statement. You're not taking the law in your own hands, but you were trying to make a political statement on behalf of the law school that this office is not going to be used by the military because we don't like this policy; is that a fair statement or not?

Ms. KAGAN. Senator Graham, I think what I was trying to do was on the one hand to ensure military recruiting, on the other hand to enforce and to defend the school's very long standing anti-discrimination policy. So it wasn't me making a political statement; it was me as Dean of the Law School, and that's what I was, I had an institutional responsibility as Dean of the Law School trying to defend an anti-discrimination policy that had existed for, I don't know, 25 years, and—

Senator GRAHAM. Well, did it apply to the Catholic Church if they wanted to come and recruit lawyers from the law school because they don't have women priests?

Ms. KAGAN. Well, the way we enforce this policy is if an employer comes, we give the employer a form. And the form basically says, you know, I comply with the following policy. And it says, "I will not discriminate on the basis of" and then it says something

like, race and creed, and gender, and sexual orientation, and actually veteran status as well. And if the employer signs the form the employer can get the services of the Office of Career Services. And if not, not.

Senator SCHUMER. So it wasn't a political statement on your behalf at all? You weren't trying to tell the world what Harvard Law School thought about this policy?

Ms. KAGAN. It was not, Senator Graham. I was just trying to defend a very long standing and—

Senator GRAHAM. It would have been OK with me if it was, I just disagree with you, but I'll take you at your word.

Now, you were an advocate for—you were a lawyer who played an advocate role in the Clinton Administration regarding formulation of policy; is that correct?

Ms. KAGAN. I was two things in the Clinton Administration. I was a lawyer for about half the time and I was a policy person for about half the time.

Senator GRAHAM. OK. Well, when it came to the partial-birth abortion debate, there's a memo that we have here that talks about if certain phrases were used by the—what was the group, ACOG, what was the acronym?

Ms. KAGAN. The American College of Obstetricians and Gynecologists.

Senator GRAHAM. As I understand it, they were going to issue a statement that you thought would be a disaster and you wanted to get the full statement into place. Was that because you were worried that if you didn't get what you wanted in place the Court might seize upon that statement and make a different ruling based on science?

Ms. KAGAN. No, sir. It was not. I mean, my—this was—

Senator GRAHAM. Well, Ms. Kagan, I'm shocked that you say that because if I believe the way you do, that's exactly what I would want. If I really did believe that partial-birth abortion as being proposed was too restrictive, and I think you honestly believe that, that you wanted to have the broadest definition possible when it came to partial-birth abortion to allow more cases rather than less, that I would have been motivated to get the language most favorable to me. And are you saying you weren't motivated to do that?

Ms. KAGAN. Senator, I was working for a President who had clear views on this subject.

Senator GRAHAM. But you were trying to take him to an area where he even felt a bit uncomfortable. You were advocating, from what I can tell, a broader view of how partial-birth abortion would be interpreted. That when you met with the professional community, the doctors, they informed you early on in a private meeting, according to the record we have, that there would be very few cases where an abortion would be allowed under the way this thing was written. And somebody with your background and your view of this issue, to me that seemed disturbing and you were trying to change that and broaden it; is that not true?

Ms. KAGAN. With respect, Senator, it's not true. I had no agenda with respect to this issue.

I was trying to—

Senator GRAHAM. Wait a minute. Wait a minute. I certainly have an agenda when it comes to an abortion. I respect the Courts, but I'm trying to push the rights of the unborn in a respectful way. You can be pro-choice and be just as patriotic as I am. You can be just as religious as anybody I know, but that's the point here. It is OK as an advocate to have an agenda. I think Alito and Roberts had an agenda. They were working for a conservative president who was pushing conservative policies.

So it just is a bit disturbing that you quite frankly say you don't have an agenda when you should have had. If I'm going to hire you to be my lawyer, I want you to have my agenda. I want it to be my agenda.

Ms. KAGAN. I was trying to implement the agenda of the United States President whom I worked for. So I was——

Senator GRAHAM. Did you have a personal belief that partial-birth abortion was—as being proposed was too restrictive on a woman's right to choose?

Ms. KAGAN. I was, at all times, trying to ensure that President Clinton's views and objectives with respect to this issue were carried forward. And President Clinton had strong views with respect to this issue.

Senator GRAHAM. But here's the issue between being a lawyer and a policy person in a political shop. I would—I just want to try the best as I can. It's OK if you did. I expect that presidents are going to hire talented, intellectually gifted people who think like they do that will push the envelope when it comes to that law. And the record is replete here on this issue and others, you were pushing the envelope in terms of the left side of the aisle. I think the record was replete with Alito and Roberts that they were pushing the envelope on the other side. And that may make you feel uncomfortable. I hope it doesn't. I just believe it to be true and you don't agree with me there.

Ms. KAGAN. Senator Graham, the two of us have agreed on many things over the course of this hearing and——

Senator GRAHAM. But we don't agree on this?

Ms. KAGAN—[continuing]. But we don't agree on this.

Senator GRAHAM. That's fair.

Ms. KAGAN. But what I tried to do was to implement the objectives of the president on this issue. At the same time to provide the president with the best legal advice, straight objective as I could.

Senator GRAHAM. Fair enough.

Ms. KAGAN. And when I became a policy person to enforce and to ensure that his policy views were carried out.

Senator GRAHAM. I just quite frankly am surprised to hear that because if I believe the way you did and I had the opportunity to serve at that level, I would do everything I could to push the law in my direction in a way that was ethical. And I didn't see anything you did that was unethical. I did see an effort on your part to push the law in a direction consistent, I think, with the Clinton Administration and your political beliefs which is absolutely fine.

An activist judge is something none of us like, apparently. Nobody on that side likes it and nobody on our side likes it. Help me find one.

Ms. KAGAN. I'm sorry?

Senator GRAHAM. Help me find one. Can you think of anybody in the history of the United States that was an activist judge? Because we don't like these people. It seems to me an activist judge is somebody who rules the way we don't like. And it's getting to be no more sophisticated than that and I would like it to be more sophisticated than that. So, what is your definition of an "activist judge"?

Ms. KAGAN. Well, Senator Graham, I think my definition is somebody who doesn't take three principles to heart. The first principle is deference to the political branches in making the policy decisions of this Nation, because that's who ought to be making the policy decisions of this Nation.

The second principle is respect for precedent. Precedent as a doctrine of constraint and humility. And also stability in the law.

And the third principle is deciding cases narrowly. Deciding them one at a time, deciding them on narrow grounds if one can, avoiding constitutional questions if one can.

Senator GRAHAM. Well, our guys say that Justice Marshall was an activist judge; do you agree with that?

Ms. KAGAN. Senator Graham, I'm not going to characterize any Justice as an activist judge, as a restrained judge. I think the best I can do is to set forth the principles that I think are appropriate and to say that if I'm so lucky—if I'm lucky enough to serve, Justice Kagan would abide by those principles.

Senator GRAHAM. And I totally understand the dilemma you're in. But we keep using that term and Justice Marshall will go down in history as one of the icons of the law and one of the greatest justices in the history of the country even though I disagree with a lot of his rulings. That's the way it should be. If our people say that's activism, so be it. I hope Justice Roberts, which I think is one of the most gifted—intellectually gifted people I've ever met—is being called by my colleagues on the other side, for 2 days now, an activist Court. And we've got somebody is wanting to be on the Court. Can you name one person in the United States that you think would be an activist judge, living or dead?

Ms. KAGAN. You know, I have a feeling that if I do that I'm going to end up doing many things that I regret.

[Laughter.]

Senator GRAHAM. Well, here's what I regret, I regret all of us throwing these terms around without any—any definition to it other than we just—you know, we believe the way they judge is just not the right way.

Now, Judge Barak, if this guy is not an activist judge, I don't know who would be. Now, he's an Israeli judge, so maybe we shouldn't talk about Israeli activism because that's foreign activism, but I'm going to go ahead and do it anyway. If Senator Kyl doesn't mind.

Here's what Judge Barak said, "the judge may give a statute a new meaning, a dynamic meaning that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes because the Court has given it a new meaning that suits a new social"—"that suits new social needs." What the hell does that mean?

Ms. KAGAN. I think it means that the Court can change a statute and I think that that's wrong.

Senator GRAHAM. I think the fact that you don't like what he said makes me feel better about you because this is so nebulous and so empowering to a judge it would make an elected official like me feel very worried that the judge doesn't understand the difference between going out and getting elected to office and reviewing policy made by elected officials.

Ms. KAGAN. And now we're back to agreeing, Senator Graham.

Senator GRAHAM. And we're going to end it there. I wish you well. You have handled yourself well. We have some differences. I think the hearings have been on the margins better, but not a lot better than they've been in the past.

I wasn't trying to trick you. I think as an advocate in the Clinton Administration and other places you have tried to push the law in an ethical way in a particular way consistent with your philosophy and your political leanings, and I just want my colleagues to know that is OK with me. The thing that would not be OK with me is if I thought you were unethical and you did it in a way outside the process that we call "the rule of law." So I wish you well, and I know your family is proud of you and I think you've acquitted yourself very well over the last several days.

Ms. KAGAN. Thank you, Senator.

Senator CARDIN. Thank you, Senator Graham. I don't think we need to do this, but let me just go over your 2009 confirmation hearings when you were asked about the partial-birth abortion decision. You repeatedly stated that you would respect *Gonzalez v. Carhart* in which the Court rejected a facial challenge to the Federal Partial-Birth Abortion Ban Act based on *stare decisis*. That's what you said in the last hearing. I assume that's your position today?

Ms. KAGAN. Absolutely, Senator Cardin, that *Gonzalez* is settled law entitled to all the precedent of settled law going forward.

Senator CARDIN. And I just really want to make a personal comment as I did on my opening statement. Many of us believe *Roe v. Wade* is a matter of privacy and a woman's right of choice and it's not really taking sides on abortion. Not whether you favor or oppose abortion, whether you favor a woman's right of choice and right of privacy and what is the appropriate role for the government to play in those types of decisions.

With Senator Graham still here, I want to just go back to one of the points that Senator Graham raised on enemy combatants and their rights to certain proceedings. And I think I'm quoting Senator Graham correctly when he said, "if we took the war on terror and made it a crime, we have a problem for our country." And I think that sort of misses the point. And, Solicitor General, I think the point that the administration was seeking is that there are certain rights in our criminal justice system that defendants are entitled to, they're different under military commissions for enemy combatants, but that we have the right, not the enemy combatant, to determine which venue we can bring about the best justice. If we think that an action by an enemy combatant was criminal, we want to use an Article 3 proceeding, and if we think we can get a better result, why would we want to take away that right? Why

would we want to limit our ability to hold a terrorist accountable for their actions, whether it is as an enemy combatant in a military commission or whether it's in an Article 3 court under our criminal code?

Was that the position that the administration was taking when you were Solicitor General, or you are still taking as Solicitor General?

Ms. KAGAN. Senator Cardin, I'm going to say the same thing to you that I hope I said to Senator Graham, which is, this is not a set of policy decisions that the Solicitor General's Office or that I personally had anything to do with. And I feel uncomfortable discussing that. I think that these are questions that are better addressed to the people who are making policy within the Justice Department on this issue.

Senator CARDIN. And I respect that. I just really wanted to clarify the choice. It's not a choice between giving enemy combatants certain additional rights. It's a question of where we believe we can hold a terrorist more accountable.

Senator GRAHAM. If I could, Senator.

Senator CARDIN. Certainly.

Senator GRAHAM. I guess that was a question for her, but I'll answer it and see if you disagree with my answer.

I really have no problem using Article 3 Courts in the war on terror. In many cases they can be a better venue. I think military commissions can be a good venue to prosecute war crimes, but the higher—the third bucket, as we all talk about, are those enemy combatants that the Court has deemed to be an enemy combatant. But the evidence for whatever reason is not subject to criminal scrutiny whether it be a military commission trial or Article 3 trial, or the evidence may be such that you, under the rules of discovery of both proceedings, you couldn't divulge it without hurting national security, it's in those cases, the 48 that the Obama Administration has identified, that the Congress needs to weigh in with the executive branch to understand that the law of war detention is the only valid theory that you can hold someone in that third category.

And when it comes to, quite frankly, the treatment of prisoners, it becomes about us, not them. I love the Geneva Convention as a military lawyer. It is not an individual right and I want my country to abide by it to the fullest extent possible and win this war within our values.

The one thing I would say in conclusion is that when it comes to having your day in court as to whether or not you're an enemy combatant, I believe an independent judiciary should look over the military's shoulder and you have to prove to an independent judge that the military is right that you are in fact an enemy combatant. But I do not believe our laws should allow enemy prisoners to bring lawsuits against our own soldiers, medical malpractice cases against doctors, or sue prison guards because they don't like the quality of the food. That to me is not consistent with war and that's what I oppose.

Senator CARDIN. I thank you for that. We've had this discussion in our Committee and I think, Solicitor General Kagan, you are correct, these are issues that we're going to have to grapple with as the legislative branch of government, hopefully working closely

with the executive branch. The bottom line is that for those who commit acts of terror against the United States we need to have an effective way to bring them to justice, whether it's within the military commission system or whether it's within our Article 3 courts. And we should be able to choose the best venue for holding those terrorists accountable.

I know you had an exchange with Senator Feinstein on the interplay between the establishment and free exercise clause. And I want to talk a little bit more about that because I related to your opening statement when you talked about your grandparents coming to this country, for one reason, because of the religious freedom of this Nation which was so dominantly lacking in Europe. The same reason brought my grandparents to this country. So the freedom of religion is a critical part of this country's tradition.

When we discussed the free exercise and establishment clause with Senator Feinstein—when you did, you said that there is some play in the joints for the government to act to make reasonable accommodations for religion consistent with both the free exercise and establishment clause. And then you mentioned the *Lemon* three-part test from 1971 which you correctly noted has not been overturned, but has not always been used by the Court either. I want to focus on the test used by Justice Kennedy in the Court opinion of *Lee v. Weisman*, in which he struck down as unconstitutional school-sponsored prayer at a public school graduation ceremony.

My question to you is what special protection should students have under the establishment clause?

Ms. KAGAN. Well, what Senator Kennedy focused on, I think I said to Senator Feinstein that some members of the Court have used on certain occasions a coercion test. The question as to whether a particular governmental action coerces a person in his or her religious beliefs. And the *Levy/Wassmann* case is one that does use that coercion test in a way that provokes strong disagreement as well. The question about whether that graduation prayer did coerce students in a constitutionally meaningful manner. Senator Kennedy, a majority of the Court held that it did.

As the Court's precedent has come down, it seems a highly fact-specific inquiry. Certainly the coercion test is used most often when it comes to children. And the Court—you know, the Court's cases essentially see a difference between coercion of adults thinking that adults can kind of stand up for themselves and coercion of children where there's a greater fear of the government's impact—coercive impact. And I think that *Levy/Wassmann* reflects that.

But it is a contentious area in the law. With some people I think that that case is a good example of the way in which people can look at the same kind of action and some see coercion and some not.

Senator CARDIN. Thank you very much for that reply. It's very helpful. With that I'm going to recognize Senator Cornyn for his inquiry.

Senator CORNYN. Thank you, Mr. Chairman.

General Kagan, let me start off with just a little housekeeping before we get into the main body of what I want to talk to you about. My experience, and I would be interested if your experience

is the same, is that sometimes people who are not members of the legal profession, when they hear lawyers talk, or maybe even judges when they disagree in the context of written opinions, majority and dissenting opinions, the like, sometimes they read into that talk a sort of personal animosity or something more than just a disagreement over what the law is or is not. Have you had a similar experience or observation in your career?

Ms. KAGAN. Well, Senator Cornyn, I do think that sometimes people can take a look at opinions and they're very strongly worded and think, my gosh, these people must just hate each other. And then it turns out that not at all, there are good faith differences on the law, but the same people who are sort of taking swipes at each other in opinions see each other as people who are operating in complete good faith and get along with each other in the next case or the case before, and certainly in their lives.

Senator CORNYN. Well, you made the point better than I did. And it's come to my attention—actually there was something published in the newspaper today that suggested that those of us who have tried to draw this line between activist judges who don't feel constrained by a written Constitution and laws or who feel like they have more liberty to basically make things up, this is my characterization, and judges who feel bound to a traditional view—I spoke to this in my opening statement—there were some folks who—or actually an op-ed that was published today that suggested that those of us who talked about Justice Marshall and talked about his judicial philosophy were somehow disparaging Justice Marshall.

Did you read any disrespect in any of the comments that any of us have made about Justice Marshall or did you understand it to be a criticism or disagreement with his judicial philosophy?

Ms. KAGAN. Senator Cornyn, I didn't see the op-ed, I've been trying very hard not to read the papers.

Senator CORNYN. That's smart.

Ms. KAGAN. Senator Cornyn, I take everything that has been said here from all the way around the bench as people operating in good faith. And certainly I've gotten nothing but fairness and courteousness from everybody, from every member of the committee. I take no offense on behalf of myself or on behalf of Justice Marshall or on behalf of anybody else at anything that's been said here.

Senator CORNYN. Thank you.

I want to ask you a little bit more—we've talked a lot about constitutional interpretation and I want to read a statement to you. And this is not a trick question. So if you want me to read it again or go over it more slowly I will. And I want to get your thoughts on this statement of constitutional interpretation. And it starts this way: "Original understandings are an important source of constitutional meaning, but so too are other sources that judges regularly invoke. The purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society." Do you generally agree with that statement, or is there any part of it that you disagree with?

Ms. KAGAN. You know, I think I would—I am trying to think—I mean, I think that what I've said is that you look to text, you

look to structure, you look to history, very much including and very especially the original understandings, and you look to precedents. And in one or another of cases, one of those may be more important than others of them. In some cases you might look to all of them. And that's a kind of pragmatic approach, not an approach that takes a sort of grand, overarching philosophical view as to, you know, it's just one thing and it's got to be that one thing in every case. And that's the way I would approach the——

Senator CORNYN. And that's consistent with what you've said as I've heard you testify yesterday and today. And really the part of it that I was interested in was the last phrase which talked about evolving norms and traditions of our society. What role do you think a judge's opinion of the evolving norms and traditions of our society have in interpreting the written Constitution?

Ms. KAGAN. Well, I think that traditions are most often looked to in considering the liberty clause of the Fourteenth Amendment. I think every member of the Court think that the liberty clause of the Fourteenth Amendment applies to more than physical restraints and I think almost every member thinks that it gives them substantive protection and not just procedural protections.

And then the question becomes, what substantive protections does it provide? And I think that the best statement of the approach that the Court has used is actually Chief Justice Rehnquist's statement in the *Glucksberg* case. Because he says he basically agrees with both of those things that the Due Process Clause provides substantive protection and means more than restraint from physical restraint. But then the question is, how do you define that and do you appropriately limit that? Because it's for sure the case that the Courts should not use that clause to appropriate decisions that best belong to the American people.

Senator CORNYN. Let me ask you another follow-up question. The author of the statement that I read is Goodman Liu, a professor at the University of California at Berkeley and a pending judicial nominee. He goes on to conclude, based on that statement of what the appropriate role of the interpretation of the Constitution is, he goes on—or he has concluded that the Fourteenth Amendment requires the government to provide citizens with certain social and economic rights including a high quality education, expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit.

He also believes, or has written, that the Fourteenth Amendment guarantees a right to same-sex marriage. He says that “evolving norms can change the ambit of the Second Amendment’s protection as interpreted by the Court.” He’s also opined that the Fourteenth Amendment requires the nationalization of education by prohibiting the local funding structure that states use to support their education systems.

In applying this interpretative standard, would you—well, I’m not going to ask you whether you agree with that, because that might ask you to decide a case that would come before the Court; correct?

Ms. KAGAN. Well——

Senator CORNYN. I was going to ask whether you agree or disagree with some of those stated opinions about what the Fourteenth Amendment means as Professor Liu has articulated?

Ms. KAGAN. You said a lot there. And I think that the view that I would have is consistent not with any particular article by Mr. Liu or otherwise. But it is consistent with the way that the Court has approached these questions and I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people. And so should understand that the clause protects things, but should act in this area with appropriate caution and respect for democracy.

Senator CORNYN. Well, I know you understand the gist of where I'm coming from. The concern is, of course, that if judges, particularly Federal judges, who serve a lifetime tenure, believe it's within their power to interpret the Constitution based on their subjective notion of what represents evolving norms and traditions then constitutional law very quickly becomes very separated from and untethered from anything you might call written law, or law representing the consent of the governed. That's the concern, and I'm sure you understand it.

I'm not asking whether you agree, I'm just suggesting that that's my concern. And you seem to agree that judges ought to act very carefully. And I would suggest my own view is that it is not an appropriate role for a Federal judge to render subjective judgments about evolving norms and traditions. That's what Congress is here for, to act responsibly to the needs and desires and the wishes of the American people. And, of course, we stand for election and we can be replaced if the people disagree with us—but not judges.

Let me change topics here quickly. And I have a series of questions here and I tried to frame these in a way that would permit a short answer and then I'd like to ask you then a larger question and I'll certainly allow you an opportunity to explain and to say anything you like in response.

This has to do with the Solomon Amendment that there's been a lot of discussion about. I told you yesterday that I had concerns about your handling of military recruiters on campus when you were dean of the Harvard Law School. And let me just ask you some questions about that, just to sort of establish exactly what happened so everybody can get their brain around it.

You argue that the military had good access to recruit Harvard Law students even during the periods before 2002 and from November 2004 through September 2005 when the military was barred from using the services of the Office of Career Services; correct?

Ms. KAGAN. I think that the military had good access during the periods where the Office of Career Services handled it and had good access when the veterans association handled the matter.

Senator CORNYN. And when they were barred from the Office of Career Services, you believe that they still had good access? That's my question.

Ms. KAGAN. Yes. When the Office of Career Services did not provide the assistance, but instead the Veterans Association provided the assistance. And I think that the figures suggest that. That both before 2002 and in the single recruiting period in 2005 when the Veterans Association handled this, there were just no differences in the numbers. To the extent that there were any differences, they went up in 2005.

Senator CORNYN. Of course, you can't tell, and we can't know, what they would have been if they still would have had access to the Office of Career Services. But basically you've gone on to answer my second question. During the time when they were barred from the Office of Career Services they had access to the Harvard Law School Veterans Association which was an alternate channel for military recruiting; correct?

Ms. KAGAN. That's correct. Way back before I became dean my predecessor put in place this accommodation, this way of trying to defend the law school's anti-discrimination policy but also enabling the military to recruit and that used the Veterans Association and they—the Veterans Association in all those years was just great in doing the things that the Office of Career Services otherwise would do.

Senator CORNYN. And as the dean of the law school, you had the power to make an exception to the anti-discrimination policy if you chose to do so; correct?

Ms. KAGAN. Well, it was a faculty-approved anti-discrimination policy but I do agree with you, Senator Cornyn, that I would have—you know, I would have gone to the—I do agree with you that I had substantial authority over that question.

Senator CORNYN. That's all I'm asking.

Conversely, the United States military didn't have any discretion to waive its policy because it was product of a Congressional act; do you agree with that?

Ms. KAGAN. I do. That the military could not sign the discrimination policy that Harvard had because of the statute that was passed by Congress. And that, of course, presented the issue that was involved is that the military could not sign the school's anti-discrimination policy, the school and I as dean felt a real imperative to enforce that policy, to defend that policy, but still to ensure that the military had very good access to all our students so that they could serve in the military. Because, you know, that was of critical importance.

Senator CORNYN. And this is really the nub of it: the Solomon Amendment, which is what we're talking about, denies Federal funds to an educational institution that prohibits or in effect prevents military recruiting; isn't that generally what the Solomon Amendment does? It denies Federal funds to an institution that denies or prohibits or in effect prevents military recruiting on campus?

Ms. KAGAN. It places a condition on Federal funding and I forget the exact language that the Solomon Amendment—but it's about military recruiting on campus.

Senator CORNYN. And I think my notes here, from your earlier testimony, were to the effect that you believed that this alternative through the veterans center and other locations on campus provided an “equally effective substitute;” is that correct?

Ms. KAGAN. This policy, I think, had worked well in the period before I became dean up until 2002. The Department of Defense had found this policy fully acceptable and it was my understanding that the Department of Defense and—that that was true, that their view that the policy enabled them good access. It was right, the policy did enable them good access.

Senator CORNYN. But your understanding was that, at a certain point in time, if Harvard Law School continued with this policy of denying them access to the Office of Career Services it would be denied Federal funds?

Ms. KAGAN. Well, that happened before I became dean. So that happened the year before. In 2002 the Department of Defense said that it had changed its mind that for many years it had found the Harvard policy acceptable and had thought that it provided full access. In 2002 the Department of Defense came to the school and said that it in fact wanted the assistance of the Office of Career Services.

Senator CORNYN. And this is my—this is my final point on this. If, as you say, this policy of Harvard Law School in barring the military recruiters from the Office of Career Services had no impact on military recruiting at Harvard Law School, it strikes me that the sole result and impact was to stigmatize the United States military on the campus, a service—services that you say you honor. So, explain to me what impact the policy had other than to stigmatize the military?

Ms. KAGAN. Senator Cornyn, it certainly was not to stigmatize the military. Every time I talked about this policy and many times besides I talked about the honor I had for the military and how much the military meant to our country and how we all have the freedoms that we have because of the military.

Senator CORNYN. I heard you say that and I will stipulate that is what you said all along. But if the policy had no impact on recruiting at Harvard Law School, what possible purpose could it serve other than to stigmatize the military? In effect, you provided a separate but equal means of providing access to students on the campus.

Ms. KAGAN. I think the purpose of the policy was something different. It was certainly not to stigmatize the military. The purpose of the policy was to express support for our students who were being discriminated against, for our gay and lesbian students who wanted to serve in the military. And the policy was meant to support them or to support with respect to other employers any other students who were being discriminated against and to say, you know, we support those students. And at the same time—at the same time to ensure that our students who wanted to go into the military had excellent access to military recruiters and vice versa.

Senator CORNYN. Mr. Chairman, I have 50 seconds remaining. I do have just a few more minutes of questions. And I would be happy to do it on another round after my time or if you would give

me just a couple more minutes of flexibility I would be glad to finish.

Senator LEAHY. In lieu of another round, and we are going to take a break when you finish. Do you have any problem with us—and saving another round?

Ms. KAGAN. I'm sorry?

Senator LEAHY. Do you have any problem—we're going to have a break when Senator Cornyn finishes, do you have any problems with going a couple more minutes and this way he'll—

Ms. KAGAN. No, that's good. That's fine.

Senator LEAHY.—forego another round.

Ms. KAGAN. That's great. That's great.

Senator CORNYN. I'll be less than 5 minutes, if that's all right? Thank you.

Let me change topics, Ms. Kagan. And this gets back to questions we've heard about the Commerce Clause. And, again, this is sort of the jurisdictional hook that Congress finds in legislating in areas that have provided, I think we would all agree, rather expansive Federal jurisdiction over much of our lives.

And you mentioned yesterday the *Lopez* and *Morrison* cases and of course those were a couple of cases that were decided when Chief Justice Rehnquist was chief. By five to four the Court said that “government actions that were defended as legitimate regulations of commerce must deal with commerce as opposed to non-economic matters.” I believe you said as much.

Do you agree with the Court's decisions in *Lopez* and *Morrison*?

Ms. KAGAN. Well, Senator Cornyn, I've refrained from agreeing or disagreeing, but I do believe that *Lopez* and *Morrison* are settled law and entitled to the precedential weight that one gives to any decision.

Senator CORNYN. Do you know or do you recall whether you've ever written or spoken expressing previously and having expressed an opinion one way or another about *Lopez* or *Morrison*?

Ms. KAGAN. You know, Senator Kyl asked me that question. I don't think that I've done any academic work on the subject. I don't know whether I've spoken about them in any of my many speeches or anything like that.

Senator CORNYN. OK. Well, one document that was among the many documents that we got from the Clinton archives was a memo you sent to the Deputy Chief of Staff at the White House on March the 31st regarding the recently decided Supreme Court case of *Seminole Tribe v. Florida* where you noted the “broad significance” of the opinion. In that memo you said, “the decision, especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools, indicates a serious effort by a bare majority of the Court to reorient the balance of power between the Federal Government and the states. It's highly unlikely that this case will be the last one to pursue that states' rights agenda.”

Now, this language in your memo is strikingly similar to the opening paragraph of a New York Times article entitled, “Lurching Toward States Rights” that you attached to the memo I just referred to. The opening paragraph of the article reads: “A headstrong five Justice majority is driving the Supreme Court toward

a revolutionary, indeed reactionary, interpretation of federalism, tilting the balance dangerously toward states' rights at the expense of Federal power." Did you agree then that the article—with that article that the Supreme Court's federalism jurisprudence was reactionary and dangerous?

Ms. KAGAN. You know, Senator Cornyn, I don't at all remember the article and I've not seen it. I have seen more recently that memo which I just sort of think of as the *Seminole Tribe* memo. It's a memo about the *Seminole Tribe* case.

Senator CORNYN. Right.

Ms. KAGAN. And I think that I was—you know, what I did was I described that case. I guess I said in light of *Lopez* it does suggest that the Court is reorienting the Federal/state balance in this area which I think indeed happened in those year. I think that that was probably—if I caught that sentence that you wrote, I had referred to *Lopez*, but this was probably before *Morrison*. So I think that there were this set of changes that occurred in those years and that memo was about neither of those, it was about *Seminole Tribe* which dealt with Congress' ability to abrogate state sovereign immunity under the Commerce Clause.

So that was a few years of—you know, important developments in the law relating to the Federal/state balance.

Senator CORNYN. In fairness to you, what my question is, is about the article, not your—not what you wrote ?

Ms. KAGAN. And I've not seen that.

Senator CORNYN. And the article refers to the Supreme Court's federalism jurisprudence reactionary and dangerous. Do you agree with that characterization or do you disagree?

Ms. KAGAN. Senator Cornyn, I have refrained from saying thumbs up, thumbs down on any cases.

Senator CORNYN. I'm not asking you that. I'm asking you, do you agree with the characterization that the Supreme Court's federalism jurisprudence was reactionary and dangerous?

Ms. KAGAN. It actually sounds—I don't even know what it means to be reactionary and dangerous. But the *Morrison* case, the *Lopez* case, the *Seminole Tribe* case are settled law. And I have, you know, no—I'll say this, no plan, no purpose, no agenda, no anything to mess with them.

[Laughter.]

Senator CORNYN. That's a legal term, I think.

Ms. KAGAN. Mess with them.

[Laughter.]

Senator CORNYN. I have one last question. I'm sure that's welcome news.

Can you name for me any economic activity that the Federal Government cannot regulate under the Commerce Clause?

Ms. KAGAN. I wouldn't try to, Senator Cornyn. The test that the current court is using is this test of economic versus non-economic and that's the test that I would expect to use under settled precedent. And if there are cases in which indeed the claim is presented that economic activity should not fall within Congress' commerce power, those will be cases that I will decide in the appropriate way by reading the briefs and listening to the arguments and talking to my colleagues.

Senator CORNYN. Thank you very much.

Ms. KAGAN. Thank you, Senator Cornyn.

Senator LEAHY. Mr. Cornyn, does that get you—thank you very much. Then we will take a recess subject to the call of the Chair.

[Recess taken at 3:34 p.m.]

Senator LEAHY. OK. Good afternoon.

A number in the press have asked about the schedule. Just so you understand we were having a discussion up here. We will finish the questions and we don't have all that much left. And then we, as far as the press knows, we will then go to the traditional closed session. And the press won't be able to be there. Nor will any, but one camera, and then that will be it for tonight.

And the public witnesses, I talked with Senator Sessions, we will begin with those after the rest and repose time in the Senate for Senator Byrd tomorrow. You, of course, can sit with your feet up and watch that part.

Ms. KAGAN. I can't come back?

[Laughter.]

Senator LEAHY. You know, if you're that much of a glutton for punishment, you're not qualified to be in the Supreme Court.

[Laughter.]

Senator LEAHY. But you can throw kisses to the TV set for those who said nice things. You can throw stuff at the TV set for those who say bad things.

Ms. KAGAN. You know, I think I won't watch.

[Laughter.]

Senator LEAHY. You know, that's probably not a bad idea.

I'm sure your staff will—Ms. Davies will tell you—

Ms. KAGAN. Tell me everything I need to know.

Senator LEAHY. She'll tell you when the good news comes.

With that, Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Ms. Kagan, I'd like to take up our previous discussion again, which I know you've had a number of folks in between. So where we had left off, I think we had agreed that it is inappropriate for a judge to bring a particular agenda to the Supreme Court, and I—just to recapitulate, we do agree on that?

Ms. KAGAN. Yes.

Senator WHITEHOUSE. Yes. So if a judge or judges had a particular agenda or motivation, say to serve the interests and reflect the values of a particular political party, that would be inappropriate?

Ms. KAGAN. That would be the worst possible thing.

Senator WHITEHOUSE. And since it would be inappropriate, the worst possible thing, is it likely that such a judge would disclose that agenda or motivation, would make it a part of a written opinion, would admit it?

Ms. KAGAN. Senator Whitehouse, as you asked the question, that seems unlikely.

Senator WHITEHOUSE. Doesn't it?

Ms. KAGAN. Yes.

Senator WHITEHOUSE. So if you had such a judge or judges on a court and they would not disclose such an agenda or motivation because it is so inappropriate, you would have to look for a pattern

of decisions to determine whether such an agenda or motivation were being pursued, would you not?

Ms. KAGAN. Senator Whitehouse, I guess I don't want to make any comment about how one should—how one should discover a judge with an agenda.

Senator WHITEHOUSE. But certainly that would be the only way, since it would never be in the decision itself as a matter of the textual content of the decision, because that would be so inappropriate.

Ms. KAGAN. Senator Whitehouse, I think I can only say what I just said.

Senator WHITEHOUSE. Well, I wonder if there might be—we've discussed a few other things that might be similar telltales if judges were seeking to impose a particular point of view or to reflect a particular point of view. Those telltales, one might be a tendency to 5-4 decisions, which would be a logical clue, since a broader consensus of judges, as we discussed, would make it difficult to move more aggressively. If your intention is to move more aggressively, you're more likely to deliver a lot of 5-4 decisions. That would be another telltale that we discussed.

Another telltale might be findings of fact by a Supreme Court that are essential to a particular decision, even though an appellate court is not supposed to make such findings of fact. Another telltale would be advancing a theory of precedent that allows judges to selectively undermine and topple precedent—again, selectively—by hotly contesting it. Are there any telltales that you can think of that would suggest the presence of a particular agenda or motivation on the part of judges beyond those?

Ms. KAGAN. Senator Whitehouse, I have to be honest with you and say that I'm more focused right now on what I would do as a justice if I'm fortunate enough to be confirmed, than any ways of discovering what any other judge might do that's inappropriate. As I suggested to you before, I assume the good faith of everybody on the court and I think that's the way I will approach the job and the institution.

Senator WHITEHOUSE. And in your position I think that's the correct answer and the right thing to both say and do. But for those of us who have been witness here to lengthy discussions about the importance of precedent and the danger of judicial activism and who have seen you challenged as to whether you'll be able to be a neutral and dispassionate judge, one without a motivating agenda, it is a matter of interest to take a look at what appear to be the clear telltales that would be left by judges with that motivation or agenda and see how often they actually appear in the recent behavior of the court, particularly the five Republican appointees who steered it so hard to the right.

Of the telltales that we've talked about, a pattern of decisions going a certain way, a tendency toward 5-4 decisions, an improbably and unusual finding of fact by an appellate court in a major case, and an announced theory of precedent removal by hot contest by the judge, we seem to be batting, what is that, five for five. And I say that not to seek a response from you at this point, because I think you've given a complete and adequate response as a nominee to the court to say that it's not your intention going into that

court to begin by trying to assess whether there are judges on that court who have motivations to pursue a particular ideology.

But I think for those of us who have to protect and safeguard the institution, it's also important for us to look back and see how we did and what we can learn from other previous nomination hearings where we were given very, very straightforward assurances about the importance of precedent and how nothing but balls and strikes would be called, and how clearly we were going to be, you know, very careful, modest, precedent-respecting judges, and then we saw this: every available telltale that would ring if judges were pursuing a particular agenda or strategy, other than to say it right out in the decision itself, which we've agreed is something that no judge would do because it would be so inappropriate.

I think you said the worst possible thing. Every other potential bell that we can think of is ringing, and so that's why I mention it, because I do think it is a matter of general concern, although I don't dispute your answer to my questions. I think you're in exactly the right place where you should be on that point, and I appreciate that.

Ms. KAGAN. Well, Senator Whitehouse, I think it's not a matter of being in the right place. I think I'm saying what I think, which is that I respect the court as a whole enormously as an individual, and each of the members on it. That respect has grown every day in the year that I've been Solicitor General.

Senator WHITEHOUSE. Well, I respect the court as an institution, too, and I think it's vitally important because it does not have the power of the purse or of executive administration because it stands on the confidence of the public, that when all these telltales are in place it is a cause for some concern, at least for some of us. So again, I appreciate the time we've had. I wish you well, and I thank you again for the candid and complete nature of the way in which you are responding to questions here today. I think the window onto Elena Kagan that America is getting in these hearings is one of a very bright, very good-humored, very well-intentioned, and very able future Supreme Court justice. So, I thank you.

Ms. KAGAN. Thank you.

Senator WHITEHOUSE. Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Whitehouse.

Senator COBURN.

Senator COBURN. Thank you.

Well, here we go again. I was just wondering, yesterday you were asked a question about whether you wrote a letter of recommendation for Miguel Estrada and you said you did not because he didn't ask you to. Did anybody—either you or anybody on your behalf—ask him to write the letter of recommendation for you?

Ms. KAGAN. I don't know, Senator Coburn.

Senator COBURN. Good question.

Do you believe he should have been confirmed?

Ms. KAGAN. I said that he is a great lawyer and a great human being, and I think I was asked whether he—

Senator COBURN. I'm asking you whether or not you believe he should have been confirmed.

Ms. KAGAN. I wasn't trying to avoid your question. I think he'd be a great judge. I think he—

Senator COBURN. So your answer is yes?

Ms. KAGAN. Yes.

Senator COBURN. And if you were sitting up here you would have voted for him, is that correct?

Ms. KAGAN. I would have.

Senator COBURN. Thank you.

Moving on—

Ms. KAGAN. I hope I would have, anyway. You know, who knows what it feels like to be one of you guys and to be subject to all the things that you guys are subject to.

Senator COBURN. I want to give you a big secret.

Ms. KAGAN. He should have been.

Senator COBURN. It's not all that much fun.

[Laughter.]

Senator COBURN. I have to reply to my colleague from Rhode Island. I gave a speech two or 3 weeks ago on the Senate floor, talking about hearings. We didn't always have hearings. They are a relatively new phenomena in the history of our country. You know, we hit two areas of very distinct testimony about Judge Sotomayor which has demonstrated she did not live up to in the two most recent cases of the Supreme Court.

So the question really comes, is confidence in our country today. We have problems with confidence in our economy, confidence in our government, confidence in Congress. I was wondering, Judge Kagan, is it important to you that the Supreme Court is seen in a light of confidence by the American people? Not us, but by the American people?

Ms. KAGAN. Senator Coburn, it's an interesting question because, of course, you want everybody—you want every—you want the Nation's citizenry to have confidence in each institution of government. But on the other hand, I think it would be wrong for a court to decide an individual case by asking itself—

Senator COBURN. I'm not—I'm not implying that. I'm not saying you make a decision based on whether you're going to have confidence. I'm saying, in general, is it important to you, if you are a justice, that the American people have confidence in the institution of the Supreme Court?

Ms. KAGAN. I think that the welfare of the country is certainly best served if the American people have confidence in the Supreme Court, as is true of the other branches of government as well.

Senator COBURN. Right. Right.

Do you have any empathy with those of us that feel there's a low confidence right now in the institutions of government?

Ms. KAGAN. Senator Coburn, I—I think it would be better for the country if people had greater confidence than they do in all of the institutions of government, and that's not to say—you know, it's hard to know how these things work out over time. But—but, you know, it's—the country is well served when people have confidence in the institutions that lead them.

Senator COBURN. And would you agree with me that the glue that really binds us together is the glue that we, in fact, embrace the rule of law, that there's blind justice, and that's our goal? We're not perfect in it, but that's our goal at every point, at every open-

ing, is that we can make that available as best we can at every opportunity. That's a glue that binds us together, is it not?

Ms. KAGAN. I believe that thoroughly. When I gave my opening statement I said that the blessing of liberty, which is the phrase that our Constitution uses, the "blessings of liberty" are rooted in the rule of law.

Senator COBURN. Yes. Well, I wonder if you've ever thought as I have. I'm 12 or 13 years older than you, but one of the things that I contemplate—

Ms. KAGAN. Maybe not after this hearing.

Senator COBURN. No, I'm sure I'm older.

[Laughter.]

Senator COBURN. Actually, you're doing quite well. Have you ever contemplated the idea of what your freedom was like 30 years ago and what it is today?

Ms. KAGAN. How old was I 30 years ago?

Senator COBURN. You were 20.

Ms. KAGAN. I'm not sure I have ever contemplated that exact question.

Senator COBURN. Well, I want to tell you, a lot of Americans have, and I certainly have. There is a marked change in this country from when I was 20 to now that I'm 62. And one of the problems with confidence, and the reason I asked you the question, is a lot of Americans are losing confidence because they're losing freedom, they're losing liberty.

You'll recall I asked you about the vegetable questions yesterday. That's on the front of a lot of people's mind. Not vegetables, health care. You knew where I was going. The very fact that the government is going to have the ability to take away, mandate what I must buy or must not buy, a very large loss of freedom.

So my basic question comes back to you, is that important, the fact that confidence in all government institutions is at an all-time low in this country? And should we be concerned about it, and should we be trying to right the ship so that we restore that confidence?

And I'm not talking of specific rulings, but you would agree that we ought to be trying to build that confidence and to reassure the American public that we actually get it, we understand the Constitution is the founding document. You've testified many times. I have some problems with some of what you've said, but that's the bedrock instrument under which we have. But with a perceived loss of liberty, confidence is declining.

On top of that, as we discussed yesterday, the Commerce Clause and this very expansive view of it as held by the Supreme Court which is counter to what our founders wrote, there's nobody that—it started in 1937. It's counter to what our founders wrote, and as it has expanded, liberty has declined. We've seen that rapidly increase. And it's not just Republican or Democratic institutions—administrations that have overseen that, they've both been guilty.

So I just wanted to—whether you'd ever contemplated that, because I think that can give you some insight into what America is concerned about. I don't think judges just go to the bench and look at the Constitution.

I think they have to look at the fact that, how do we continue this wonderful and grand experiment, and that there are consequences to their actions, whether it be the consequences of the Senator from Rhode Island seeing a conspiracy, sinister, and people who think about and believe in the original intent believe in expanded freedom, not limiting freedom, and believe that what the founders had to say in the *Federalist Papers* and in interpreting the Constitution was of any import. So you've never contemplated any change in the freedom that you've experienced?

Ms. KAGAN. Senator, I guess I'll say this to what you said, which is that I believe that confidence in our institutions is terribly important. The confidence in the Supreme Court is terribly important. I do think that the job of a Supreme Court justice is to decide cases, and—and in deciding cases it's not to think about big questions like restoring American confidence, that that's more a question that belongs to the members of—of this body. I do think that the job of a Supreme Court justice is to listen very carefully to all arguments that are presented, and that means all arguments. That's what I've pledged to do, and that's what I will do if I'm—

Senator COBURN. You said earlier, to Senator Klobuchar this morning, that people get to make fundamental decisions about this country. You know what? A large percentage of people in America today don't believe that. They don't believe they're getting to make decisions about this country. I mean, that is a serious problem, when 22 percent of the people in this country have confidence in Congress. That's just speaking about Congress. I haven't seen a poll on the Supreme Court. So the question—that's the ideal, is we do want the people to be able to make the decisions. The fact is, they're not today. There's a disconnect.

And it's seen—that's why we see the unrest, the tension that's out there in the electorate, is that we're not paying attention. That's why I was so hard and insistent on original intent, because they're like me, they're non-lawyers. They read the Constitution and they see the words. They're not sophisticated. They didn't—most didn't go to Harvard. And they say, you know, here's the fact and here's the statement, and the fact doesn't match the statement.

And I'm just saying, when it's a sliver dividing line one way or the other, if the Supreme Court isn't paying attention to that on an individual case when it can go either way, it ought to go for freedom, not more government, not bigger government, not an expanded Commerce Clause. It ought to go for individual freedom, individual liberty when it's—when it's on the narrow. I'm not talking about major cases that you can easily see plainly, because you're going to have a lot of cases that are going to be tough for you to decide. You would agree with that, correct? It's going to be difficult.

Ms. KAGAN. Senator Coburn, I think that there are difficult cases that come to the court, no question.

Senator COBURN. The—the other thing that you said to Senator Kaufman this morning—you were quoting Holmes again on the Commerce Clause—is that “the judges aren't principal players in that game.” That was one of your quotes back to him. And I just have to relate to you again my concern, as I read the Constitution and I read what the founders wrote about the Commerce Clause.

I mean, they even said we were going to try to expand it and we were going to—I mean, they actually quoted that we would try to abuse what they meant, and they said that's not what we meant, and yet we still have this tremendous expansion of the Federal Government, and with it a concomitant loss of individual freedom. And so I have to tell you, my hair has grayed a little bit the last 2 days because of your position, or lack of emphasis, on original intent. I think it's valuable.

I have one other question in regard to the same thing. Senator Grassley quoted to you out of President Obama's book about property rights and you gave an appropriate, good answer. The question I would have to you is, one of the concerns that Americans have today, I talked about, I think, our rule of law is what binds us together. No matter where you come from, what your wealth status is, the fact is, in this country like no other, you have a better shot at getting in a court of law in a fair outcome than anywhere in the world.

But some of the things we're doing, which the Supreme Court should weigh in on, and he talked about property rights, including abrogation of contract rights to bond holders in a government-managed takeover of an auto company, I mean, it's a total violation of contract law, that bond holders don't have a right. When they should be first, they're placed last.

When we ignore the idea that the problem with illegal immigration isn't illegal immigration, it's the very fact that somebody is violating a law, and then with amnesty toward that it is seen as tearing apart the glue that holds us together. Or the proposed recommendation of cram-down on mortgages, where Congress would pass a bill that said mortgage contracts out, and we're going to tell you what your contract is. Do you see my concern on property rights in that regard, and also the fact that we're kind of abandoning contract law, as well as tort law? And this is Congress. I'm not talking about the court.

Ms. KAGAN. Senator Coburn, I think when you say it's Congress, I think that's right, that some of the things you just talked about are policy issues that are appropriately addressed, debated, argued about by Congress, that of course decisions get to the court in a different way. They get to the court in the form of individual cases and controversies. And the only way that a judge can legitimately approach and decide issues is through that forum, by looking at, you know, the actual circumstances of a case, the actual facts, the record, and trying to apply the—the law as best one can.

So it might be that some of these bigger issues that take place in Congress about the appropriate direction of the country, you know, in some way inform or—or—or seen in individual cases or controversies, but that's the only way that the court can look at them, not as these big, abstract questions, but just—

Senator COBURN. No, I'm not asking you to do that. I'm just asking—trying to get a feel for your appreciation of where we are today in this country. Some of my colleagues may disagree, but I'm traveling all over this country today and I see something I've never seen in my 62 years of life: an absolute fear that we're losing it, that our institutions are failing us, that we're ignoring the basic document that combines us and puts us together, and that with the

abandonment of that we're liable to lose a whole lot more than just our short-term gains in income. It's a real problem and it's what—you know, the fact is, is today our kids' future has been mortgaged and the confidence that we can get out of that is waning, and that we need to build that back up. So, you know, it's just a plea for you to look at as you become a justice, if you do, that it's not just a—the Constitution, it's what was the Constitution intended to be? It's my appeal for you to go back and look at the *Federalist Papers* and what are—I thought they had tremendous wisdom. They weren't—they didn't get it all right, but they sure got a lot of it right. The proof is in the pudding of where we are today.

Let me move on.

Ms. KAGAN. Senator Coburn, I—I said in my opening statement that I was only going to make a single pledge, and that was the pledge that I made in my opening statement. But I'll make you another: I'll reread the *Federalist Papers*.

Senator COBURN. Thank you. I'd appreciate that.

Ms. KAGAN. It's a great document.

Senator COBURN. America will appreciate that.

Ms. KAGAN. It's a great document.

Senator COBURN. I want to go to the Second Amendment for a minute, if I can. One of the things that we found in some of the papers as we looked, and you know we looked at thousands of them and there's no way you're going to be able to recall all of them, although I'm sure you've looked at some of them. You chose a phrase, when talking about the Second Amendment, that you were not sympathetic when discussing someone's claim that DC's handgun ban violated their fundamental preexisting right to bear arms. And I have a very specific question for you: do you believe it is a fundamental preexisting right to have an arm to defend yourself?

Ms. KAGAN. Senator Coburn, I very much appreciate how deeply important the right to bear arms is to millions and millions of Americans, and I accept *Heller*, which made clear that the Second Amendment conferred that right upon individuals and not simply collectively.

Senator COBURN. I'm not asking you about your judicial—I'm asking you, Elena Kagan, do you personally believe there is a fundamental right in this area? Do you agree with Blackstone that the natural right of resistance and self-preservation, the right of having and using arms for self-preservation and defense? He didn't say that was a constitutional right, he said that's a natural right. And what I'm asking you is, do you agree with that?

Ms. KAGAN. Senator Coburn, to be honest with you, I don't have a view of what are natural rights, independent of the Constitution. And my job as a justice will be to enforce and defend the Constitution and other laws of the United States.

Senator COBURN. So you wouldn't embrace what the Declaration of Independence says, that we have "certain God-given inalienable rights" that aren't given in the Constitution, that are ours and ours alone, and that the government doesn't give those to us?

Ms. KAGAN. Senator Coburn, I believe that the Constitution is an extraordinary document. And I'm not saying I do not believe that there are rights preexisting the Constitution and the laws, but my job as a justice is to enforce the Constitution and the laws.

Senator COBURN. Well, I understand that. I'm not talking about as a justice, I'm talking about Elena Kagan. What do you believe? Are there inalienable rights for us? Do you believe that?

Ms. KAGAN. Senator Coburn, I think that the question of what I believe as to what people's rights are outside the Constitution and the laws, that you should not want me to act in any way on the basis of such a belief, if I had one or——

Senator COBURN. I would want you to always act on the basis of the belief of what our Declaration of Independence says.

Ms. KAGAN. I think you should want me to act on the basis of law and that is what I have upheld to do, if I'm fortunate enough to be concerned—to be confirmed, is to act on the basis of law, which is the Constitutions and the statutes of the United States.

Senator COBURN. Going back to the Second Amendment, what we know with the two most recent cases is that they didn't necessarily take away the precedent of *Miller*, does it?

Ms. KAGAN. I'm sorry?

Senator COBURN. They don't necessarily take away the precedent of *Miller*.

Ms. KAGAN. I've not read *McDonald* yet because of these hearings, but if I understand *Heller* correctly, *Heller*—*Heller* did not find it necessary to reverse *Miller*. *Heller* distinguished *Miller* as involving a different kind of weapon.

Senator COBURN. So when you say——

Chairman LEAHY. The Senator's time has expired.

Senator COBURN. We are going to have another round?

Chairman LEAHY. Those who have asked for it. I——

Senator COBURN. I've got several more questions, Mr. Chairman.

Chairman LEAHY. Then we'll give—well, with all due respect to the Senator, if they're questions, fine. If they're 10-, 15-minute speeches, your personal beliefs, which I know you hold strongly, are fine, but I'd prefer questions. I would be willing to give you another 5 minutes when your turn comes back.

Senator KLOBUCHAR.

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

Hello, again. I wanted to read you a quote. I was thinking as I was listening to Senator Graham ask you about your role when you worked for the Clinton administration and you were answering about how your role was a specific one, and that it was different than you trumpeting your own personal beliefs.

And this was a quote from another nominee at another one of these hearings, and this person said, "My view in preparing all the memoranda that people have been talking about was as a staff lawyer. I was promoting the views of the people for whom I worked."

In some instances those were consistent with my personal views, in other instances they may not be. In most instances, no one cared terribly much what my personal views were, they were to advance the views of the administration for which I worked. Do you think that's a fair characterization of some of the work that you were doing when you were working for others in the administration?

Ms. KAGAN. I think that is a fair characterization, Senator Klobuchar. I think that most White House assistants would—would sense the truth of that statement.

Senator KLOBUCHAR. And that was actually John Roberts, at his confirmation hearing, in response to some of the questions from my colleagues. I was really interested in listening to Senator Coburn—I wasn't going to focus on this as much—when he was talking about the concept of freedom, which is integral to our country and to our Constitution, and he was actually asking you just now, back 30 years ago, if you thought that we were more free. And I think it's a very hard question to answer and not one that necessarily is one that you would expect in this hearing.

But I was thinking back, and 30 years ago was 1980. In 1980, I just checked, the top songs were Blondie, "Call Me", Queen, "Another One Bites the Dust." I remember, I was just starting to wear little bow ties and things like that. Then I was thinking about, were we really more free if you were a woman in 1980? Do you know, Solicitor General, how many women were on the U.S. Supreme Court in 1980?

Ms. KAGAN. I guess, zero.

Senator KLOBUCHAR. That would be correct. There were no women on the Supreme Court. Do you know how many women were sitting up here 30 years ago in 1980?

Ms. KAGAN. It was very striking when Senator Feinstein said that she was one of two women. I thought, how amazing. So, how many?

Senator KLOBUCHAR. There were no women on the Judiciary Committee. In fact, no women were on the Judiciary Committee until after the Anita Hill hearings in 1991.

Do you know how many women were in the U.S. Senate in 1980, 30 years ago?

Ms. KAGAN. I'm stumped again.

Senator KLOBUCHAR. No women were in the U.S. Senate. There had been women in the Senate before, and then in 1981 Senator Kassebaum joined the Senate.

So as I think about that question, about if people were more free in 1980, I think it's all in the eyes of the beholder. Certainly people had the potential freedom to get these jobs, but there were things that were impeding them from advancing to where I think that they wanted to go.

And you actually gave a speech in 2005 on "Women in the Legal Profession: A Status Report." And as I mentioned in my opening remarks, it's clear that we have come a long way. And as you noted, when Harvard's president—in this speech you noted that Harvard's president was asked about the law school and how it was faring during World War II when so many of the people who would have been in the law school were off to war, and his response was that it wasn't as bad as he expected. He said, "We have 75 students and we haven't had to admit any women."

But your speech also made some very serious points about the ways there are still gender disparities in the legal professions. We all know that more and more women are graduating from law school and from our professional schools, but women lawyers—to quote you, "Women lawyers are not assuming leadership roles in proportion to their numbers."

And as you note, that is "troubling not only for the women whose aspirations are being frustrated, but also for the society that is los-

ing their talents.” As dean, you clearly recognized the problems and disparities faced by women entering the legal profession.

What did you do about it, and what do you think we should be doing about it?

Ms. KAGAN. Well, there still are these disparities. And it’s interesting, because right now Harvard—and all schools—are about 50 percent women. Sometimes it’s 48 and sometimes it’s 52. Some schools are actually a good deal more, 55.

Senator KLOBUCHAR. And we know that over 50 percent of the people in this country are women, but there’s only 17 out of 107 Senators that are women. Go on.

Ms. KAGAN. Yes. And I do think that if you look all over the legal profession, not just in—in these governmental institutions but in—certainly in law firms, women don’t have the kind of—there’s just not the kind of diversity that I think anybody would want. And—and I think people are trying hard to make that diversity happen. I don’t think it’s a matter of bad faith in this regard, but I do think that there are structural obstacles, that there are ways in which it’s hard to balance work and family. It’s still harder for a woman than it is for a man, and that that often comes into play in the legal profession, as it does elsewhere.

And if you—if you look at these opportunities for women, you know, I think probably the best thing that we could do as a society—but this isn’t the court’s role, this really is Congress’ role—is to try to enable women and men, but I think that they especially strike women, to—to manage those balances, the—the desire to have a fulfilling professional life, and also the desire to have a wonderful family life, to manage that balance better and to sort of create the structures that enable them to do so.

And, you know, the work that I did in the Clinton White House, you’re quite right, it had—it has nothing to do with what I would do as a judge, and it also didn’t have much to do with my particular beliefs, except that I did believe in—I mean, I was proud to serve in the administration of President Clinton. And one of the things that I did do there was to work on some of these issues, to work on issues relating to child care, for example, and to—to try to help women and men with these very difficult issues and how to have wonderful professional lives, and also have wonderful family lives.

Senator KLOBUCHAR. So do you think women are more free, just to end this discussion that was sparked by Senator Coburn’s going back to 1980? Do you think women are more free to pursue some of their career goals now than they were in 1980, given the numbers that we see?

Ms. KAGAN. I think that there’s no question that women have greater opportunities now, although they could be made greater still.

Senator KLOBUCHAR. Thank you.

One last point I just wanted to make. There still continues to be a lot of focus on the recruiting—military recruiting. I think you made very clear that at no time were the recruiters banned from the Harvard campus, and that in fact I think you’ve mentioned—I don’t want to put words in your mouth—but the military recruit-

ing, the numbers went up, more people were recruited during the time you were there. Is that right?

Ms. KAGAN. You know, I don't want to make too much of this.

Senator KLOBUCHAR. Yes.

Ms. KAGAN. The numbers were basically stable. There was certainly no drop in the—in the particular year in question. There was actually a slight uptick, but it seems to me that if you look over the whole history, both before I was dean and after I was dean, what it suggests is that the difference between military recruitment being done under the kind of auspices of the Office of Career Services and being done under the auspices of the veterans organization just didn't make a difference.

Senator KLOBUCHAR. OK. And I just—you know, numbers are always interesting and important, but for me sometimes what people say that would work with someone like you is important, and I know that the Chairman put this letter in from a student, Robert Marrow, who had served in Iraq.

In his own words, he went from fighting in the streets of Fallujah to studying in the hallowed halls of Harvard Law School, and he talked about—in this—in this op-ed that was in the *Washington Post*, he talked about how students pretty much treated him the same as other students, except for a few silly questions, and how most of the faculty members were fine but didn't really acknowledge what had happened.

But you had acknowledged his service, and he ended by saying this. He said, "She was decidedly against don't ask/don't tell, but that never affected her treatment of those who had served." He says, "I am confident she is looking forward to the upcoming confirmation hearings as an opportunity to engage in some intellectual sparring with Members of Congress." He says, "She treated the veterans at Harvard like VIPs and she was a fervent advocate of our veterans' association."

And then he says, when he talks about the sparring with Members of Congress—and I'll end with this—he says, "I would especially warn the Members of Congress to do their homework, as she has a reputation for annihilating the unprepared." I think that's a good ending. You've done a wonderful job. Thank you very much.

Ms. KAGAN. Thank you, Senator Klobuchar.

Chairman LEAHY. Thank you very much.

Senator Sessions, did you want more time? I know Senator Coburn said he wants more time.

Senator SESSIONS. Yes.

Chairman LEAHY. Oh, I'm sorry. Senator Franken has. We'll go to Senator Franken. Let's just see how many more want more time. Senator Coburn has already said he wants another 5 minutes. You want how many? How much more time? You want more time. Senator Hatch. He may. Senator Grassley, you want another 5 minutes. Senator Cornyn. OK. Senator Franken, let's go on because we have the secure room available at 5 to do the closed session.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, General Kagan.

I'm extremely concerned about the proposed merger between Comcast and NBC-Universal. Media consolidation matters in a really fundamental way. I watch television for entertainment, but I also

get a lot of my information there too. So when the same company owns the programming and runs the pipes that bring us the programming, I think we have a problem. I'm interested in the ways that the Supreme Court affects the information that you and I get when we turn on the TV or read the newspaper.

Sixty years ago, in *United States v. Associated Press*, the Supreme Court found that the First Amendment supported aggressive antitrust enforcement. Justice Black wrote, "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." He then continues, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."

When I read Black's opinion, I think immediately of Comcast and NBC-Universal. Comcast is already extremely powerful. It's the nation's largest cable operator and also the largest home internet service provider. If it owned both the pipes and the programming, it would have the ultimate ability to keep others from publishing. It could just choose to favor its own programming over programming that other companies produce and withhold its own programming or charge more for it and drive up Minnesotans' cable bills.

To make matters worse to me, if Comcast and NBC merge, I worry that AT&T and Verizon are going to decide that, well, they have to buy ABC or CBS to compete, and that will mean there will be less independent programming, fewer voices, and a smaller marketplace of ideas. That's a First Amendment problem, it's also an antitrust problem. So General Kagan, here's my first question: do you agree with Justice Black that freedom to publish is guaranteed by the Constitution but freedom to combine to keep others from publishing is not?

Ms. KAGAN. Well, Senator Franken, I—I—first off, let me say that I think that that Comcast merger is under review by the Department of Justice at the current moment, so I want to steer well clear of that.

Senator FRANKEN. I'm not asking you about it specifically.

Ms. KAGAN. Yes. I mean, the—the—you know, the First Amendment does not provide a general defense, I think, to the antitrust laws. I'm not saying that in any particular cases First Amendment principles might not be relevant, but in general. The antitrust laws are the antitrust laws and they apply to all companies.

Senator FRANKEN. OK. Let me talk about online.

Ms. KAGAN. Talk about?

Senator FRANKEN. Speech that's online, over the internet and over the airways, or over cable. Many of the pipes that carry speech are in the hands of corporations, whether those corporations are cable companies or internet service providers.

And I brought this up with then-Judge Sotomayor at last year's hearing. I asked her about net neutrality, and she agreed that there is a First Amendment interest in ensuring that the internet stays open and accessible, protected from corporate interference. I'd like to ask you a variation on that question, now applying it to the merger context. Let me start with a pretty simple question: do you believe that the First Amendment helps to promote diverse public voices and opinions?

Ms. KAGAN. One of the purposes of the First Amendment is to ensure a public sphere in which all kinds of different opinions and views and thoughts can be expressed, and we can learn from all of them.

Senator FRANKEN. And would you agree that the First Amendment governs actions or behavior by the federal government?

Ms. KAGAN. Of course. The First Amendment governs actions and behaviors by the federal government, as well as by the states.

Senator FRANKEN. OK. So the First Amendment helps to promote diverse speech and it governs governmental actions. In a merger case, the government is the one making the decision to allow two companies to merge. Given all of this, do you believe that the First Amendment could inform how the government looks at media anti-trust cases?

Ms. KAGAN. Senator Franken, I—I guess you could be thinking about that as a kind of policy matter, as to whether the authorities that are responsible for approving mergers and such ought to take into account so-called, you know, First Amendment values, not the—and—and I think I would defer to people who know a lot more about antitrust policy than I do on that. So, I guess that's what I'd say.

Senator FRANKEN. OK. Thank you. One last thing.

A lot of people have been talking about judicial activism. I know that I certainly have, and I'm glad my friend Senator Graham brought this up. He said, can you find a judicial activist somewhere? And I can understand why you didn't want to find one. I want to try to help. I always want to help my friend, Senator Graham. You said there are three things that judges hold to when they're not activists.

You said this: they respect precedent, they make narrow decisions, and they defer to the political branches, in other words, the legislature. There are a lot of recent cases that we've been talking about that instinctively strike me, and a lot of other people, as falling outside of these three guidelines. I think that in these cases the Supreme Court was legislating from the bench, which is being activist.

In *Circuit City*, which I discussed at length during my first round, the Supreme Court explicitly ignored—explicitly ignored—Congress, gave absolutely no deference to Congress' intent. This is on the specific provision protecting all workers from mandatory arbitration. The Court read that provision in such a strained manner that, even though the legislative history indicated a quite different intent, that provision would exclude almost all workers. In *Gross*, and in *Rent-A-Center*, and in *Citizens United*, the Court answered questions that it wasn't asked. They didn't rule narrowly. That was your second.

In a *Leegin* case, the Court struck down a century-old precedent—that's your third—that protected small business owners against vertical pricing fixing. So those are all three of your conditions: ignoring Congress, the intent; not ruling narrowly, and overturning precedent. So I think that the judges who decided these cases are judicial activists. Under the guidelines that you laid out to my friend Senator Graham, and that he seemed to like.

Now, let me distinguished this from Justice Thurgood Marshall. Justice Thurgood Marshall argued *Brown v. Board of Education*, as you and Senator Graham discussed, correct?

Ms. KAGAN. Yes, he did.

Senator FRANKEN. And if I lumped *Brown v. Board of Education* in with the list of cases I just mentioned, most people in the room would balk, don't you think?

Ms. KAGAN. Well, *Brown v. Board of Education* is the kind of iconic case that doesn't belong on any list.

Senator FRANKEN. Well, there's a reason that—I mean, it is an exemplar of overturning a precedent that needed to be overturned, is that correct, would you say?

Ms. KAGAN. Yes, sir, Mr. Franken. Yes.

Senator FRANKEN. And that's because there is a place for judicial review in our legal system. I'm trying to make the distinction between judicial activism and not judicial activism. There are certain situations where the Supreme Court really should subject the law to heightened scrutiny.

This is what I think Justice Marshall was talking about when he said that the court should show "special solicitude for the despised and disadvantaged, the people who went unprotected by every other organ of government and who had no other champion." Now, in the opening statements, you were criticized for admiring Justice Marshall for believing this, but I actually think that this belief, that Justice Marshall's belief, is good, constitutional law. Are you familiar with *Carolene Products*, the *Carolene Products* case of 1938?

Ms. KAGAN. Yes, sir.

Senator FRANKEN. Are you familiar with Footnote 4 of that decision?

[Laughter.]

Ms. KAGAN. Yes, sir.

Senator FRANKEN. And you're familiar with that because the footnote is really important, isn't it? It's often taught in constitutional law classes, whether they be in the first year or the second year or the third year, right?

Ms. KAGAN. It is.

Senator FRANKEN. Can you tell me what that footnote says and why it's important?

Ms. KAGAN. Senator Franken, it seems as though you have it in front of you and you're going to do a better job of it than I am at this moment.

Senator FRANKEN. You're a mind reader. Footnote 4 basically says that when courts interpret the Constitution and try to figure out whether a law complies with the Constitution, the court should give special scrutiny to laws that violate a specific part of the Constitution, that restrict the political process, and that affect "religious, national, racial, and discrete and insular minorities" who have a really hard time getting help through the normal political process. Now, to me, "discrete and insular minorities" sounds a lot like the "despised and disadvantaged" that "go unprotected" and "have no other champion." Is it safe to say that Justice Marshall's belief is consistent with *Carolene Products*?

Ms. KAGAN. Well, there's no doubt, Senator Franken, that racial classifications are subject to very high scrutiny under the Equal Protection Clause, and have been so for a long time. And the Equal Protection Clause exists to ensure against discrimination on disfavored bases, very much included, and the archetypal example is race, and that it is not only appropriate, but obligatory on the courts to enforce that prohibition on discrimination on the basis of race.

Senator FRANKEN. So Justice Marshall's belief that was criticized in the opening statements is really very consistent with established constitutional law, isn't it?

Ms. KAGAN. Well, Senator Franken, I will say that when I wrote those words I was not speaking of Footnote 4 and *Carolene Products*. I was speaking instead of—of what I've talked about several times at this hearing, which is Justice Marshall's deep belief in ensuring a level playing field for all Americans and ensuring that each and every American, regardless of wealth or power or privilege, that each and every American gets fairly heard before the court. And—and when I—when I wrote that tribute to Justice Marshall and wrote those words, that was very much what I had in mind.

Senator FRANKEN. So I'd like to leave you with this thought, General Kagan. Justice Thurgood Marshall is one of the greatest lawyers and jurists in American history. This is the man who won *Brown v. Board of Education*, who helped end segregation in our Nation's schools and opened the doors to black Americans. This is the man who proved that separate but equal was inherently unequal. Not only that, but he served with distinction as Solicitor General, as a judge on the Second Circuit, and as the first African-American Supreme Court justice. This is a giant of the American legal system.

And I think what I really want to say is that Justice Marshall wasn't some activist radical, rather, his views were very much in the mainstream and in line with constitutional jurisprudence since 1938, since *Carolene*, and before that. And I just think that we need to be aware of that and to remember that.

Ms. KAGAN. Senator Franken, I'll just say what I've said on many occasions in the past, which is that Justice Marshall is a hero of American law and a hero of mine.

Senator FRANKEN. And of mine. Thank you. Thank you, General Kagan.

Thank you, Mr. Chairman.

Senator FRANKEN. I'm going to yield to Senator Sessions, but I've already been told that Senator Klobuchar wanted to correct one—

Senator KLOBUCHAR. Yes. We have learned from many emails to our office that in fact, in 1980, Solicitor General Kagan, Nancy Kassebaum was already serving in the Senate, so there was in fact one woman Senator. There were no women on the Judiciary Committee, and I was correct: "Call Me" from Blondie was the top song.

[Laughter.]

Senator KLOBUCHAR. So I wanted to make that. And I assume it doesn't change any of your answers.

Ms. KAGAN. Isn't email a wonderful thing? You can learn you're wrong right away.

[Laughter.]

Senator KLOBUCHAR. It is nice. Thank you.

Chairman LEAHY. Trust me, I do.

[Laughter.]

Chairman LEAHY. I was just looking at some of the ones that have come in since this started.

Senator Specter, you just wanted to put a letter in?

Senator SPECTER. Yes, Mr. Chairman. Following Senator Franken's questioning, I ask consent that a letter dated May 11, 2010 from Senator Casey and me to the Chairman and all the members of the Federal Communications Commission regarding the NBC-Comcast merger be placed in the record.

Chairman LEAHY. Without objection, so ordered.

Senator SPECTER. I thank the Chair.

[The information appears as a submission for the record.]

Chairman LEAHY. We will go to Senator Sessions, then Senator Hatch if he so wishes, and then Senator—let me see who else? Senator Grassley, did you want more? And, Senator Coburn, you want more.

Senator Sessions.

Senator SESSIONS. We are doing our best to be cooperative.

Chairman LEAHY. I still withheld most of my time from my second round.

Senator SESSIONS. You are very generous. Well, we would normally be going into tomorrow with these hearings. Because of the extraordinary events of the week, Mr. Chairman, I am glad to work with you to try to finish up tonight, and we will do our best to do that.

Chairman LEAHY. I would note again for the record Senator Sessions has been extraordinarily cooperative in trying to do that.

Senator SESSIONS. But I know you know that this is not a little matter. This is a very, very significant matter. A nominee could serve, if she served as long as Justice Stevens, 34 years—38 years on the bench, and we wish you a productive service if that occurs.

I would say at to what kind of agenda you should bring to bear, I think the oath sets a good agenda. The oath is that you would impartially do your duty with equal right to the poor and the rich, without respect to persons under the Constitution and laws of the United States. And I guess I would ask you a question. One columnist I saw said, "Would you do so without any mental reservation or purpose of evasion?"

Ms. KAGAN. Senator Sessions, I agree with you that that is exactly what I should be doing if I am fortunate enough to be confirmed, and I would do so without any mental reservation or purpose of evasion.

Senator SESSIONS. All right.

Ms. KAGAN. It feels a little bit odd to be taking what seems like that oath at this table.

Senator SESSIONS. A bit early. But it is not an exact copy.

You talked about Miguel Estrada. I so admired him and still do, and I think without a doubt spoke more on the floor in support of his confirmation than probably any other Senator. One of the big

issues that occurred was whether or not the internal memoranda of the Department of Justice should have been produced so that people in the Senate, mainly my Democratic colleagues who filibustered his nomination and kept it from ever coming up to a vote, which he would have been confirmed had that occurred. Their objection in large part seemed to be that those internal memoranda should have been produced, whereas every living Attorney General—every living former Solicitor General wrote that those documents should not be produced.

So I guess I would ask you, Solicitor General, do you think now that you should produce those documents? Or do you think the better policy is the one the Bush administration pursued, which was not to go down the road of producing such documents?

Ms. KAGAN. Senator Sessions, before you said it, I was just going to say that, in fact, every living Solicitor General did say that those documents ought not to be produced, and they said that because of an understanding about how the office works and how important confidentiality within the office is to effective decision-making. And I think that that's absolutely right, and it is one of the reasons why I have not wanted to talk about any internal deliberations that have occurred within the office, and I certainly think that it was the right view then that those documents from within the office should not have been produced.

Senator SESSIONS. Well, I would say I have been interested in what might be in those internal documents you were involved in in the Solicitor General's office, but have refrained from asking for it. But based on that answer, I assume that you would advise other members of the Senate that in the future they should not be demanding such documents of a nominee, absent some special, discrete problem that may justify it in an unusual case.

Ms. KAGAN. I do think that the Office of Solicitor General is a very special kind of office where candor and internal really truly thorough deliberation is the norm and that it would very much inhibit that kind of appropriate deliberation about legal questions if documents had the potential to be made public generally in that way.

Senator SESSIONS. Thank you. United States Code 983, the Solomon Amendment, I believe the last of the four amendments that we passed to try to make sure that our law schools could not continue to get around it some way and find a loophole, says this: that the military must be given access "that is at least equal to the access to campus and to students that is provided to any other employer."

My question to you is: During the entire time you were dean, did you give the military at least equal access to any other employer?

Ms. KAGAN. Senator Sessions, our consistent view was that we were in compliance with the Solomon Amendment. Of course, the Department of Defense determined otherwise, and when the Department of Defense determined otherwise, we complied with what the Department of Defense asked of us.

Senator SESSIONS. I do not think that answered the question. I do not think there is any doubt that they were not given equal access to the campus. It was based on a decision you made to reverse

previous Harvard policy, and I just remain troubled that we cannot seem to get in sync on that issue. It is a big problem for me.

My colleague asked about judicial activism. I would say that Judge Barak's statement that Lindsey Graham read is a classic. He says, "The statute remains the same as it was, but its meaning changes because the court has given it a new meaning that suits new social needs."

I believe an activist—and I think I am quoting Senator Hatch, although he would not give me credit for it—he would not take credit for it. My view of an activist judge is one who allows their personal, political, ideological, religious or other views to cause them to not be faithful to the law. And when Justice—I know you are rushing me, Mr. Chairman.

Chairman LEAHY. I am not rushing you.

Senator SESSIONS. You are breaking my little train of thought. It is so easy. My brain is weak. But Justice—

Chairman LEAHY. It probably is the third or fourth—

Senator SESSIONS—[continuing]. Marshall—well, I guess Solicitor General Marshall and the courts who ruled against separate but equal, I do believe in my mind, by my definition, that was a decision consistent with the plain words of the Constitution. When you said a child could not go to this school because of the color of their skin and another one must go to that school simply because of the color of their skin, that is not equal protection. So I think they just simply returned to the plain words of the document, and there was evidence that the people who drafted it had that in mind. But I think originalism has its limits. Each theory has its limits. But fundamentally I think it is not activism to reverse a bad decision, and the Court should do that, and the courts who failed to set aside bad decisions are not in harmony with the law or are failing in their responsibilities.

Mr. Chairman, one more.

I did not quite understand. I thought that Harvard had abandoned any constitutional law course requirement. You and Senator Grassley I think talked about first-year law school requirements of constitutional law. Is there a requirement at Harvard in any year that they take constitutional law?

Ms. KAGAN. Senator, at least as far back as when I was a student, there has actually not been a requirement that constitutional law is taken, but almost all students take a very great deal of constitutional law.

Senator SESSIONS. But international law was required recently? A course in international law was required recently?

Ms. KAGAN. When we reviewed our first-year curriculum, we determined really because the constitutional law professors of the school wanted to keep constitutional law in the second and third year where it could be taught more in-depth and more broadly where students would have really greater time to study it, the constitutional law professors thought that it would not be a good idea to put it in the first year. Some constitutional law actually we did put into the first year in a course on the governmental process, and particularly that deals with separation of powers law.

In general—and this has been true for a long time—Harvard has taught constitutional law in the second and third year where there

are not requirements, but the vast majority of students take a very great deal of constitutional law.

Senator SESSIONS. Well, yesterday you indicated that the Court could consider foreign court opinions as they could “learn about how other people might approach” and think about approaching legal issues. And you said, “I guess I am in favor of good ideas coming from wherever you can get them.” I think some of the Justices on the Court have used that phrase. But ideas sound like policy to me. It does not sound like authority to me.

I guess I want to ask you, there is a raging debate on the Court and within the legal community over the propriety of citing foreign law in opinions as providing guidance. Justice Stevens in the *McDonald* firearms case Monday dissented and cited “the experience of other advanced democracies” regarding their gun restrictions.

We have got a constitutional amendment that says you have the right to keep and bear arms. He wants to consider the experience of other advanced countries.

All right. This is my last question.

He went on to say, “While the American perspective must always be our focus, it is silly, indeed arrogant, to think we have nothing to learn about liberty from the billions of people who live beyond our borders.” And Justice Scalia noted with some sarcasm that, “No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what other countries do.” In other words, he was saying he thought this was a very unwise policy.

So I would ask you on whose side do you come down, Justice Scalia’s or Justice Stevens’?

Ms. KAGAN. Well, Senator Sessions, I have not read the *McDonald* case so I have not read what either Justice Scalia or Justice Stevens has to say about that question. It is interesting that you ask this with respect to the Second Amendment, because I think that I was asked about this question during my SG confirmation, was given a written question about whether I thought that the use of foreign law was appropriate in the context of the Second Amendment. And I hope I am remembering this correctly that I said it was not, that the Second Amendment question as defined by *Heller* was so peculiar to our own constitutional history and heritage that, you know, foreign law did not have any relevance.

So I hope I am paraphrasing that accurately, but I know I wrote about it to the Senate previously.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

I will also put in the record—you had mentioned Solicitors General. We have a letter directed to Senator Sessions and myself signed by Solicitors General in the administrations of Presidents Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush, all supporting you, Ms. Kagan, to be on the Supreme Court. It is signed by Charles Fried, Kenneth Starr, Drew Days, Walter Dellinger, Seth Waxman, Ted Olson, Paul Clement, Gregory Garre, all supportive. And I will put that in the record.

[The letter appears as a submission for the record.]

Chairman LEAHY. Senator Grassley, you are recognized.

Senator GRASSLEY. If you answer the questions briefly, I will not need the 13 minutes and 10 seconds that Senator Sessions just took.

Ms. KAGAN. You were counting, huh?

Senator GRASSLEY. Here is where we are. I want to make one statement because I did not want you to have the last word on *Baker* and settled law, so I would make this clarification, and you do not need to comment.

My question on the precedential value of *Baker* was whether *Baker* is binding as settled law on lower courts until the Supreme Court revisits the issue. The Supreme Court has stated, "Lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" So until the Supreme Court speaks directly in response to the issue in *Baker*, it seems that the Court precedent supports the position that *Baker* is settled law and should control in the lower courts.

Ms. KAGAN. Senator Grassley, may I?

Senator GRASSLEY. You may.

Ms. KAGAN. This is not an area which I know a great deal about, so I thought that I was stating, you know, what Senator Leahy called hornbook law on this question. But it is not an area that I have studied in any depth, and I look forward to being further informed about it.

Senator GRASSLEY. Thank you. I want to go to the fact that in 1996 Congress passed and President Clinton signed into the law the Defense of Marriage Act. That law defines marriage for purposes of Federal law as between one man and one woman, and it also provides that no State or territory shall be required to give effect to another State that recognizes same-sex marriages. Both provisions have been challenged as unconstitutional, and Federal courts have upheld both.

Do you agree with Federal courts which have held that DOMA does not violate the full faith and credit clause and is an appropriate exercise of Congress' power to regulate conflicts between the laws of different States?

Ms. KAGAN. Senator Grassley, I do think that that is an issue that might come before the Court, the constitutionality of DOMA, so it would not be appropriate for me to comment on it.

Senator GRASSLEY. OK. Let me move on then, a little bit along the same line but a different approach, whether or not you played any role in approving or reviewing the Reply Memorandum in Support of Defendant United States' Motion to Dismiss in the case of *Smelt v. United States*? If so, could you please explain why the Justice Department abandoned the argument that traditional marriage rationally served the legitimate interest of promoting the raising of children by both parents, which Congress could reasonably conclude is the optimal environment for raising children?

Ms. KAGAN. Senator Grassley, this was not a case in which I was the decisionmaker. It was a case in district court, and the Solicitor General's decision-making responsibilities take over at the appellate court level. It was a case in which members of my office and I reviewed some briefs and participated in some discussions. And I think I would need to say with respect to those discussions that, you know, I cannot reveal any kind of internal deliberations of the

Department of Justice, but just to say that, in general, lawyers do make a raft of decisions, strategic and otherwise, about how best to present cases. And the Department of Justice is right now defending the DOMA legislation in the courts in that case and in a couple of others.

Senator GRASSLEY. Do you believe that it was necessary to note in the Reply Memorandum that “the Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal”? Do you believe such language is consistent with your promise to vigorously defend the statutes of our country?

Ms. KAGAN. Senator Grassley, I am reticent to talk about particular decisions made with respect to that brief, not only because I was not the decisionmaker on that brief, but because the Department of Justice is currently litigating those cases, and I do not want to do anything that interferes or undermines or, you know, in any way gets in the way of the defense the Department of Justice is making on those cases.

Senator GRASSLEY. OK. Well, you took an oath to defend the laws of the United States, including DOMA. Would you agree that calling a law “discriminatory” and advocating for its repeal is no defense?

Ms. KAGAN. Senator Grassley, I do believe that the Department of Justice is vigorously defending DOMA in that case and in other cases.

Senator GRASSLEY. OK. On another matter, in *Griswold* Justice William Douglas stated—

Chairman LEAHY. How much more time would the Senator like?

Senator GRASSLEY. I want less than what Senator Sessions had.

Chairman LEAHY. Senator Sessions, of course, is the Ranking Member and by tradition—

Senator GRASSLEY. Oh. Well, then can I have 2 more minutes?

Senator SESSIONS. Mr. Chairman, I think he can—

Senator GRASSLEY. Can I have—

Senator SESSIONS. You can give him—

Chairman LEAHY. He asked for 2 more minutes, and I am going to give it to him. But I just want to know because we have to plan for the—

Senator GRASSLEY. This will be the last question.

Chairman LEAHY—[continuing]. Security people on the closed room.

Senator SESSIONS. And we can be so pleased that he can be Ranking Member next year.

[Laughter.]

Senator SESSIONS. You should be nice.

Chairman LEAHY. I would miss you so much, I do not know if I could handle that.

Go ahead, Senator Grassley.

Senator GRASSLEY. Do not worry.

In *Griswold*, Justice William Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.

A two-part question. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”? Is it appropriate for a judge to go searching for “penumbras” and “emanations” in the Constitution?

Ms. KAGAN. I think, Senator Grassley, that rights have to have textual bases, and so I would not subscribe to the Justice Douglas approach on penumbras and emanations.

I do, as I think every nominee has, support the result in *Griswold*. I think that the way other Justices have understood that result as properly justified is through the Liberty Clause of the 14th Amendment.

Senator GRASSLEY. Well, then I think from your answer, which I like, that you do not—you would not say that there are a lot of other rights that are implicitly written into the Constitution then?

Ms. KAGAN. I do believe that rights need a textual basis in the community, and they might have that basis in general clauses, but there needs to be a textual basis in the Constitution for any right.

Senator GRASSLEY. OK. Then the last point would be a continuation of this, and I think you probably answered it, but let me tell you why I ask these questions, because of somebody called Justice Souter. Some judges found ways to make law through “penumbras” in the Constitution. Justice Souter in his confirmation hearing told me that the courts fill “vacuums” in the law. Justice Sotomayor has said that the court of appeals is “where policy is made.” If you are confirmed, will you try to find a creative way to “make policy” from the bench based upon “penumbras” or Souter’s “vacuums”?

Ms. KAGAN. Senator Grassley, I have tried during the course of this day and a half to state how I would approach constitutional interpretation, that where the text governs, the text governs; where more work needs to be done, what judges ought to look to is the structure of the Constitution, the history of the Constitution, and the precedent relating to the Constitution. And that is what I would do in any case. It is law all the way down, I think is what I said yesterday, and that is what I believe. It is not personal views. It is not moral views. It is not political views. It is law all the way down.

Senator GRASSLEY. I gave you an opportunity to sum up 2 days of what you have been trying to tell us. Thank you.

I was 5 minutes short of Senator Sessions.

Chairman LEAHY. I found when the Republicans were in control and I was ranking members, they always gave me a little bit extra and Senator Sessions has never been cutoff. Senator Graham, did you have anything?

Senator GRAHAM. No.

Chairman LEAHY. Senator Coburn, how much time would you like?

Senator COBURN. Oh, less than 10 minutes.

Chairman LEAHY. You are recognized. Go ahead.

Senator COBURN. Thank you.

Chairman LEAHY. And at that point, just so people know on the schedule, when Senator Coburn finishes, you have a short 10-minute statement you want to make, I will too and we will break for about 15 minutes and then reconvene in the regular room,

right? The regular room which has been secured by the people who do that. I have only been here for 36 years, I am still learning my way around. Senator COBURN, go ahead.

Senator COBURN. Thank you, Mr. Chairman. Again, thank you for your testimony and your answers to our questions. I know it hasn't been the most pleasant experience in the world, but this is my fourth one and I think this has been one of the best.

Ms. KAGAN. Senator Coburn, I want to say that I think it has been terrific. Everybody has been very fair and very considerate and I hope you found it informative. I found it somewhat wearying but actually a great moment in my life.

Senator COBURN. Just a couple of questions and hopefully I won't use all 10 minutes.

I was interested in your discussion about the economic versus non-economic test on the commerce clause and just to put your feelings on whether or not that test supercedes original intent.

Ms. KAGAN. Well, Senator Coburn, I think this goes back to some of the discussion that we were having yesterday. As I understand the court's commerce clause law, that test is the governing test which is entitled to the weight the precedent usually has.

That means that it's not enough to say that the decisions are wrong and it doesn't matter why the decisions are wrong. It doesn't matter whether the decisions are wrong because they are contrary to original intent or for some other reason why people might think that decisions are wrong.

The point of precedent is to constrain judges and the point of precedent is to remind judges that they don't know everything and that they should rely on sort of the wisdom of the courts and of other judges over time. I think that, and the point of precedent is to provide stability and reliability in the law.

I think that those values govern even though somebody might come in and say a decision is wrong. That is true if the person says the decision is wrong because it violates the text or it violates the history, the original history or it violates anything else that there is, there needs to be a kind of high bar for reversing precedent.

Senator COBURN. But that does not preclude that precedent can be reversed.

Ms. KAGAN. It can be reversed, and we have talked on various occasions about when it can be reversed. In particular if the precedent is unworkable or if the precedent's doctrinal support has eroded or if the precedent no longer fits the actual factual empirical circumstances that exist in the country, there are occasions in which precedent can be reversed.

Senator COBURN. Let me go onto another section if I might. The coercion test that you discussed. Do you find it ironic that the coercion test applied to graduating seniors in high school who are old enough to go and die for this country but the coercion test says they are not old enough to make a decision about something they hear? Is that ironic to you?

Ms. KAGAN. Senator Coburn, I have tried hard not to characterize particular decisions, not to grade them, not to give them the thumbs up or the thumbs down.

Senator COBURN. You would admit there is some irony in that?

Ms. KAGAN. Senator Coburn, when I talked about this with, I forget who I talked to about it.

Senator COBURN. I do, too. I forgot who you talked to about it as well.

Ms. KAGAN. I did talk about how one of the, I think an attribute of the coercion test is that four different people can look at a practice and have four different views as to whether coercion has in fact taken place.

I think everybody would say that coercion, adults are different than children. I think the question of sort of who counts as a child and who counts as an adult is one of those matters that I think the coercion test is, notably presents that different people can look at the same set of facts and reach different conclusions as to whether the government in fact has engaged in coercive activity.

Senator COBURN. Thank you. I have two final questions. One, was there at any time, and I'm not asking what you expressed or anything else, was there at any time you were asked in your present position to express an opinion on the merits of the health care bill?

Ms. KAGAN. There was not.

Senator COBURN. Thank you. And final question. It is your testimony before this Committee that you had no efforts at all to influence the decision by ACOG in terms of what they ultimately put out on partial birth abortion?

Ms. KAGAN. My only dealings with ACOG were about talking with them about how to ensure that their statement expresses their views. I was a staffer with no medical knowledge. I would not have presumed to nor would ACOG have thought it was relevant for me to.

Senator COBURN. But you were part or at least you acknowledge being a part of the people who developed the four options for President Clinton.

Ms. KAGAN. I definitely participated in discussion of this issue.

Senator COBURN. And you referenced that that was our memo, correct? In other memos to the President.

Ms. KAGAN. Yes. I mean, I definitely participated as an aide in trying to implement the President's views on this issue.

Senator COBURN. And you were concerned with their original language, that is true?

Ms. KAGAN. I was—

Senator COBURN. ACOG's original language. You were concerned with. It was problematic.

Ms. KAGAN. I was concerned that that language did not accurately reflect what ACOG's views were and what they had expressed to us.

Senator COBURN. Their original language, being somebody that has delivered thousands of—where it was absolutely accurate. Their second language was not accurate. I would think that the vast majority of those who have been through my experience would agree with that.

I have no other questions for you. I thank you for the spirit in which you answered the questions here today. As was said in the paper today, you kind of light up a room. I agree with that. Congratulations on your nomination.

Ms. KAGAN. Thank you so much, Senator Coburn.

Chairman LEAHY. Thank you.

Senator COBURN. And that's 3 minutes early, Mr. Chairman.

Chairman LEAHY. It's what?

Senator COBURN. Three minutes early.

Chairman LEAHY. God bless you. I will put it on your positive—

Senator COBURN. I know the Chairman remembers when he was a lowly low Ranking Member of the Judiciary Committee some 35 years ago.

Chairman LEAHY. I have so many stories, I'm not going to do it with the television. I will tell you a couple of them afterwards. I will put the extra 3 minutes in your ledger. Now it is very full.

Senator COBURN. Thank you.

Chairman LEAHY. Senator Session, you want to make a short posing, I understand?

Senator SESSIONS. I would be pleased to. First I would offer a number of letters for the record from Colonel Gonzolo Bagara who would oppose the nomination, Judicial Action Group, the National Right to Life Committee, Military Families United, Southern Baptist Ethics and Religious Liberty Commission, American Association of Christian Schools and Center for Military Readiness who expressed opposition to the nominee.

We talked about a lot of important issues today. The interstate commerce issue, several of our Committee members asked about it. *Lopez, Morrison*, a 5–4 decision. Foreign law, that's a ranging debate within our country today.

I do not see how anyone can justify a citation to actions outside the country as any authority whatsoever to define what Americans have done. Americans believe that you only govern with the consent of the governed and we have not consented to be governed by Europe or any other advanced nation.

People are concerned about abortion issues, they are concerned about national security. We've got raging debates in our conference over that. I think this nominee in private life wrote a very intemperate letter about some of those issues that causes me concern.

The ownership of firearms. We've got two seminal cases 5–4 that had it been one vote switched within 5–4, completely eviscerating the right to keep and bear arms, allowing any city or any county in America, any state to completely deny the people of the right to keep and bear arms.

People are worried about that. Senator Coburn has been, some of the things he's saying that I'm hearing as I'm going around my state, people are concerned and are asking the question is there any limit on what you do in Washington? Does anybody care? We do. We are tired of this. We are worried about this and I think their worries are legitimate. I don't think it's extreme.

We are talking about activism. Justice Barak says, you know, the words don't change but you give them new meaning that suits new social needs. Well, I know you said he's your hero and I'm sure you're correct that you don't adopt all of his philosophies, but many judges in the court system in America today are not too far from that I believe, and I believe some of those judges are not fulfilling

their oath. I'm not going to vote for a judge I do not believe is committed to that.

I am worried about the idea of legal progressivism. I think that's a pernicious philosophy. A liberal ideal has always, I have had, I do admire the liberal ideal in the American tradition. But this progressive movement I think is particularly hostile to playing the law. I'm not pleased with it.

The President, I think as Senator McCain said is a legal progressive, or Mr. Greg Craig, his counsels have said and indicated that you are, Ms. Kagan. So I worry about that.

And I would just say with regard to the discussion about Harvard and the military, I am concerned about the way you overall described what happened, suggesting that it really wasn't that big a deal and that you always wanted to help the military.

I was involved in writing the Solomon Amendment, several different versions of it. It took four times to get it so the deans around the country couldn't figure a way to get around it. It was a national debate, it was very intense at Harvard and I do believe that your actions, I think your actions there were not consistent with the law.

So a nominee is a person of skill and intelligence who has a diverse background. I do think that this Senate has a very serious responsibility at this time and people are deeply worried about our Constitution and is it being followed. They want to know that the next nominee to our Supreme Court will be faithful to that Constitution even if they don't like it.

Some of the things you have said today have indicated that, but a combination of record and statements leave me uneasy. So I look forward to studying that record and trying to fairly and objectively make my evaluation of whether I should vote for you for Supreme Court of the United States. Thank you, Mr. Chairman.

Chairman LEAHY. Solicitor General Kagan, the good news is that this is in all likelihood the last time you will ever have to be in a public hearing before a Senate Judiciary Committee.

Some of us have probably enjoyed it more than you have. I have appreciated your, not only your intellect but your good humor throughout.

I said to somebody, see, we do agree on something. I said to somebody earlier today who mentioned I have been here throughout all the hearings, I said it was like going back to my favorite courses in law school.

You have patiently listened to our statements, you have answered our questions over the last 3 days, yesterday you testified 10 hours, today you have been here since 9 this morning. Each Senator both sides participated in a 30-minute opening round. Some took the opportunity for another 20-minute round and some have gone beyond that to over an hour.

Of course I mention for the public watching, this is in addition to our other interactions with you. All of us have met with you privately. I know speaking from my views, when I met with you you answered openly and candidly every single question I asked you.

I appreciate that you engaged with Senators, you have answered their questions more fully than many recent nominees. Senators on

both sides of the aisle have liked and agreed with some of your answers and they have differed with others.

That, based on my experience, is not unusual in hearings. Based on my review of your record, now your answers this week I expected that you and I would not always agree. I do not agree with every decision that Justice Stevens has written or Justice O'Connor or Justice Souter, but I have such great respect for their judgment. I respect their judicial independence and I have never once regretted my vote for each of these Justices.

I mentioned each were nominated by a Republican President. I voted for each of them. I have never regretted those votes for each of them. I hope the Senators and the American people have a better sense of the kind of Justice you would be.

You demonstrated an impressive, I'd say an encyclopedic knowledge of the law and we can see why so many of your students, many of whom I have met here during these hearings consider you a wonderful teacher of the law.

I told my wife last night, I really wish I could be back in law school taking a course with you. You spoke about your approach to the law, you consistently spoke of judicial restraint and your respect for our Democratic institutions, your commitment to the constitution and the rule of law.

You demonstrated a traditional view about deference to Congress and judicial precedent, a view that conservatives used to embrace and fortunately few still do. I'm pleased that over 1,000 members of the public were able to attend your hearings in person. Thousands more watched your confirmation hearing live on television and we streamed it online through the Judiciary Committee website.

I believe the country needs and deserves a Supreme Court that bases its decision on the law and the Constitution, not politics or ideological agenda by either the right or the left. No Justice should substitute his or her personal preferences and overrule Congressional efforts to protect hard working Americans pursuant to our constitutional role.

Judges have to approach every case with an open mind and a commitment to fairness. I respect your plight and I take so seriously which you pledge to all of us here that you will do your best to consider every case impartially, modestly, with a commitment to principle in accordance with law.

Solicitor General Kagan, I believe you. We stand in recess.

[Whereupon, at 5:35 p.m., the Committee was recessed.]

**THE NOMINATION OF ELENA KAGAN TO BE
AN ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES**

THURSDAY, JULY 1, 2010

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

The Committee met, pursuant to notice, at 4:04 p.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Specter, Schumer, Durbin, Cardin, Klobuchar, Kaufman, Sessions, Hatch, and Kyl.

Chairman LEAHY. Good afternoon. First off, I should say I apologize to everybody who has been waiting patiently. In respect for our former colleague and long-serving colleague, Senator Robert Byrd, whose body was lying in repose in the Senate, some that is an extraordinary occurrence, until just a few minutes ago, we decided not to hold the hearing during that time.

There are a number of panels. If any one of you has a full statement, we will put the statement in the record, no matter what. You can just submit your statement. All of it will be in the record, and then I would urge you, each one, to keep within the 5-minute limit, and then Senators will be recognized for 5 minutes each to go around.

I would ask all of you to stand. I will administer an oath.

[Laughter.]

Sorry. No, just the witnesses.

I was beginning to feel important at that point. I never had a room stand before. Colonel, I know about your shoulder, and do not worry. We are not going to ask you to raise your right hand. But others, if you would, repeat after me, do you solemnly swear that the testimony you all give in this matter will be the whole truth and nothing but the truth, so help me God? All you have to do is say, "I do."

Ms. LEDBETTER. I do.

Mr. GROSS. I do.

Ms. GIBBINS. I do.

Captain YOUNGBLOOD. I do.

Captain HEGSETH. I do.

Colonel MOE. I do.

Chairman LEAHY. Thank you. Frankly, I cannot imagine any member of this panel or the other panels doing anything but.

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Our first witness is Ms. Ledbetter. Lilly Ledbetter served as a manager at the Goodyear Tire and Rubber Company plant in Gadsden, Alabama, for more than 19 years. She was the plaintiff in the employment discrimination suit *Ledbetter v. Goodyear*, and she is now a tireless advocate for workplace fairness. Her case was one where she had been paid less than men doing the same thing, and that was kept hidden from her until well after she had retired. The Lilly Ledbetter Fair Pay Act of 2009 is named in her honor.

Ms. Ledbetter, please go ahead.

STATEMENT OF LILLY LEDBETTER, PLAINTIFF, LEDBETTER v. GOODYEAR TIRE

Ms. LEDBETTER. Thank you, Mr. Chairman and members of the Committee. My name is Lilly Ledbetter, and it is an honor to be here. I am not a lawyer, but I know two things. I know that the Supreme Court's decisions have a profound effect on everyday Americans, and I have learned that who is on the Supreme Court makes all the difference.

I never in a million years would have thought that one day I would end having my fate decided by the Supreme Court. But I did. It all started in 1979 when Goodyear hired me to work as a supervisor in their tire plant in Gadsden, Alabama. I worked hard and I was good at my job, but Goodyear did not make it easy. I was one of only a few female supervisors, and I faced discrimination and sexual harassment by people who did not want women working there.

At the end of my career, someone left an anonymous note in my mailbox at work showing how much I got paid compared with the male managers. I was actually earning 20 percent less than the lowest-paid male supervisor in the same position.

On my next day off, I filed a complaint with the EEOC. Goodyear tried to say I was a poor worker and that is why they had given me smaller raises than the men. But after hearing all of the evidence, the jury did not believe them. It found that Goodyear had discriminated against me because I was a woman. That was a good moment. The jury was not going to stand for a national corporation paying me less than others just because of my sex.

But then by a single vote, the Supreme Court took it all away. Five of the Justices said I should have complained after the first time I was paid less than the men, even though I did not know what the men were getting paid and had no way to prove that it was discriminatory.

The Court said that once 180 days passed the smaller paychecks no longer counted as discrimination. But it sure feels like discrimination when you are on the receiving end of that smaller paycheck and trying to support your family with less money than the men are getting for the same job.

And Goodyear continues to treat me like a second-class citizen and worker today because my pension and Social Security is based on the amount I earned. Goodyear gets to keep my extra pension as a reward for breaking the law.

Justice Ginsburg hit the nail on the head when she said that the majority's decision did not make sense in the real world. People cannot go around asking their co-workers how much money they

are making. In lots of places that could get you fired. Plus, even if you know that some people are getting paid more than you, that is no reason to suspect discrimination right away. You want to believe that your employer is doing the right thing and it will all even out down the road. And, anyway, it is hard to fight over a small amount of money early on.

But the majority did not understand that or did not care. How it could have thought Congress would have intended the law to be so unfair I will never know. So Congress had to pass a new law to make sure that what happened to me would not happen to others in the future. My case shows that who gets appointed to the Supreme Court really makes a difference.

If one more person like Justice Ginsburg or Justice Stevens were on the Court, one more person who understands what it is like for ordinary people living in the real world, then my case would have turned out differently.

Since my case, I have talked to a lot of people around the country. Most cannot believe what happened to me and want to make sure that something like it does not happen again. They do not care if the Justices are Democrats or Republicans or which President appointed them or which Senators voted for them. They want a Supreme Court that makes decisions that make sense.

That is why these hearings are so very important. We need Justices who understand that law must serve regular people who are just trying to work hard, do right, and make a good life for their families. And when the law is not clear, Justices need to use some common sense and keep in mind that the people who write laws are usually trying to make a law that is fair and sensible.

This is not a game. Real people's lives are at stake. We need Supreme Court Justices who understand that.

Thank you very much for allowing me this honor. Thank you, sir. [The prepared statement of Ms. Ledbetter appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Ms. Ledbetter. You have been before this Committee before, and I always appreciate your being here.

Our next witness is Jack Gross. He recently retired from the Farm Bureau Financial Services, FBL, after 29 years. He was the plaintiff in *Gross v. FBL Financial Services, Inc.* The Supreme Court's 5-4 decision in that 2009 case made it more difficult for employees to prove they are victims of age discrimination. I advocated for the passage of the Protecting Older Workers Against Discrimination Act.

Please go ahead, sir.

**STATEMENT OF JACK GROSS, PLAINTIFF, GROSS V. FBL
FINANCIAL SERVICES, INC.**

Mr. GROSS. Thank you, Chairman Leahy, Ranking Member Sessions, and Committee members, for inviting me here to tell my story and state my position regarding the outcome and implications of the Supreme Court decision in my case, *Gross v. FBL*.

It is an honor to be given this opportunity to speak out on behalf of millions of older workers, all too many of whom have experienced discrimination in the workplace.

While my name has now become associated with age discrimination, my story is being duplicated daily across the country, and my case has already been cited hundreds of times to deny remedies to victims of many other non-Title VII forms of workplace discrimination. I certainly never imagined that my case would end up here when it all started over 7 years ago or that it would have such far-reaching implications.

Very briefly, my employer, Farm Bureau Insurance, or FBL, demoted all claims employees who were age 50 or over and had supervisory or higher positions. I was included in that wholesale demotion even though I had 13 consecutive years of performance reviews in the top 3 to 5 percent of the company. My career and my contributions were exceptional, and they were very well documented for the jury.

With very strong evidence of age discrimination, I filed a complaint, and 2 years later a Federal jury spent a week listening to all the testimony, seeing all the evidence, and being instructed on the ADEA, your law. The verdict came back in my favor and I thought the ordeal was over in 2005. As we now know, it was just the beginning.

FBL appealed and the Eighth Circuit overturned my verdict because I had a “mixed motive” jury instruction, and they said that required so-called direct evidence instead of just the preponderance of circumstantial evidence that we had provided.

With four decades of legislation and court precedent overwhelmingly on our side, we appealed to the Supreme Court, and we were elated when they accepted certiorari on that one issue of direct evidence requirements and “mixed motive” instructions. At the hearing, however, the Supreme Court broke with their own protocol and allowed the defense to advance an entirely new argument, one that had not been briefed nor had we been given an opportunity to prepare a rebuttal. In effect, it was a bait-and-switch on us—accepting cert. on our question and then ignoring that question to use my case as a vehicle to eviscerate the clear intent of the ADEA by creating a new hierarchy of workplace discrimination. Those that were specifically covered in Title VII were now at the top and required the prevailing standard of proof while all others, including age, now require—are at the lower tier and require a new and significantly higher standard of proof.

I believe Congress, the branch of Government closest to the people clearly intended to abolish discrimination in the workplace, not to create exceptions for it or to stratify it. We came to DC last June believing our highest Court would uphold the rule of law and apply it consistently to all areas of discrimination. We were disappointed and, quite frankly, disillusioned by their arrogance in putting their own ideology ahead of the clear will of Congress and their own precedents.

Since the Supreme Court’s decision, I have been particularly distressed over the collateral damage that has been inflicted on others. I hate having my name associated with the pain and injustice now being inflicted on other victims of discrimination because it is now nearly impossible to provide the level of proof required by that decision.

My case went largely unnoticed by the media and the public, but its tentacles are going to impact the lives of millions of workers. I have to keep reminding myself that I am not the one who changed your law. Five Justices did. With that I am not labeling the Court as a bad Court, but it is one that got at least one case entirely wrong, and the way they did it was unjust. Mistakes can be fixed, and we can move on.

Congress has a long history of working together on a bipartisan basis to create and maintain and level playing field in the workplace. The ADEA is just one example. I urge you on behalf of millions of workers who only want an equal opportunity to revive that bipartisan spirit you have demonstrated in the past on civil rights issues and pass the Protecting Older Workers Against Discrimination Act soon, before more of your constituents back home are hurt by the new Court-made law.

I am here before you as a man who agonized over the decision to pursue this case. As much as I hate discrimination in all its forms, I knew that I would be burning my career bridges behind me once I was branded as litigious. My wife, Marlene, and I prayed about it, decided it had to be done, and we left the outcome in God's hands, never expecting that He would bring us here. If my experience eventually prevents anyone else from having to ensure the pain and humiliation of discrimination, I will always believe that this effort was part of God's plan for my life.

Thank you.

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

Chairman LEAHY. Thank you very much, and thank you for coming here again.

Jennifer Gibbins is the Executive Director of the Prince William Soundkeeper, the leading environmental advocacy organization in Prince William Sound, Alaska.

Incidentally, I went there once years ago with former Senator Ted Stevens. It is a beautiful area.

She lives in the remote fishing town of Cordova, the site of the 1989 *Exxon Valdez* oil spill. For the past 7 years, she has worked to inform the public about the ongoing environmental, economic, social, and cultural impacts of the Exxon Valdez oil spill.

Ms. Gibbins, please go ahead.

**STATEMENT OF JENNIFER GIBBINS, SOUNDKEEPER/
EXECUTIVE DIRECTOR, PRINCE WILLIAM SOUNDKEEPER**

Ms. GIBBINS. Thank you, Mr. Chairman and Committee members. I am honored to be here today and speak briefly regarding the spill's ongoing impacts to people of my community and across Prince William Sound. I also want to be clear that everyone here understands that I myself am not an Exxon plaintiff.

The precedent-setting decision in that case equated Exxon's punishment, at the time the most profitable corporation in the world, to the loss of individual working men and women after 20 years of litigation.

When the decision was announced in my town, the streets were silent, people were somber, and they just did not speak for days. You walked into the local breakfast dive which is typically bustling

with activity and fishermen talking about the upcoming season, and it was quiet. People were dazed. They stared at their eggs, they stared at the wall.

There are five key messages I wish to deliver to you today, and they are especially important with what is going on in the gulf.

First, above all, you cannot clean up an oil spill. Period.

Second, the more than 32,000 victims of the Exxon Valdez spill were never made whole as Exxon promised. Regardless of compensatory or punitive damages, life as they knew it was permanently and irrevocably altered.

Third, lingering oil persists in Prince William Sound to this very day, and you do not need a shovel to find it.

Fourth, there is the pervasive sense that Government and the courts have failed the people—to the point where many question their relevance—and the question goes far beyond the health of their fundamental right to justice. They question its simple existence.

Fifth, and perhaps most sadly, almost 20 years to the day, it is as if there is an echo coming from the gulf. The people of Prince William Sound stand in solidarity with the people in the gulf, and I do not know a single person who is surprised by what has happened. We tell them very clearly, do not believe a single word that BP is telling you. Do not expect anyone to help you. And, sadly, do not hold your breath when it comes to the courts.

I am going to speak very briefly today to some of the impacts. There are four primary areas—environmental, cultural, economic, and social—and I am going to skip most of those and just focus on the societal impacts.

One of the least understood impacts of the Exxon Valdez spill is the impact of litigation that continued for 20 years. Victims were promised in exact words—and we are hearing similar words today—that “you are lucky it was Exxon”, that Exxon would “make you whole,” that the litigation “will not go on for 20 years.”

After the spill, there were divorces, suicides; there were families that lost everything, and a lot of people left. Men speak to this very day of the psychological struggle due to losing their identity as family provider.

One fisherman, now 50, has described to me of sinking into a mental abyss over the years following the spill when his wife had to become the sole breadwinner for the family. He was so affected that he began to fantasize about killing her.

Another fisherman friend of mine about the same age stunned the community at a gathering just 2 years ago, declaring that he had recently been contemplating suicide because of his feelings of worthlessness. At about that same time, a woman in Cordova told me that the endless court case made her feel that she simply did not exist as a human being.

Personal resource loss, chronic stress, feelings of alienation, anxiety, social disruption—these have been studied by highly credentialed social scientists in our town for 20 years, and these same scientists are now in the gulf.

Because Exxon has such deep pockets—which, not incidentally, expanded exponentially over the past 20 years—they could litigate endlessly, wearing down their victims who, even as they stood to-

gether, were dwarfed. Exxon knew that if they played it as long as they could, memories would fade, the context could be changed, and they could win big.

In 2008, a representative for Exxon speaking in the media called the punitive damages as originally awarded “an excessive windfall” for the plaintiffs.

Exxon fought hard to avoid a precedent, and the cruelest irony for the plaintiffs is that a precedent was indeed set, one that diminished them further.

To be dragged through litigation for 20 years is to be victimized over and over again. The burden of proof is always on the victim, and we are now hearing this from BP. They will pay all “legitimate” claims. We in Prince William Sound know exactly what that means.

Somewhere along the way America has forgotten that corporations do not own the air or the lakes or the rivers or the seas. A privilege to use them has been granted on behalf of the millions of citizens who do, in fact, own them, and the business community is not living up to that privilege.

How often is the root of disaster a cost-cutting, profit margin issue? Citizens need a better way of ensuring that people in business take the time to do what is right. I support the Big Oil Polluter Pays Act, and I believe that it is time to update OPA 90.

Today in Prince William Sound we are working to move on, and it has been a long haul. But the journey is just beginning for the people in the gulf. And I think Elena Kagan seems like a fine nominee to the Supreme Court. She clearly knows the law, and she has a passion for it. And she wants the job.

I just wish the nomination process was more about thinking and thoughtful discussion and less about sort of the silly pursuit of the “ah-ha” moment.

You know what they say about thinking: that it is patriotic.

Thank you.

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

Chairman LEAHY. Thank you very much, Ms. Gibbins.

Our next witness is Captain Flagg Youngblood. He is an Army veteran who deployed to Afghanistan in 2003 and 2004 as a member of the California Army National Guard. He has served as Director of Military Outreach for Young Americans Foundation. He is a native of Nashville, Tennessee. Captain Youngblood graduated from Yale University. Am I correct in all that?

Captain YOUNGBLOOD. Thank you. No. I will say just for the record that I actually did not serve in Afghanistan.

Chairman LEAHY. Oh, I am sorry.

Captain YOUNGBLOOD. I was deployed to the California National Guard in command of a unit that oversaw security for Travis Air Force Base.

Chairman LEAHY. Thank you. Please go ahead, sir.

STATEMENT OF CAPTAIN FLAGG YOUNGBLOOD, UNITED STATES ARMY (RETIRED)

Captain YOUNGBLOOD. Thank you for the opportunity today to give voice to the concerns many of our fellow citizens and veterans have regarding Elena Kagan's Supreme Court nomination.

My father, who is a veteran from Vietnam, asked me to join the Army when I was 16. He said to me, "You owe it to our country. You do not have to make a career of it, but you should."

As a college freshman in 1993, my daily walks by the war memorial in the heart of Yale's campus made me question why learning the art of military leadership required a 65-mile drive to the University of Connecticut for ROTC. Never mind the gratuitous jabs when a tight schedule required wearing the uniform on Yale's campus.

After an English instructor once remarked, "Flagg, you should not wear that uniform to class; it is not conducive to learning," I decided I had to speak out and do something about a situation I did not think was right.

Trips to Washington, DC, in the summers of 1994 and 1995, along with lots of work and help in between, gave rise to the passage of the ROTC Campus Access Act, better known today as part of the Solomon Amendment.

I am here today as a concerned citizen who cares deeply about the future of our constitutional republic.

Having worked closely with the legislative team that crafted the original language of the Solomon Amendment, I can speak to legislative intent. The goal was simple: to renew institutional support for the military on campus.

As the Supreme Court's unanimous ruling on the Solomon Amendment reflects, "In order for a law school and its university to receive Federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the non-military recruiter receiving the most favorable access."

Claims that Dean Kagan acted adequately to comply with Solomon Amendment are factually false for two primary reasons;

First, Dean Kagan admitted to breaking the law in September 2005 in a letter she wrote to the Harvard Law School community. To abbreviate for clarity, "Although the Court's decision meant no injunction applied, I reinstated our policy. My hope in taking this action was that the Department would choose not to enforce the Solomon Amendment." As the military has long known, hope is no method. In Dean Kagan's case, her hope demonstrates a total disregard for the rule of law.

Second, separate but equal is, quite simply, not equal. Full-time students who act as part-time volunteers will never be able to compete with Harvard Law's paid full-time career services staff and the institutional might it brings to bear.

As the 2005 letter from Harvard Law School's Veterans Association indicated, "We possess neither the time nor the resources to routinely schedule campus rooms or advertise extensively for outside organizations, as is the norm for most recruiting events."

To illustrate this point another way, imagine Dean Kagan owned a lunch counter. What she said to the military was, in effect, Sure,

you are welcome here, but would you be so kind as to use the back door by the garbage? You do not mind eating in the kitchen, do you?

To the all but 12 percent of Americans who hold unfavorable views of the military, most favorable access means, particularly in a post-9/11 environment, that Dean Kagan would have invited the military into every Harvard Law classroom each semester, personally introduced the recruiters, and encouraged every eligible young adult to take the oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic."

To defend the barriers Dean Kagan erected by saying military recruiters did not suffer or military recruiting did not suffer completely misses the point. A consistent policy of institutional support, namely, "most favorable access," as the Solomon Amendment demands, would have unquestionably increased the ranks of those interested in serving. Just imagine how many more of the school's 1,900 students would have answered the Defense Department's call if they were asked as routinely as they were by other employers.

Barriers do indeed prevent all but the most committed from serving. I personally would not have joined the Army had my father not routinely encouraged me to do so.

Dean Kagan's unlawful brand of segregation clearly estranged the students of Harvard Law School from the military. Dean Kagan's actions deem the military not worthy so much as to gather up the crumbs under Harvard's table, and all during a time of war, after thousands of innocent Americans were brazenly murdered on our soil. All the Defense Department humbly requested was equal access. Neither Dean Kagan nor Harvard is above the law, even though both have acted as though they are.

So what are the implications for Ms. Kagan's fidelity to the text of the Constitution and the laws and ability to judge impartially, especially when she is presented legal claims that do not suit her ideological tastes? What signals do her actions at Harvard Law School send?

Dean Kagan's double-dealing betrays an unprincipled refusal to make these choices. Quite simply, it reflects a condescension toward American rule of law. A vote to confirm Ms. Kagan as a Supreme Court Justice is a vote to harm the interests of our military, the American people who overwhelmingly support it, and not just now but potentially for decades to come.

Thank you.

[The prepared statement of Captain Youngblood appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Captain Youngblood.

Captain Pete Hegseth—did I pronounce that correctly, sir?

Captain HEGSETH. Yes.

Chairman LEAHY. He is the Executive Director of Vets for Freedom and an infantry officer in the Massachusetts Army National Guard and an Iraq war veteran. He received his B.A. from Princeton University and is currently pursuing a master's degree at Harvard University's John F. Kennedy School of Government.

Is that all correct?

Captain HEGSETH. Yes, sir.

Chairman LEAHY. Thank you. Please go ahead.

STATEMENT OF CAPTAIN PETE HEGSETH, EXECUTIVE DIRECTOR, VETERANS FOR FREEDOM, ARMY NATIONAL GUARD

Captain HEGSETH. Chairman Leahy, Ranking Member Sessions, other members of the Committee, thank you for the opportunity to be here today. It is a privilege to take part in these proceedings.

My name is Pete Hegseth, and I am the Executive Director of Vets for Freedom, an organization of Iraq and Afghanistan veterans dedicated to supporting our warfighters, and their mission on the battlefield. I received my commission from Princeton University in 2003 and have since served two tours with the United States Army, the first at Guantanamo Bay, Cuba, and second in Iraq with the 101st Airborne Division. I am currently an infantry captain, as the Chairman said, with the Massachusetts Army National Guard and a graduate student at Harvard University. I am at this committee today as a citizen and a veteran and do not purport to speak at all on behalf of the military.

I am going to start with the bottom line up front, as we do in the Army. We are a Nation at war, a Nation at war with a vicious enemy, on multiple fronts. I have seen this enemy firsthand, as have a precious few from my generation. The enemy we face detests and seeks to destroy our way of life while completely ignoring, and exploiting, for that matter, the rule of law.

This context motivates my testimony today. I have got serious concerns about Elena Kagan's actions toward the military and her willingness to myopically focus on preventing the military from having institutional and equal access to top-notch recruits at a time of war. I find her actions toward military recruiters at Harvard unbecoming a civic leader and certainly unbefitting a nominee to the United States Supreme Court. Ms. Kagan is clearly a capable academic, and the President has the right to choose whom he pleases. But in replacing the only remaining veteran on the Supreme Court in Justice John Paul Stevens, how did we reach this point in this country where we are nominating someone who, unapologetically, obstructed the military at a time of war? Ms. Kagan chose to use her position of authority to impede, rather than empower, the warriors who have fought and who have fallen for this country.

I know a number of my fellow veterans will testify to Ms. Kagan's personal support of veterans on Harvard's campus. And Ms. Kagan has had good things to say about the military, which I appreciate. But, for my money, actions always speak louder than words. And Ms. Kagan's actions toward recruiters, with wars raging overseas, undercut the military's ability to fight and win wars, and they trump her rhetorical explanations.

General David Petraeus calls counterinsurgency "a thinking man's war." Defeating our enemy on the battlefield and in the courtroom takes the best America has to offer. Yet in 2004, as you have heard many times already, Ms. Kagan took the law into her own hands, blocking equal access for military recruiters, in direct violation of Federal law. Moreover, she encouraged students to protest and oppose the presence of military recruiters.

These actions coincided with my deployment to Guantanamo Bay, Cuba, itself a legal maze of graduate-level proportions. Would not the legal situation there and in the courtrooms of Iraq and Af-

ghanistan be better off with participation of lawyers of Harvard Law School caliber? And don't we believe our best and brightest should be encouraged to serve?

In response to his critique, Ms. Kagan has repeatedly stated that, despite her decision to bar recruiters from the Office of Career Services, the number of military recruits actually increased during her tenure. Let us be clear about that. It increased in spite of Ms. Kagan, not because of her. But I ask a more important question: Would that number not have been even higher had she actually supported recruiters rather than actively opposing them?

To be fair, I do not begrudge Ms. Kagan's opposition to the so-called Don't ask, don't tell legislation; reasonable people disagree about this policy. However, her fierce and activist opposition to the policy was intellectually dishonest and unnecessarily focused on the military.

In e-mails to students and statements to the press, Ms. Kagan slammed, and I quote, "the military's discriminatory recruitment policy." Yet as a legal scholar, she knows better than that. She knows that the policy she abhors is not the military's policy, but a policy enacted by Congress and imposed on the military. In fact, after the law was passed, Ms. Kagan went to work for the very man who signed "Don't ask, don't tell" into law—President Clinton. So for her to call it "the military's policy" is intellectually dishonest, and her opposition to military recruiters at Harvard Law School had the effect of shooting the messenger.

Likewise, while Ms. Kagan sought to block full access to military recruiters, she welcomed to campus numerous Senators and Congressmen who voted for the law she calls "a moral injustice of the first order." Additionally, Harvard Law School has three academic chairs endowed by money from Saudi Arabia, a country where being a homosexual is a capital offense. So rather than confront the congressional source of the true legislation or take a stance against a country that executes homosexuals, Ms. Kagan zeroed in on military recruiters for a policy they neither authored nor emphasized.

In closing, the real moral injustice is granting a lifetime appointment to someone who, when it mattered most, treated military recruiters like second-class citizens. I urge you to consider this as you consider Ms. Kagan.

Thank you for the opportunity to address this important topic.

[The prepared statement of Captain Hegseth appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Captain.

Thomas Moe is a retired Air Force Colonel and Vietnam veteran, served in the Navy Reserve and the Air Force Reserve. He flew 85—is that right?—combat missions in Vietnam until he was forced to eject over North Vietnam where he spent more than 5 years as a prisoner of war until he was released during Operation Homecoming in 1973. He received his B.A. from Capital University and M.A. from the University of Notre Dame.

Please go ahead, Colonel.

**STATEMENT OF COLONEL THOMAS N. MOE, UNITED STATES
AIR FORCE (RETIRED)**

Colonel MOE. Thank you, Chairman Leahy and Senator Sessions and members of the Committee, for the opportunity to testify before this Committee.

I would like to express my concern regarding the nomination of Ms. Kagan to the Supreme Court for the following reasons. Some of them are referring back to some of the reasons my colleagues have mentioned as well.

Chief among them is that she has demonstrated a strong bias against the military, particularly while Dean of the Harvard Law School, largely over policies concerning the eligibility of homosexuals to serve in the military.

As we have heard, in 1993 Congress passed and President Clinton signed Title 10 U.S.C. Section 654. Among other things, the law provided that the administration could omit the requirement that persons joining the military make any reference to their sexual orientation, a policy that became known as "Don't ask, don't tell."

In 1995 Ms. Kagan joined the Clinton administration as Associate Counsel, but I know of no stand that she took against "Don't ask, don't tell" during her tenure with Mr. Clinton.

But when she was appointed Dean of the Harvard Law School in 2003, she began to loudly condemn the law and policy, calling it "a profound wrong" and "a moral injustice of the first order," disregarding the fact that the 1993 law was approved by strong bipartisan majorities in Congress.

She also knowingly defied the particular law we have already heard about, the Solomon Amendment, which concerns military recruitment. As Dean, Ms. Kagan treated military recruiters as second-class citizens. She did not allow the military to recruit on an equal basis with other agencies, and even called on her students to forcefully criticize military personnel.

As we have heard on some occasions, she has expressed support for those in uniform, but such superficial gestures cannot mitigate her official actions. She apparently was encouraged by a ruling in 2004 by the Third Circuit Court of Appeals that the Solomon Amendment was likely unconstitutional, but this court had suspended its own ruling pending review by the U.S. Supreme Court. Nevertheless, in violation of the Solomon Amendment, Ms. Kagan continued to restrict military recruiters at Harvard Law School.

In 2005, she escalated from hostile words to legal activism, and she joined a friend of the court argument to the Supreme Court, claiming that Harvard Law could bar military recruiters because it barred all recruiters who discriminated against homosexuals. But in 2006, this argument, along with the suspended Third Circuit Court ruling, was struck down by the Supreme Court unanimously. Even the most liberal-minded Justices rejected Ms. Kagan's position. With a stinging rebuke, the Court said that her theories were clearly not what Congress had in mind. She later acknowledged that her actions were not justified, but said that she had acted anyway in the hope that the Department of Defense would not enforce the law. The issue here is bias, and Ms. Kagan's record reveals the persistent bias, at least regarding the military.

As a citizen, I cannot support the appointment of Justices who would pick and choose which law they wished to follow or violate a law in hopes that it would not be enforced. As a veteran, I am even more troubled that an activist Justice would not instead defer to the other branches of Government, particularly the Congress, which the Supreme Court has itself recognized as more qualified to act on issues concerning the military.

And what evidence is there that Ms. Kagan has shown an understanding of the Defense Department's position regarding homosexuals in the military? The 1993 law clearly states why homosexual activity in the military is harmful to its mission while stressing that the military is a specialized society subject to special laws that would not apply to the citizenry at large. Those who do not understand the special nature of the military should not be handed authority to make important decisions that affect it.

And I question whether Ms. Kagan has consistently applied her stated principles regarding discrimination against homosexuals. Her principles did not seem to come into play in 2007 when President Clinton, the sponsor of "Don't ask, don't tell", spoke at Harvard's commencement or, as we have already heard, when a member of the Saudi ruling family, a person in a position to influence the policy in Saudi Arabia which executes homosexuals opened a school on campus and Ms. Kagan did not lift her voice against that.

Last, I would think that a person so opposed to rules governing the military as Ms. Kagan would encourage rather than hinder participation in the military by her graduates so that they may be part of the composition of the military's leadership and thus have the opportunity to influence military policy.

It is unfortunate that Ms. Kagan has presumed herself the wisdom to demand the military to accept professed homosexuals, but in my view, she has neither the experience on which to base that wisdom nor the responsibility to deal with the consequences of her conviction.

I thank you again, Chairman, for this opportunity.

[The prepared statement of Colonel Moe appears as a submission for the record.]

Chairman LEAHY. Thank you, Colonel. And, of course, yesterday—and now I will be on my time—we put into the record a letter from First Lieutenant David Tressler, who is currently serving in Afghanistan, who strongly supports Solicitor General Kagan. He was at Harvard Law when she was dean. And we will have on the next panel Kurt White, who is the President of the Harvard Law School Armed Forces. After graduating from West Point, Mr. White, served as a platoon leader, an executive officer in Iraq where he earned two Bronze Stars in 2004 and 2006, left active duty in 2007 with the rank of captain, went on to serve in the National Guard, currently finishing graduate degrees in law and business at Harvard, who supports Solicitor General Kagan.

Mr. Gross, it is nice to have you back to the Committee, and I appreciate you following in Ms. Ledbetter's footsteps by educating people about why the Supreme Court matters and how their decisions in your case need to be overturned by legislation. I hope that my friends on the other side will join us in passing the Protecting Older Workers Against Discrimination Act. We passed the

Ledbetter bill with bipartisan support, and we will need the same help there. In fact, in your written testimony, you state that all Americans owe Ms. Ledbetter thanks for helping us overturn an unjust decision.

Ms. Ledbetter, yesterday Senator Klobuchar made a great point about women like Elena Kagan who broke the glass ceiling. When you started working at Goodyear, how many women managers were there?

Ms. LEDBETTER. None to my knowledge. I never met any.

Chairman LEAHY. Do you know how many women were on the Supreme Court when your case went before them?

Ms. LEDBETTER. One.

Chairman LEAHY. How do you think women or young girls in this country would feel if Solicitor General Kagan is confirmed and we have for the first time three women on the nine-member Supreme Court?

Ms. LEDBETTER. I think it would be an outstanding accomplishment for the people across the Nation, not only the women but also their families. And one thing I have heard in observing and watching the hearings, all of Elena Kagan's responses have been that she would adhere and follow the law, not make the law. She understands what her responsibility would be as a Supreme Court Justice.

Chairman LEAHY. Is that why you support her?

Ms. LEDBETTER. Yes, sir. Yes, sir.

Chairman LEAHY. Thank you.

Ms. LEDBETTER. I wish the people on the Supreme Court, five of those Justices, just one more had adhered to the law in my case. Then my outcome would have been different.

Chairman LEAHY. Thank you.

Ms. Gibbins, you spoke about life and work on the shores of Prince William Sound in Alaska. You have dedicated your life to doing it, rather gripping stories to hear the personal effect on people, the suicides, the demoralized people. All those people, as I understand it, like the folks in the gulf, worked very hard, played by the rules, did not expect any—expected everybody else to play by the rules. In your testimony, you touched on the impact of the *Exxon* case on your community, and you are not one of the litigants in it, so you do not have a financial interest in this. But you have seen what it has done to the people there, just as we are seeing every night on the news and every morning in the papers about what it is doing to the people down in the gulf.

Do you think that the Supreme Court ruling in *Exxon Shipping v. Baker* has affected public confidence in our justice system? And if so, how?

Ms. GIBBINS. Well, as I mentioned briefly, the impact that it had on the people in my community, what they took away from it is a sense that there is no justice. And currently I work a lot with people in the gulf. We are trying to be very supportive of them. And I think there is the same fear.

And when you look at the mistakes that have been made, the human errors, the attention on the profit margin, the missed opportunities over and over again to prevent things like this—and I am also president of the Chamber of Commerce. I believe in busi-

ness, and I believe that business can do the right thing. But when the laws are not enforced and the best tool that we have to hold corporations accountable, punitive damages, is not used in the way that they were intended, then people lose faith. And I would have to say that the people in my community have lost faith.

Chairman LEAHY. Thank you very much. My time has expired. I am going to be putting a letter in the record after, but I will yield to Senator SESSIONS.

Senator SESSIONS. Thank you, Mr. Chairman.

I thank our military witnesses for, with clarity, stating the true facts of what happened at Harvard. It was not a little bitty matter. It was not a matter that just slid into reality and Dean Kagan was caught somehow in the middle of a controversy. She was a leader, she was a driving force in the effort to remove the military from full and equal access to that campus after the Solomon Amendment had been passed and that was required.

Captain Hegseth, were you with General Petraeus in Mosul?

Captain HEGSETH. I was not. I did not have the chance to serve under him. No, sir.

Senator SESSIONS. I was with the 101st there during that time in Mosul. They had the Alabama National Guard attached to them, too, at that time.

But you talked about coming in the back door, having to eat—or maybe it was Captain Youngblood—having to dine in the kitchen and not sit out front. Do you think just from—both of you, you are Yale, you are Harvard, you are Notre Dame. Do you feel that that policy, setting aside the impact it may have had on recruiting, sent a message of some kind to the veterans and to the recruiters who may themselves have come off the battlefield to come on that campus?

Captain YOUNGBLOOD. Oh, absolutely.

Senator SESSIONS. What was that message, Captain?

Captain YOUNGBLOOD. That message very clearly is that your service to the country and to protect the Constitution is not valued by these institutions.

Senator SESSIONS. Captain Hegseth.

Captain HEGSETH. It certainly was not a message of support. You know, I know she met with veterans on Veterans Day. I know she honored them on public occasions. And, you know, that is appreciated by veterans. We learned that lesson from Vietnam vets who we did not honor. But it is a whole other thing when you take actions on their behalf to proactively give them access, elevate their service, show fellow classmates that indeed entering the military, going to the JAG Corps, and being an Army lawyer or an Air Force lawyer is a way to contribute to your country just like any other legal defense fund. It is one thing to say it. It is another thing to do it. And I think she made that very clear.

Senator SESSIONS. You being somewhat familiar with the Harvard campus, I understand that the speech she made to a protest was at the same time that a recruiter was in the next building attempting to recruit students. And so she made a speech in which she condemned the military policy and spoke out in that fashion.

Do you think that would have been an asset to the recruiter in his effort in the next building?

Captain HEGSETH. It is certainly not going to help, sir. Also, the fact that it was encouraged that students would sign up for time with recruiters who had no interest in joining the military to clog the time and clog the rolls so that less actual possible recruits would have access. That is something Ms. Kagan also is purported to have encouraged.

Senator SESSIONS. Well, this veterans group, do you have any knowledge of it at Harvard—

Captain HEGSETH. I have been a member of some veterans groups. Oftentimes, we sit around and drink beer sometimes, but we do not usually bring recruiters on campus, sir.

Senator SESSIONS. Well, the veterans group at Harvard, they did not have a salary, they did not have an office. They were just a group of people that got together on occasion. How do you feel—Dean Kagan's testimony here about how the veterans association was offered the opportunity to be helpful to the recruiters. How do you judge that as a realistic explanation for denying them the official ability to utilize the recruiting services and office?

Captain HEGSETH. I just do not think there is anyway you could possibly say that that is equal access. You are thrusting it on students with a full workload like anyone else. They did not sign up to bring recruiters on to campus. They do not have the resources. They are not being paid. They are not able to publicize it. Students oftentimes did not even know that recruiters were there. So it is an issue when the Office of Career Services—anybody that has been at a university knows that all the folks that come in to offer jobs go through the Career Services. You read the bulletin or you look on the screen to see when they are here, who you can meet with. When you do not have access to that, you are not accessing the pool of students in any sort of equal way.

Senator SESSIONS. Do you agree, Captain Youngblood?

Captain YOUNGBLOOD. I absolutely do. In fact, you know, much is made over time about the network, you know, the networking opportunities going to an Ivy League will provide students and be shut out of that, when everyone goes through a Career Services Office, in effect prevents people from ever considering those careers.

Senator SESSIONS. Colonel Moe, thank you for your service. Do you have any comments on that subject?

Colonel MOE. Well, you know, actually the experience I had at Notre Dame was in direct contrast to what these gentlemen have said for the very opposite reason. Notre Dame, a strictly Catholic school, practices the Catholic character of the just war, et cetera, has a very, very strong ROTC presence, and as a student and later a faculty member and then a researcher at the Kroc Peace Institute, I saw very well and discussed very heatedly with a number of faculty about the position of the military on campus and even issues of war.

But one of the references I made in my testimony, Senator, actually comes from the mouth of Father Ted Hesburgh, by many standards certainly not a flaming conservative, who believed that one of the main reasons to have a strong ROTC presence at Notre Dame, both in the undergraduate and graduate school, was that those graduates who go forth in the military and influence the military such as they could from their upbringing.

Senator SESSIONS. Thank you.

Chairman LEAHY. Thank you. My brother-in-law was a teacher—he is a Holy Cross priest, and he was a teacher there for some time. I would love to hear more of it. We are trying to keep to our strict schedule, and I am going to turn the gavel over to Senator Cardin, although the next person to be recognized will be Senator Specter. And if anybody feels like they are being cutoff, it is, again, because of the extraordinary circumstances of starting this at this hour, just so all the others who are going to want to testify will have the time to, both for and against Solicitor General Kagan. So that is why I am—and I know you have been waiting patiently, but that is why we are keeping to the time. Thank you.

Senator SPECTER. Mr. Chairman, may I yield to Senator Durbin and take a turn a little later?

Chairman LEAHY. Certainly. Go ahead, Senator Durbin.

Senator DURBIN. Well, thanks Senator Specter, and thanks to the panel for your testimony, all of you.

I want to especially thank Ms. Ledbetter, Mr. Gross, and Ms. Gibbins for putting a face on many of the issues that are before the Supreme Court. Our hearings here tend to be so general and so technical and so legal that I am sure at the end of the day a lot of people think, well, this will never affect me. But each one of you has a story to tell about how it affected you personally, and I thank you very much for doing that.

Ms. Ledbetter, we met before, and I congratulate you for not giving up after losing in the Supreme Court. I was there when President Obama signed his first bill, the Lilly Ledbetter Fair Pay Act, and I was glad to be part of that.

Mr. Gross, coming from the Midwest and having worked with the Farm Bureau all my life, I am sorry you were the victim of age discrimination, and I am sorry this Court, the Supreme Court, which is supposed to be a non-activist Court, decided to invent a legal theory to deny you recovery. I think that is unfortunate.

Ms. Gibbins, 21 years ago I was up in Prince William Sound, right after the spill, and I saw it. And I will never forget it as long as I live. And I, too, share your skepticism about some of the promises that are made on the corporate side and know that we need to have a court system and a Congress that is sensitive to the need to think, as you say, and be thoughtful in the way we approach some of these environmental issues.

To the other three witnesses, I apologize for stepping out for a moment, but I have read your testimony, and I thank you for being here and thank you for your service to our country. We all appreciate it very much.

I would like to note by way of a question two things that struck me recently. One is the fact that we all know so many of our great veterans of World War II are passing on. Time is taking its toll. And I have one Joe Flynn who lives in my home town and who was part of the D-Day invasion and the Battle of the Bulge. A great old fellow, so proud of his service in World War II, and I do not question for a minute what Tom Brokaw said, "The Greatest Generation." They served for the duration when they decided to enlist in our armed forces.

But there was also another historic event just last week, the 60th anniversary of the beginning of the Korean War, and we gathered in Statuary Hall, and one of the first persons to speak was Congressman Charlie Rangel of New York. Congressman Charlie Rangel was a combat veteran of the Korean War. He had enlisted before the Korean War in an army that was segregated. And Congressman Rangel happened to be able to serve in Korea in combat because of the efforts of President Truman to integrate our armed forces.

I raise that issue because I want to ask one of you, any of you, if you think that we can honor the Greatest Generation and our military men who gave so much to our country and still look back with some dismay that it was a segregated force and it was not until the Korean War that our military was truly integrated. And if you think that you can—and I believe you can—can you understand for a moment how some may have feelings about discrimination in our current military against those of a different sexual orientation and believe that that discrimination should also be noted and people may want to speak out on it?

I invite your comments.

Captain HEGSETH. Senator, I would say that I can understand that certain members of our society would feel excluded because of a particular policy, and many people have different opinions on that policy. My testimony and my issue is the way in which Ms. Kagan confronted that policy. She could have done so by talking about the wrongs of countries like Saudi Arabia that execute homosexuals. She could have taken issue with it by not bringing Senators and Congressmen who voted for the law she calls “immoral, wrong, of the first order” to campus.

There are many different ways she could have zeroed in on that particular policy and instead used the military as the focal point to do it when these recruiters, you know, they are messengers. They are there to recruit—

Senator DURBIN. But I ask you, you do not disagree with the premise, that if you feel that there is discrimination in our society and even though you respect the institution, the military in World War II, but know there was discrimination, that speaking out is not un—

American or inconsistent with our history, is it?

Captain HEGSETH. I am not calling it un-American, but I think you also have to look at it in the context of a post-9/11 world where we are fighting a real enemy and we need recruits and good ones.

Senator DURBIN. I understand that, and I also understand the testimony of Solicitor General Kagan, and you have all noted and see it differently that during this period of time, the recruiters were on campus with veterans organizations and they actually increased the number of recruits. Some of you said, well, we could have had maybe more if they had done it in a different fashion.

But I think it was clear from the letters we have received in this Committee, she is not opposed to veterans. She is not opposed to the military. It was a matter of conscience for her to speak out. I respect her for that. She might have done it differently. We all might do things a little differently. But I think in the end there is

no question that she has the greatest respect for the military and our country, as I have respect for your service.

Thank you.

Senator CARDIN. [Presiding.] Thank you, Senator Durbin.

Senator Hatch.

Senator HATCH. Mr. Chairman, I'm just grateful for all these witnesses and appreciate their testimony here today. Thank you.

Senator CARDIN. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, all of you, and thank you especially for your service and everything you've done for our country. I really appreciate it.

We talked a lot about your case during the questions of Solicitor General Kagan, Ms. Ledbetter, and I wanted to just go through some of that. First of all, could you just go through again how you found out, how you had to find out that some of your counterparts—your male counterparts were making more money than you did and got raises that you didn't get?

Ms. LEDBETTER. Yes. I only learned about the discrepancy in my pay after 19 years, and that was with someone leaving me an anonymous note, because otherwise I would not have known because Goodyear prohibited each one of us from ever discussing our pay or we would not work there. So our pay was never discussed and we could not find out, and that was the only way I had to find out.

Senator KLOBUCHAR. So you had no way of knowing that other workers, men that were getting more money than you, and it kept getting worse and worse as the years go by, you didn't know that?

Ms. LEDBETTER. No, I did not. I had no way to know.

Senator KLOBUCHAR. Right. Then you go to court and you win an award to say you could make up that money that you'd lost, and then you go to the U.S. Supreme Court, and what did they tell you in terms of when you were supposed to have found that out?

Ms. LEDBETTER. According to the response that Justice Alito wrote, he said that I should have complained after the first paycheck that I received that was discriminatory, even though I didn't know that and no way to prove it.

Senator KLOBUCHAR. So I'm just wondering, and I know that Justice Ginsburg—and this is something I talked to Solicitor General Kagan about this—was I suppose only—you would have had to be, like, rifling through the drawers, looking at paystubs or asking your fellow employees who much they were making. Is that what you were supposed to do?

Ms. LEDBETTER. Well, I was supposed to do that in order to find out, and had I done that I would have been fired.

Senator KLOBUCHAR. Right. So I think one of the reasons your case, in addition to the obvious wrongs that were righted by the law that was passed in Congress, but I think one of the things that interested me about your case was it was just an example of you, who never thought you'd end up here in the halls of Congress, nor I think did any of the other witnesses here, I can see them shaking their heads at the end, wondering if it's that fun anyway to be here.

But what you were—what strikes me most about your case is that you just happened to be in this situation. You ended up going

to the highest court in the land, and I think to me you are an example of what I talked about, that these decisions have an impact on regular people when the court makes these decisions.

You touched on the fact, through your testimony, that sometimes the law isn't always clear, Ms. Ledbetter, and that the importance of the court using common sense is very important. And do you want to talk a little bit more about why you think Solicitor General Kagan, who I know you're here to testify for today, why you think she has that common sense?

Ms. LEDBETTER. Because that's what I've heard her say in these hearings so far, is that she would adhere to the law and not be making the law. It's Congress' job to change laws and make new laws. A Supreme Court justice should adhere to the law and follow the precedent, and I've heard her say she would follow precedent. I heard Senator Specter yesterday comment about some of the—two of the last three Supreme Court justices that went on the bench have not ruled according to the way they testified when they were confirmed.

Senator KLOBUCHAR. Very good.

Now, Ms. Gibbins, I was always interested in your case, not only because of the horrible wrong that happened there, but also actually it was a Minnesota law firm that represented the fishermen, the plaintiffs in the case. So I'm somewhat familiar. I actually read a book on it called *Cleaning Up* about the case and how long it took, and those kinds of things.

What do you think we can learn from what happened, the delay? I think 8,000 of the plaintiffs died before getting any of the awards because of the delay in their case. As you mentioned, the verdict was \$5 billion slashed down to \$500 million. What are the lessons we can learn in terms of the Supreme Court, and also what we should be doing now with the oil spill in the Gulf?

Ms. Gibbins. Have you got a couple of weeks?

[Laughter.]

Senator KLOBUCHAR. I have exactly 19 seconds. No, I think you can go a little into my time. The Chairman will allow me.

Senator CARDIN. Fifteen seconds.

Ms. Gibbins. Well, one of the big problems was, after 20 years, everything was out of context. The strategy that the lawyers had for their clients was out of context, the climate of the country had changed. One of the things that I think concerns me the most is, over that time, the U.S. Chamber of Commerce had a really serious influence on the composition of the court, and as an environmental activist and as president of our local Chamber of Commerce, I support business, but I think somewhere along the line we forgot that the backbone of the United States is actually small business.

In terms of what's going on in the Gulf, I think we need to look at some of the things that were applied in Alaska, our oil response system, our regional Citizens Advisory Councils, and those things need to be institutionalized nationwide. I also think that it's incredibly important that we institutionalize transparency through public participation in the incident command system, in the development of plans. Here we have a plan for response in the Gulf that—there's nothing there, and if citizens can be participating, I think that's the real hope of transparency.

Senator KLOBUCHAR. Thank you very much.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you very much.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. I appreciate all of the witnesses' testimony.

As to the first three, I take from the invitation to have them testify a hope that their presence argues for a justice who would rule for them; a more results-oriented ploy, I cannot imagine. It is precisely the concern I have about the President's motivation in nominating Elena Kagan. As to the last three, I thank you for your service and your testimony.

Senator CARDIN. Let me thank all of our witnesses. I particularly want to thank our three military witnesses for their service to our country, and we very much appreciate you being here.

I do want to put in the record a letter that was sent to Chairman Leahy today from Zachary Prager, a Lieutenant in the Navy, in support of Dean Kagan, who was at Harvard during the time in question. Without objection, that will be made part of the record.

[The letter appears as a submission for the record.]

Senator CARDIN. I also want, during my time, to underscore the point that I said in my opening statements at Solicitor General Kagan's hearing. That is, I wanted Americans to get a better understanding of the impact of the Supreme Court on their everyday lives. I think this panel has been particularly helpful in that regard. It affects students, their decisions. It affects, certainly, workers. It affects consumers, and clearly affects those who are fighting for our environment.

I particularly want to thank Lilly Ledbetter and Jack Gross and Jennifer Gibbins for putting a face on the issue. We hear statistics, we hear numbers, but we really are talking about the effect on real people's lives. We know the name Gross and we know the name Ledbetter because of Supreme Court decisions, but they're real people, as we see here today, who have real emotions. Solicitor General Kagan said that she wants every American to get a fair shake. It's something that really impressed me in her opening comments.

So I just want to go back just one more time and give you, Ms. Ledbetter, Mr. Gross, Ms. Gibbins, a chance to respond as to how you felt when you took your case to the court and were able to prove discrimination, able to get a jury to give you an award, knew that Congress had passed a law against gender discrimination, against age discrimination. You had the law on your side. Then your case goes to the Supreme Court.

In one case, Ms. Ledbetter, the court rules against you. In the other, Mr. Gross, the court changes the case in order to take up basically a different matter. But the results were the same: you both were denied your individual justice, but just as importantly, the reason you brought the case, is to make it clear that gender discrimination and age discrimination have no place in America.

How did you feel the day you learned about the Supreme Court decision?

Ms. LEDBETTER. The day I learned, I was very disappointed because, as you said, the law had been on my side. It supported my case. The Equal Employment office had supported me all the way

to the Supreme Court. And then those five justices decided I should have complained back in the early days when my pay was first set, even though I didn't know it and even though I had no way to prove it, and even though we were not allowed to discuss or ask about our pay.

It was so hard to understand how they could do that, and the precedent had always been in other cases that it would have gone in my favor. It was really devastating, because this is real people, real lives, and it's not easy to swallow this disappointment when they change the law. I felt—and the Supreme Court didn't say I had not been discriminated against, they just said I waited too long.

Senator CARDIN. Mr. Gross.

Mr. GROSS. A couple of things. During the hearing, Justice Suter made the comment that juries are smarter than justices, and that kind of rang true. I really felt like the first obligation of our court system would be to try to sanctify that a jury who heard all of the evidence and saw all of the testimony, our citizens, heard the law. I think they were able to interpret it; they're pretty bright Iowans. I think the discrimination is a little bit like pornography. You may not be able to define it clearly, but you know it when you see it. I believe the jury did.

Second, when we got to the hearing and we had presented everything that had been briefed, I had personally spent \$11,000 just in printing costs for the briefs once we got there. We got through our argument, the Solicitor General took half of our time and made an argument on our behalf.

And then all of a sudden, we were just blindsided. They decided, let's just take off in a new direction, and instead of addressing the issue that they had agreed to take, they said let's go back and look at the entire context of the ADA and the language of it, and essentially they just redefined the law.

Senator CARDIN. Thank you.

Ms. Gibbins, you've already answered that from your community, I think.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Captain Youngblood, I was in ROTC myself. Some will say the University of Pennsylvania is elite. You expressed concern about difficulties of recruiting on so-called "elite" campuses. I think ROTC is very important. Just a 20-second personal story. I went to summer camp, one of 2,000 cadets, on June 25, 1950. It was the day the Korean War started. We were in khaki. We thought we'd never go back to college. Most were fourth year. But when we finished our training, they sent us back to school because they wanted to win the war. I served stateside during the Korean War as a lieutenant in the United States Air Force.

And I think the military has to have access to campuses. When you deal with the issue of sexual orientation, you're on a very sensitive subject. Thinking has evolved on the matter with the Supreme Court changing the law of criminality there. I have a couple of issues that I'd like you to respond to.

One issue is whether sexual orientation has any impact on the ability to serve, and the second would be whether, even if you dis-

agree with Ms. Kagan—and I've disagreed with her on quite a few things over the course of the last couple of days, and I'm thinking about her nomination very carefully. Would you say that this one issue, in the context of her overall career, would be a disqualifier? But take up Number one first, about sexual preference having any impact on a person's ability to serve, man or woman.

Captain YOUNGBLOOD. Well, I would say, first off, Senator, the issue—and this is something I've argued since I was a student in college and this was an issue back in the 1990s. You know, so long as someone is willing to put their service to the military first, just like everybody in the military has to do, mission comes first, I personally don't have a problem with that.

But again, mission has to come first. If something arises that disrupts the mission, it doesn't matter what it is, it could disrupt the mission. So, you know, Congress sets that policy. It's your decision as a Member of Congress so to do. You know, someone in the military would just salute and drive out smartly.

Senator SPECTER. Well, there are a number—many things can affect mission. But do you think sexual orientation does?

Captain YOUNGBLOOD. Well, again, like I say, if someone's willing to put their service first and worry about the mission first, to me it's not something that's an issue.

Senator SPECTER. And how about the question of one issue disqualifying a nominee for the court?

Captain YOUNGBLOOD. Well, I think it's not an issue, strictly speaking, of don't ask/don't tell here. It's more an issue that through her own decision, Dean Kagan, at the Harvard Law School, decided to strictly ignore the law. There was no injunction from a court that had jurisdiction over Harvard Law School. No one issued a statement or enjoined the DoD from enforcing the law. As her letter said, which I read into the record, she strictly acted hoping that she would be able to not have the law enforced, knowing full well that the law was in full force and effect.

So to that, I would say somebody that shows disregard of that nature to a Federal law, a law set by this body, is not acting in conjunction or in honoring the rule of law, which she has been on record saying that she would honor the rule of law, so there's a direct contradiction there. But then second, especially in a time of war when there are people out fighting and dying, we have somebody that is flouting the foundation of the rule of law, which is to say our Constitution. So that, I do have a serious issue with.

Senator SPECTER. Well, thank you for your service, Captain Youngblood and Captain Hegseth and Colonel Moe.

One question for you, Mr. Gross. Your age discrimination victory before a jury was reversed by the Supreme Court, which as you characterized it, did not follow precedent. And I think that precedent is very important. We've had a lot of discussion in this room about stare decisis, the fancy Latin phrase, "to follow the law."

I've been concerned about, nominees talk about stare decisis and then not follow it. I talked extensively about Chief Justice Roberts, who said he would follow it, then issued a long concurring opinion, really repudiating his testimony. One of the concerns I have is what we can do about nominees who say one thing here, and cross the street and cite it some other way.

I've been pushing television for a long time as the one thing, if people understand what the court does and they decide all the cutting-edge questions, there might be some pressure on accountability. I'd like your opinion, as a fellow who's been to the Supreme Court, probably even watched television, whether you think that television would have a good impact generally, or if we understood what the court was doing, would have some influence on accountability.

Senator CARDIN. Mr. Gross, you can respond quickly. You can always supplement this by a written response.

Mr. GROSS. Well, there's actually several parts to that question. In general, I agree with a lot of what you're saying. I watched a little bit of the hearings. I think there's a consensus among everybody, both parties, that we don't want activist judges, we want them to follow the law. I've heard it time after time. There does seem to be some partisanship that enters into that. I don't know if you can find a perfectly unpartisan candidate for that spot. I think you have a very tough job on your Committee to vet people. That's what we hire you to do, and we're assuming that you're going to do the best job that you can, being as diplomatic as I can.

As far as televising things and keeping them open, I think that would be good, transparent. But I don't know where else to go with that.

Senator CARDIN. Thank you. That was a very concise answer. Appreciate it.

I thank our witnesses for their testimony. That will conclude the first panel. We will now call up the second panel.

Senator Leahy has announced that because we are unable to do more than one round, that there may be some questions that will be propounded in writing to our different panelists. With your cooperation, we might be coming back to you and asking you for further information. I believe the record is open until noon on Monday for questions to the witnesses.

Thank you all very much for being here.

Senator SESSIONS. Mr. Chairman? I'd just thank all of you. I'm sorry I didn't get to talk to the first three witnesses. I got carried away with the military issue that I care about.

Ms. Ledbetter, it's good to see you went past that Goodyear plant a lot of times, according to my wife, who grew up in Gadsden. And congratulations on moving the Congress to alter the law, I think, in a way that will not allow that kind of thing to happen.

Ms. LEDBETTER. Thank you, Senator.

Senator CARDIN. Again, we thank all the witnesses for making the effort to be here. It's certainly important for this process. This is the Supreme Court and it's important we get as much information as possible.

Ms. LEDBETTER. Thank you.

Senator CARDIN. If I could ask the witnesses, and the witnesses only, to rise in order to take the oath, I would appreciate that. Thank you very much.

[Whereupon, the witnesses were duly sworn.]

Senator CARDIN. Thank you. Please be seated.

As pointed out in the last panel, we would ask that you respect the 5-minute clock. Your entire written statement will be placed in

our Committee record. We will adhere to a 5-minute round for the members. And as I also indicated, we might be propounding supplemental questions in writing. If we do, we'd ask your courtesy in responding in a timely way.

Our first witness is Professor Jack Goldsmith. Mr. Goldsmith is the Henry L. Shattuck Professor of Law at Harvard University. He holds a JD from Yale Law School, a BA and MA from Oxford University, a BA from Washington & Lee University.

He clerked for the Supreme Court Justice Anthony M. Kennedy, Court of Appeals Justice J. Harvey Wilkinson, and Judge George Aldritch on the Iran-U.S. Claims Tribunal.

Professor Goldsmith.

**STATEMENT OF JACK GOLDSMITH, HENRY L. SHATTUCK
PROFESSOR OF LAW, HARVARD LAW SCHOOL**

Mr. GOLDSMITH. Thank you, Mr. Chairman, and thank you to the members of the Committee. Thank you for the opportunity to comment on the nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States.

I have come to know Elena Kagan well since Harvard hired me in 2004 during her term as dean. Based on hundreds of conversations with her, based on my reading of her scholarship, and based on my assessment of her very successful legal career, I believe that she will be a truly outstanding Supreme Court justice.

In my written testimony I offered three reasons for this conclusion. The first concerns her immense competence, that is, her intelligence, her knowledge of the law, and the range of her relevant experiences. This point has been ably demonstrated by Elena Kagan herself over the past 3 days and I will not comment on it further. I will instead focus on the two other reasons I think she will be a great justice, her attitude toward the law and her temperament.

First, her attitude toward the law. Elena Kagan's unusual seriousness about the law was apparent in the very first conversation we ever had in 1994. I'm sure she doesn't remember it, but I remember it well. I was an entry-level law professor candidate visiting the University of Chicago where Kagan was teaching at the time.

Over dinner, I summarized a paper that I was presenting to the faculty the next day on the role of Federal courts in deciding foreign relations cases in the absence of guidance from Congress. Kagan responded with an avalanche—and I use that metaphor advisedly—of difficult questions that pressed me to clarify my thesis and that pushed me on its implications for matters racing from the conflicts of law, to the Erie doctrine, to the meaning of the Commerce Clause.

It was a truly remarkable performance. I had been in the teaching market for many months but I had not encountered Kagan's razor-sharp questions, questions that exposed weaknesses and inconsistencies in my thesis. Kagan quickly grasped my central point, questioned how it fit in with broader legal principles.

Here was someone who took legal doctrine seriously, someone who by instinct cared a lot about getting the doctrine and the case holdings and the broader legal implications just right, and someone who is remarkably knowledgeable about the law and unusually

adept at legal argument. I will say that she also displayed a similar attitude toward the law countless times during our years together at Harvard in conversation, and in appointment Committee meetings, and in faculty workshops.

Kagan's view—in my opinion, Elena Kagan views the law with an earnest respect to have a reality, to have an autonomy, and to have a constraining bite. And while I do not purport to speak for fellow conservatives of various stripes, I think this quality is one reason why so many prominent conservative lawyers who know Elena Kagan well admire and support her confirmation. My colleague John Manning, who has known Kagan since law school, writes to this Committee that she is “careful and reflective in her legal analysis and cares deeply about law and legal craft.”

Former Judge Michael McConnell, now a professor at Stanford Law School who has known Kagan for 20 years since they were together on the Chicago faculty, writes that “she has demonstrated a fidelity to legal principle, even when it means crossing her political and ideological allies.”

These are extraordinary testaments to Kagan's—these and others—and there are other similar testaments from conservative lawyers on the record—are an extraordinary testament to Kagan's commitment to the integrity of law and should count in favor of her confirmation.

Now I turn to her temperament. And I think she has an ideal temperament to be a Supreme Court justice. She has a remarkably open mind, she cherishes intellectual debate, and she generally considers all sides of an argument before exercising her judgment.

These were some of the qualities that, in my opinion, helped make Harvard Law School an intellectually richer and intellectually more diverse law school under her deanship. It's a little awkward for me to talk about this because I am actually held up as a conservative scholar who was hired while serving in the Bush administration.

I'm held up as the example of how open-minded she was. It makes it a little awkward for me to talk about this, but I do think that her actions as dean, not just in connection with me but much more broadly, do demonstrate a commitment to the frank and open exchange of ideas and reveal a temperament ideally suited for the Supreme Court.

I don't think she was interested in achieving balance for balance's sake. I think she thought that excellence in law school required an intellectual environment where every idea can flourish. Now, this might seem like an obvious point, but in the American Legal Academy, and especially among the most elite law schools, it is far from obvious and not at all established.

Much attention has been paid to her hiring of conservative scholars, but this is too narrow a focus, for these hires were a small feature of a larger commitment to treating everyone and all ideas on the merits rather than through an ideological lens.

My time is running short, but I would say it was not just the way she treated me and not just the way she treated conservatives, but the way she treated everyone. I agree with Michael McConnell that these aspects of Kagan's deanship “demonstrate qualities of mind and character that are directly relevant to being a justice on

the Supreme Court, respect for opposing argument, fair-mindedness, and willingness to reach across ideological divides, independence, and courage to buck the norm.

Thank you.

[The prepared statement of Professor Goldsmith appears as a submission for the record.]

Senator KAUFMAN. [Presiding] Thank you, Mr. Goldsmith.

Curt White is the president of the Harvard Law Armed Forces Association and hails from Teliqua, Oklahoma. After graduating from West Point, Mr. White served as platoon leader and executive officer in Iraq, where he earned two bronze stars in 2004 and 2006. He left active duty in 2007 with the rank of captain and went on to serve in the National Guard. He's currently finishing his joint graduate degrees in law and business at Harvard.

Please proceed, Captain White.

STATEMENT OF CAPTAIN KURT WHITE, PRESIDENT, HARVARD LAW ARMED FORCES ASSOCIATION, ARMY NATIONAL GUARD

Captain WHITE. Thank you, Mr. Chairman and members of the Committee. It's a great honor to be asked to testify at this hearing.

I'm most grateful, however, for the opportunity to help dispel some of the untrue and unfair accusations of anti-military bias that have been leveled against Ms. Elena Kagan, a woman who, in my short time of knowing her as the dean of the Harvard Law School, went to such great lengths to show her respect for, and appreciation of, the military and military veterans.

Rather than spending my time directly addressing the policies toward military recruitment at Harvard Law School during Ms. Kagan's time as dean, issues which she has spoken to and directly addressed herself, I will rather spend my few minutes explaining my interactions with Dean Kagan, her feelings toward the military, and the pro-military environment that she created during her tenure as dean.

I first heard Ms. Kagan speak in the fall of 2007 as she gave the welcoming address to the students of my incoming law school class. Sure, she had many eloquent and inspiring words, but one of her speech has remained particularly memorable for me. As Dean Kagan was ensuring that every student knew what a special class they had just joined, she began listing the States and countries from which students had come, and then began speaking to some of the incredible honors and accomplishments of those seated around me.

As I listened to the descriptions of my classmates, I was somewhat surprised that I had been allowed to join this amazing group as a student at the Harvard Law School. I was more surprised, though, when Dean Kagan pointed out the number of military veterans seated in the room among the incoming class as a group of students that others should keep their eye out for and try to meet during the coming year.

It was truly a proud moment to be recognized in such a way, that the dean of the law school saw military service as something so important that she would mention the veterans to the entire class on our first day. It made me immediately feel welcome and respected in my new environment. I later found out, from speaking to vet-

erans in other classes, that Dean Kagan made a point of highlighting military members and military service each year during her welcoming address.

Later that year, I had the rare opportunity as a first-year law student to spend an evening visiting intimately with the dean. Around Veterans Day, Dean Kagan hosted a dinner for military veterans and their families. During this dinner she spoke very little, other than to express her deep gratitude to the current and former service members seated at the table.

The evening consisted mainly of Dean Kagan asking about our military service, listening intently to our stories, and expressing her sincere appreciation for our service. It was truly moving to have the dean of the law school take an evening out of her schedule to show her thanks to our small group of veterans. More, she made each of us feel as if she was the one who was honored to have the opportunity to dine with us and visit with us for the night. This event which Ms. Kagan pioneered during her time as dean meant a great deal to the veterans at the school and has luckily been continued by her successor.

Also, while Dean Kagan was leading the law school, numerous other attempts were made to emphasize the service of the military veterans at the school, from articles published on the school web site, to highlights of veterans and their stories in alumni newsletters.

During the time I knew her as dean of the Harvard Law School, Ms. Kagan's support of the military was clearly evident. Over the past 3 years, I've been a part of numerous conversations between veterans at the Harvard Law School where all have spoken warmly of her graciousness toward the veterans since we arrived there.

It might seem that this would not be a conversation that we would need to have with each other on multiple occasions, but such was the importance of Dean Kagan's words and actions toward us to our overall experience at the law school that it was something that we could not help but discuss frequently.

It is, thus, my honor to have the opportunity to answer anti-military accusations made against Ms. Elena Kagan, who again did so much to make the experience of myself and my fellow veterans what it was, and who did so much to make us feel welcome, appreciated, and as she has mentioned earlier in her testimony, indeed revered while she was the dean.

With that I'll conclude my remarks.

[The prepared statement of Captain White appears as a submission for the record.]

Senator KAUFMAN. Thank you, Captain White.

Professor Robert Clark is the Harvard University Distinguished Service Professor and Austin Wakeman Scott Professor of Law, and the former dean and professor of law at the Harvard Law School.

He's also a former commercial and corporate lawyer and faculty member of the Yale Law School. He received his BA from Marinaw College, his Ph.D. from Columbia University, and his JD from Harvard Law School.

Professor Clark.

**STATEMENT OF ROBERT C. CLARK, HARVARD UNIVERSITY
DISTINGUISHED SERVICE PROFESSOR, AUSTIN WAKEMAN
SCOTT PROFESSOR OF LAW, AND FORMER DEAN, HARVARD
LAW SCHOOL**

Professor CLARK. Thank you, Senator and members of the Committee. I support the appointment of Elena Kagan to the court and I'd like to offer some perspectives based on my own experience as her colleague and her predecessor in the role of dean at Harvard Law School.

I believe her superb performance as dean should be a positive factor in your decision-making. Now, I admit that the case for Solicitor General Kagan has many parts. First, she has demonstrated, I think, to all of you in the last few days, as she clearly demonstrated to me personally, she is extremely bright. I know this from having taught her and observed her and graded her in the mid-'80s and from having studied her scholarship in the late 1990s when deciding whether to support—which I did—her appointment to our faculty.

Moreover, she thinks like a lawyer, and I, at least, mean this in a good way. She makes sure she understands the law and the facts very closely and accurately and precisely and puts them together carefully before she draws her conclusions.

I think that a lawyer who actually does this, as she does, is unlikely to get too creative or loose when she makes decisions as a judge. She will feel obligated to follow the law, not make it up.

Furthermore, she has relevant experience with the law not only in her recent experience as Solicitor General, but in my view also in her many years of spectacularly successful teaching of constitutional law and administrative law, which are very relevant subjects to this position that she's about to get, I hope.

This teaching experience tends to be neglected, I know, when people discuss her qualifications for the court, but I think it's relevant because she knows legal doctrines inside and out in a way that very few practicing lawyers do.

But I want to stress now her performance as an institutional leader and explain why I think the skills and attributes she brought to her role as dean and developed while dean would benefit her and the court if she's confirmed. I was dean for 14 years, a long time, 1989 to 2003, and strongly supported Elena Kagan as the choice to be my successor.

From my viewpoint, once she became dean she did a fantastic job of taking positive changes and initiatives that had been begun in the 1990s and building on them. She was not one who tried to take over and change the paradigm, as so many new leaders do, or to take things in an ideological or particular direction. She built on what the faculty had come to want to do.

For example—I'll give three examples, if I have time. We hired a large number of faculty members, including some top scholars from leading schools during her tenure. The number went up about two dozen in just 6 years, from about 1981. That is, in a law school context, kind of amazing.

In my view it's a positive indicator because in the case of a very complex law school like Harvard with multiple constituencies, it says something about the ability of the dean to build consensus.

The appointments process is relentlessly democratic: you need two-thirds of the voting faculty to approve an appointment.

In a strong-willed faculty, which we have, with widely varying views about what really counts as good scholarship, you need a dean who can understand many different points of view and then encourage people to work together. Dean Kagan did this successfully. I watched her learn to do it even better as she proceeded. She wasn't just political, she actually learned to understand and appreciate many different points of view.

Similarly—this is dealing with another constituency—she took over and led a very successful fundraising campaign. In the late 1990s, under my guidance the law faculty developed an ambitious long-term strategic plan. We then proceeded to get university-level approval for a campaign to fund it—not easy—and I spent a couple of years getting initial gifts and commitments. Then in June of 2003, my last month in office, we had a so-called kick-off of a public phase of this campaign. I announced we had already raised over \$170 million in commitments and gifts, and gave, standing right next to me the about-to-become dean Elena Kagan and her team, the hard task of getting that number up to \$400 million.

Well, flash forward five-plus years later, the fall of 2008. The campaign closed, having greatly exceeded its goal by reaching \$476 million, which was another record in law school fundraising. We had done that already 10 years previously.

This fundraising success, which is of fundamental importance to an institution like Harvard Law School that does not depend much on foundation grants or any government grants, would not have happened without Elena Kagan's skill in seeing other people's perspectives. I can say this from personal experience: in order to gain support from 23,000 alumni and friends of the school, which the law school did during this campaign, its dean had to learn to understand and appreciate the viewpoints of many very different people out there who have strongly varying attitudes about what the school was doing and planning to do. I watched her get better and better at this over time, and I heard reports from old alums that I knew already. I believe that her experience and success in this role will help her do a better job as justice of the court.

And as with faculty and alumni, so with students. Dean Kagan did a superb job of boosting the mood and morale of the student body. She did this with gestures great and small, everything from an ice skating rink and free coffee—

Senator KAUFMAN. Professor, could you wrap it up, please?

Professor CLARK. OK. To substantive revamp of the first-year curriculum. I could go on listing her other achievements, but given the time I won't. I will note that I have an op-ed piece from the *Wall Street Journal* that I'd like to have put in the record that deals with the military recruiting issue. That's not my theme today. My concluding point is, I think the Committee's decision about Solicitor General Kagan ought to be positive.

Yes, we may not—it may happen that as a justice she'll sometimes fill in the blanks of received common law in a way that some of us don't like, but as—and as history shows it's really hard to predict accurately what a future justice will do, but I think in this case worrying too much about the downside possibilities is to miss

the forest for the trees. She's an excellent choice for the court and should be confirmed.

[The prepared statement of Professor Clark appears as a submission for the record.]

Senator KAUFMAN. Thank you, Professor Clark.

Gregory G. Garre is a partner in the Washington, DC office of Latham & Watkins. He served as the 44th Solicitor General of the United States under President George W. Bush.

Prior to his unanimous confirmation as Solicitor General by the Senate, Mr. Garre served as principal Deputy Solicitor General and then as Acting Solicitor General. She served as a law clerk for Chief Justice William H. Rehnquist, and to Judge Anthony J. Scalia of the U.S. Court of Appeals for the Third Circuit.

Mr. Garre received his BA from Dartmouth College and JD from George Washington University Law School, where he was editor-in-chief of the *Law Review*.

Mr. Garre.

STATEMENT OF GREGORY GARRE, PARTNER, LATHAM & WATKINS, FORMER SOLICITOR GENERAL OF THE UNITED STATES

Mr. GARRE. Thank you, Mr. Chairman, Ranking Member Sessions, members of the Committee. It's an honor to appear before you today.

I had the great privilege of serving as Solicitor General of the United States at the close of the last administration, and like all former Solicitors General going back nearly a quarter of a century over the course of the Reagan, Bush I, Clinton, and Bush II administrations, I'm pleased to support the nomination of Solicitor General Kagan to be Associate Justice of the Supreme Court. My testimony today is focused on how General Kagan's service as Solicitor General will serve her well on the Supreme Court.

Service as a Solicitor General is by no means a necessary, or in itself sufficient, qualification to sit on the Supreme Court, but the Office of the Solicitor General offers a valuable training ground for service on the court. In fact, the Solicitor General is sometimes referred to as the tenth justice, although as many former Solicitors General would say, and I can attest, never by the justices themselves.

The Solicitor General is enmeshed in virtually all aspects of the court's business. She and her lawyers argue in about two-thirds of the cases appearing before the court each term. She personally argues the most important and usually most contentious cases before the Supreme Court each term, formulating and advancing the positions that serve the best interests of her client, the government.

By all accounts, General Kagan has served the government well before the Supreme Court. Importantly, she managed the challenging transition from one administration to the next, with the best interests of the Solicitor General's Office and the United States in mind, and minimizing changing positions before the court.

One vitally important area where the government's positions have remained essentially unchanged is in litigation involving the war on terror. General Kagan has successfully briefed and argued

many significant cases in this area of law, including the decision in the case *Holder v. Humanitarian Law Project*, in which she successfully defended the constitutionality of the material support statute before the Supreme Court this term, as well as other cases involved in the handling of wartime detainees.

It is not possible to work on these cases without gaining a deep appreciation for the national security challenges facing this country, and for the men and women who confront these challenges in the armed forces on a daily basis. I believe this experience will serve Solicitor General Kagan well.

It is also significant that General Kagan has earned the confidence, trust, and admiration of the enormously talented career lawyers in the Office of the Solicitor General. It's hard for me to think of a higher compliment when it comes to her service as Solicitor General, nor better indication that she possesses the intellect, fair-mindedness, and dedication to duty that Americans expect in a justice of the Supreme Court.

Now, it's true that General Kagan lacks judicial experience, but history shows that prior judicial experience is by no means a prerequisite to distinguished service on the Supreme Court, especially for someone like General Kagan with a varied background in the law and numerous accomplishments when she goes on the court.

Some 40 individuals have joined the Supreme Court without prior judicial experience. I had the great privilege to clerk for one of them, Chief Justice William Rehnquist, and I am confident that his lack of prior judicial service in no way impeded his enormous accomplishments on the court.

The Constitution grants the President broad leeway in determining how to carry out the enormously important responsibility of choosing a justice for the Supreme Court. One can hold different views on the important legal issues facing the country and still conclude that General Kagan is well-qualified to serve on the Supreme Court. Like my predecessors as Solicitor General going back over the course of the past four administrations, I support Solicitor General Kagan's nomination to be an Associate Justice, and I hope that this Committee will do so, too.

Thank you.

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

Senator KAUFMAN. Thank you, Mr. Garre.

Ronald Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law. Previously, he was professor at George Mason University School of Law and the University of Illinois School of Law. He received his BA from Harvard College and his JD from Harvard Law School. He subsequently clerked for Judge Walter Mansfield in the Second Circuit Court of Appeals.

Professor Rotunda.

STATEMENT OF RONALD ROTUNDA, THE DOY & DEE HENLEY CHAIR AND DISTINGUISHED PROFESSOR OF JURISPRUDENCE, CHAPMAN UNIVERSITY SCHOOL OF LAW

Professor ROTUNDA. Thank you very much. If you have any questions, speak up. My tie is kind of loud, so it's hard for me to hear.

It's been 40 years since a Solicitor General has been nominated to the Supreme Court, since the late great Thurgood Marshall, the grandson of a slave. Since then, among other things, the law has changed. There's now a special law dealing with such situations, 455 U.S. Code—that is, 28 U.S.C.A. Section 455(b)(3).

Basically it provides that if the justice has served in government employment, in such capacity participated—I'm paraphrasing, now—as an advisor concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy, she must disqualify herself.

That's augmented by Section 455(a) that says you should disqualify yourself if the impartiality might reasonably be questioned. The Senate was, I think, pretty serious about this law in the House because they provided, in Section 455(e), that the parties cannot waive this particular disqualification, the justice must disqualify herself. Congress enacted the law in response to a case called *Laird v. Tatum* in 1972.

The respondents in *Laird* moved to disqualify the new Justice Rehnquist because he had testified on a particular legal issue relating to this case when he was at the Justice Department and expressed a statement about the merits of a case. He wasn't a lawyer on the brief. He wasn't even in the Solicitor General's Office, he was Office of Legal Counsel.

Justice Rehnquist, in his opinion, acknowledged—he said they're correct in stating that during the course of my testimony and on other occasions I expressed an understanding of the law, as established by the decided cases, that was contrary to the position that the respondents took, but he refused to disqualify himself. Under the law at the time, I think that was correct. So people were upset with that, so they changed the law.

Now they had this much broader language. If they participated not simply as counsel but as an advisor, whether his opinions are public or private, whether they're oral or written, if he's expressed an opinion concerning the merits of a particular case or controversy, he must disqualify himself. There are very few cases interpreting this, but those that do exist are fairly broad.

First of all, it's clear under the statute this applies to U.S. Supreme Court justices, not just the others. So Solicitor General Kagan, if she's on the court, will obviously disqualify herself in all cases in which she's counsel of record, but it doesn't matter that she's no longer counsel of record, that the Deputy Solicitor General has taken over. She also has to recuse herself if she was an advisor concerning the proceeding, that is, gave advice about the particular proceeding or expressed an opinion concerning the merits of a particular case or controversy.

The statute defines proceeding very broadly to include pre-trial matters. The Supreme Court web page acknowledges this. It says that if you've earlier been involved in the case as a lawyer you must disqualify yourself, whether or not you're on the record. The pre-trial—that is, all stages of litigation, including the pre-trial.

One of the few cases interpreting the section is *United States v. Iron*—in 1994. It involved a U.S. Attorney who became a district judge. He was U.S. Attorney at the time of an investigation before

there was an indictment. It eventually led to indictment and a criminal trial.

The judge was not personally involved in the investigation, it simply occurred under his watch. The Ninth Circuit said you have to disqualify yourself. The Ninth Circuit acknowledged he wasn't personally involved, but said it imputes to the U.S. Attorney the knowledge and acts of his assistants. Now, that would be everybody, of course, I think, in the Solicitor General's Office.

Several years ago under the Bush administration, the Solicitor General's Office coordinated and had advice on many, perhaps all, of the detainee cases then in the lower courts. I don't know what's done now, but if they keep the same procedure she would have to disqualify herself in all of the detainee cases, even though they're not yet at the appellate level. Newspapers have reported that she gave oral advice and had input into briefs filed in the Arizona immigration case.

If that's true—I don't know, we'll ask her—she should disqualify herself if that case ever comes to the Supreme Court. If the administration asked her advice on the constitutionality of proposed legislation in connection with contemplating proceeding, either where the United States would be plaintiff or defendant, if you have a particular proceeding, a particular thing in mind, she'd have to disqualify herself.

Now, she's only been Solicitor General for, what, less than 2 years. I don't think there will be a lot of cases like this. I would think within the next year or two she would—this qualification would end. But until that time, in cases involving the United States, she should disqualify herself.

Thank you very much.

[The prepared statement of Professor Rotunda appears as a submission for the record.]

Senator KAUFMAN. Thank you, Professor Rotunda.

Robert Alt is the Senior Legal Fellow and Deputy Director of the Center for Legal and Judicial Studies at The Heritage Foundation. He's also a fellow in Legal and International Affairs of the John M. Ashbrook Center for Public Affairs at Ashland University in Ohio. He received his bachelor's degree from Alameda-Souza Pacific University and his JD from the University of Chicago Law School.

Professor Alt.

STATEMENT OF ROBERT ALT, SENIOR FELLOW AND DEPUTY DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION

Mr. ALT. Thank you, Mr. Chairman and Ranking Member Sessions, for inviting me to testify.

As these hearings open, numerous members of this Committee lamented what was variously described as the judicial activism or corporatism of the Roberts court. Indeed, TV viewers who tuned in late could be excused if they believed they were watching reruns of the confirmation hearings for John Roberts or Samuel Alito, given the frequent references to those justices.

Singled out for special condemnation were the Roberts court's decisions in *Citizens United* and *Ledbetter*. The complaints raised closely tracked those of liberal activists who issued reports which

both highlighted their grievances and served as talking points on these cases and on the Roberts courts in anticipation of these hearings.

The story of a conservative activist pro-corporatist Roberts court may sound compelling at first blush, particularly with its repetition and regrettable distortion of the cases involved, but it is just a story, and a fictional one at that.

Take, for example, the case of *Citizens United*. In his State of the Union Address, the President chided the Supreme Court for reversing a century of law. Multiple members of this Committee complained at the beginning of this hearing about the Roberts court overturning longstanding precedent. But the suggestion that the court overturned a century of precedent just isn't true.

The leading case in this area of campaign finance law is *Buckley v. Vallejo*. In that case, and time and time again thereafter, the court affirmed the First Amendment free speech rights of individuals, groups, and incorporated groups making independent expenditures. Since *Buckley*, the only interest that the court has accepted as being sufficient to justify governmental regulations closely drawn is preventing the actual corruption or the appearance of corruption. This has been the consistent standard applied by the court, including in cases in which the free speech rights of corporations were recognized.

There was just one outlier case, *Austin v. Chamber of Commerce*, in which the court, for the first and only time, embraced a kind of speech equalization theory to permit restrictions on corporate independent expenditures in an opinion which ignored well-established precedent.

But this case was the jurisprudential equivalent of an orphaned eunuch: it had no jurisprudential parents and it bore no meaningful jurisprudential children. Even after *Austin*, the court returned to rejecting rationales for government regulation outside of preventing actual corruption or the appearance of corruption.

The court in *Citizens United* overturned precedent, yes, but it did not overturn a 100-year-old precedent that was well-revered or established. It overturned a 20-year-old case that was an outlier in the law and that stood as contrary to the leading case on the topic and virtually every other case on the topic decided and it did so in the service of a well-grounded approach to the Constitution, one which recognizes that political speech is really the core speech protected by the First Amendment.

Contrary to the misguided claims bandied about, this case is not a sin against stare decisis, but rather comported with the proper understanding of that term by adhering to the multiple precedents which *Austin* itself ignored and abrogated.

Or take *Ledbetter*. President Obama said that *Ledbetter* "didn't know that she was getting paid less. When she discovered it, she immediately filed suit to get back pay, and the suggestion was somehow that she should have filed suit earlier."

Just this week, Senator Feinstein said that she found it shocking that "the court would hold to a technicality when a woman couldn't possibly have known, during the time that the tolling was taking place, that she was disadvantaged, and when she learned she was disadvantaged it was too late."

But it just isn't true. As the court noted, *Ledbetter* conceded in her own deposition, which I have right here, that she knew about the alleged pay inequity more than 5 years before she filed suit. Her novel arguments were necessary in order to evade the statute of limitations that were imposed by Congress, not by the courts.

This raises a very important issue. In many of the cases that have been used by liberal activists and most recently by members of this Committee to allege activism by the court, the crux of the argument is that the person objecting does not like the policy outcome.

But the outcomes in these cases were dictated by policies of Congress and dutifully carried out by the courts. If Congress disagrees with its own policy it can change it, as it did in the wake of the *Ledbetter* case. Far better this than courts undermining the rules that Congress has drafted in order to impose its own view of what policy is. Now, that would be activism.

There is no need to make a papier mâché Mephistopheles of activism. There's real activism in the world. There are even examples of real pro-business activism decisions by the Supreme Court, such as its decision in *BMW v. Gore*, in which Justice Stevens found in the Due Process Clause, probably hiding behind some emanations and penumbra, a constitutional cap on punitive damages, a position rejected by conservative justices who sought to apply the law according to its original meaning.

But the claims of a concerted conservative pro-corporatist Supreme Court, while good political talking points and an able diversion from questions about Dean Kagan's failure to adhere to the requirements of Federal law in the Solomon Act, are just not true.

Thank you. I welcome your questions.

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

Senator KAUFMAN. Thank you, Mr. Alt.

Ed Whelan is the president of the Ethics and Public Policy Center. He served as principal Deputy Assistant Attorney General for the Office of Legal Counsel under President George W. Bush. He clerked for Judge J. Clifford Wallace in the U.S. Court of Appeals for the Ninth Circuit, and for Supreme Court Justice Antonin Scalia. Mr. Whelan received his undergraduate degree from Harvard University, his JD from Harvard Law School.

Mr. Whelan.

STATEMENT OF ED WHELAN, PRESIDENT, ETHICS AND PUBLIC POLICY CENTER

Mr. WHELAN. Thank you, Senator Kaufman. Thank you, Senator Sessions.

Various supporters of Elena Kagan's nomination have sought to bolster their position by flinging assertions that the Supreme Court, under Chief Justice Roberts, has engaged in conservative judicial activism. Those assertions are badly confused. A sober assessment of the current reality and future risk of judicial activism provides compelling reason to vote against the Kagan nomination.

Since the Warren court's heydays in the 1960s, the court has entrenched the Left's agenda and usurped the realm of representative government through a series of activist rulings on a broad range

of matters, including abortion, secularism, obscenity and pornography, gay rights, criminal procedure, national security, and the death penalty. These monuments of liberal judicial activism have deeply transformed—and I would submit degraded—American politics, institutions, and culture.

Even worse, new edifices of Leftist ambition are in the works. Elena Kagan is a predictable vote, quite possibly the decisive fifth vote, in favor of inventing a Federal constitutional right to same-sex marriage. Reasonable people have different views on whether and how public policy should accommodate same-sex relationships, and that's a matter that's being worked out through the democratic processes.

But the court's invention of a constitutional right would not only radically redefine the central social institutions of marriage and the family for the entire Nation, it also branded as bigots and inevitably coerce and penalize all those Americans who understand the essence of marriage as a union of a man and a woman.

Ms. Kagan would also provide the fifth vote to continue the court's unprincipled practice of selectively relying on foreign law to alter the meaning of the Constitution, one part of a broader, transnationalist agenda that would displace the constitutional processes of representative government and dilute cherished constitutional rights to free speech and religious liberty.

By contrast to the decades-long reality and ongoing threat of liberal judicial activist rulings, the overall picture of supposed conservative judicial activism pales into virtual nothingness. Let's consider a remarkable colloquy that took place just last week on the Senate floor among three Senate Democrats, all members of this Committee, though I see that unfortunately none of them is able to be here right now.

Each of the three Senators complained about the supposed conservative activism of the Roberts court, each offered a supposedly compelling example of that activism. Senator Cardin gave as his example of judicial activism the Supreme Court's ruling in *Ledbetter*. In that case, the court majority ruled that the time period for filing a charge of employment discrimination with the EEOC begins when the discriminatory act occurs and that it isn't retriggered by later non-discriminatory acts. That ruling flowed directly from four Supreme Court precedents over the previous three decades. I'm quite sure that Mr. Garre, who signed the brief in that case for the government, will attest and argue for the exact position the Supreme Court adopted—will attest to that.

The court in *Ledbetter* expressly left open the question “whether Title 7 suits are amenable to a discovery rule, whether, that is, in those instances in which the employer was not aware that she'd been discriminated against, the charging period would instead run from the time that she discovers the discrimination.”

But here's what Senator Cardin had to say about the *Ledbetter* ruling: “This defies logic. How can a person bring a claim when they don't know they're being discriminated against? It makes no sense.”

In short, Senator Cardin's vehement denunciation of the *Ledbetter* ruling rests on his simply misreading the case. Three years after the court's ruling in *Ledbetter*, Senator Cardin thought

that the court had rejected applying a discovery rule to the charging period in Title 7 suits. He also evidently didn't understand that Mrs. Ledbetter had waited more than 5 years after she learned of the discrimination to file her EEOC charge.

As respected legal analyst Stuart Taylor has written, President Obama and other Democrats were able to make the court's ruling against *Ledbetter* seem outrageous only by systematically distorting the undisputed facts.

Next in the Senate colloquy was Senator Whitehouse. His showcase ruling was a 2008 case in which the court ruled, by a 5:3 vote, that punitive damage is awarded against Exxon in connection with the Exxon-Valdez oil spill was excessive as a matter of maritime common law.

Senator Whitehouse's discussion of the case suffers from a few unfortunate omissions. First, the author of the majority opinion that he decries was the liberal Justice Suter. Second, Justice Ginsburg, in dissent, describes Suter's opinion as "well-stated and comprehensive," and called the case "a close one."

Third, Senator Whitehouse leaves the impression that the court's general review of punitive damages awards divides justice along ideological lines, but in fact Justices Scalia and Thomas are the strongest opponents of the position that the Constitution imposes general substantive limits upon punitive damages.

I see that my time is running out. I'd be happy to address any questions on the arbitration case that Senator Franken had so much to say about, inaccurately, during the confirmation hearing. But let me conclude by simply noting that it's entirely proper that Supreme Court decisions be subjected to careful scrutiny and, where appropriate, vigorous criticism.

But as the colloquy I've discussed and detailed more extensively in my written comments illustrates, so many of the criticisms of the Roberts court for supposedly engaging in conservative judicial activism are of dismal quality and invite the suspicion that they're motivated by crude political considerations. Genuine concerns about judicial activism cut strongly against the Kagan nomination.

Thank you.

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

Senator KAUFMAN. Thank you, Mr. Whelan.

Stephen Presser is the Raoul Berger Professor of Legal History at Northwestern University School of Law, and holds a joint appointment at Northwest's Kellogg School of Management. He's a graduate of Harvard College and Harvard Law School. Following graduation, he served as a law clerk for Judge Malcom R. Willkey of the Court of Appeals for the DC Circuit.

Professor Presser.

STATEMENT OF STEPHEN PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Professor PRESSER. Thank you, Mr. Chairman. I've been asked to address the propriety of a Supreme Court justice's turning to international or foreign authority in order to interpret the Constitution of the United States, a point to which Mr. Whelan alluded.

This question is really part of a broader problem, which is what a Justice is supposed to do when a Justice explicates the meaning of constitutional provisions. Here, we should return to first principles, and in particular return to the most important statement on judicial review, that offered by Alexander Hamilton in *Federalist* '78, quoting the Baron de Montesquieu, to the effect that "there can be no liberty when judicial function of government is not separated from the legislative."

To put it in the vernacular—and we talked about this—it's the job of justices to judge, not to make law. In the past few years we've seen several instances of justices turning to international or foreign law to make American constitutional law. Thus, Justice Kennedy, turning to the law of the European community, found support for his view, departing clearly from prior precedent, that consensual homosexual acts could not be criminally punished.

In a similar manner, recent Supreme Court decisions, relying in part on European and other international authority, have decided that it is unconstitutional to apply the death penalty to minors and that it is unconstitutional to apply the death penalty to persons suffering from mental retardation.

Now, the results in all of these cases might be wise social policy, but they all represent really legislative acts by the court. In America, where the people are supposed to be sovereign, changes in such social policies are supposed to be for the popular organ, the legislature, or for the ultimate popular organ in action, amending the Constitution.

Turning to international or foreign authority then as a means of reworking constitutional provisions or overturning prior precedents betrays the nature of our Federal system and flies in the face of the rule of law. It should be acknowledged of course that, from the beginning of our history, Federal judges and Supreme Court Justices have used international authority in order to reach judicial decisions, and indeed even to aid in the interpretation of provisions of the United States Constitution. But there's a profound difference between this use of international law and that use of Justice Kennedy's referred to earlier.

In the early years of our Republic and subsequently, judges and justices have quite properly sought to understand and apply the Law of Nations, a body of super-constitutional principles that apply to every nation and that have been the subject of work by international scholars for hundreds of years.

But this recourse to the ancient Law of Nations, this traditional recourse to international law, is very different from turning to recent international or foreign jurisprudence to implement policies and rules, very different from those previously prevailing. One is a longstanding legitimate use of international authority, the other is a usurpation of the sovereignty of the people.

As you members of the Senate examine the qualifications of General Kagan for this awesomely responsible position, you must ask yourselves whether she is a person who believes that it's appropriate to turn to international or foreign authority to alter the meaning of the Federal Constitution.

There are some troubling comments on this issue made by then-Dean Kagan about 2 years ago when she was introducing Justice

Kennedy at Harvard. Dean Kagan praised Kennedy as a jurist who addressed constitutional questions from an independent perspective and as one who understood that questions of constitutional interpretation had to be made pursuant to a realization that the United States is part of an international community.

Dean Kagan observed that Justice Kennedy has emerged as a fiercely independent voice on cases involving all manners of legal issues. Further, Dean Kagan remarked that “I would point to Justice Kennedy’s unique and evolving vision of law. Far from swinging between positions that are defined by others,” she said, “Justice Kennedy consistently charts his own course.” It seems very likely to me that, in her words to introduce Justice Kennedy then, Dean Kagan laid out her own jurisprudential philosophy.

Her praise of Justice Kennedy’s jurisprudence and his independence could certainly be interpreted as Ms. Kagan is suggesting, both that it was appropriate for Justices to formulate their own notions of what the Constitution should mean, and that it was appropriate for Justices to change the meaning of the Constitution by reference to emerging international norms and policies. Both of these ideas are not what a Justice is supposed to do, and I do believe it is your task to discover if that is in fact what General Kagan believes. If she does, I think you have cause to hesitate before voting to confirm her as a justice of the Supreme Court.

In a country such as ours, governed by the rule of law, it’s not the job of a judge or justice to have a unique and evolving vision of law or to chart his own or her own course. It is, to the best of his or her ability, to determine what the law is and then to follow it. Before you vote to confirm a Justice Kagan, you must be sure that she understands that.

Thank you.

[The prepared statement of Professor Presser appears as a submission for the record.]

Senator KAUFMAN. Thank you, Professor Presser.

I’m to start with the round, 5 minutes each. I’ll start with me and then Ranking Member Sessions, and so on.

Professor Goldsmith, in your testimony you spoke briefly about your view of the relevance of prior judicial experience to serve on the Supreme Court. Can you elaborate on that, and also on whether there might be a down side to having the entire court come from an appellate court background?

Mr. GOLDSMITH. Thank you, Senator. In my written testimony I stated that I thought it was irrelevant that she had no prior judicial—that Elena Kagan had no prior judicial experience, and I stated, as Greg Garre did, that many of our most distinguished Justices did not have—Chief Justice John Marshall, Chief Justice William Rehnquist, Chief Justice Earl Warren, and I could go on and on. I think Greg said there were 65. I don’t have a particular view about whether it’s a good or bad thing to have had prior appellate experience.

Senator KAUFMAN. Thank you.

Captain White, let me begin by recognizing your service to the country as a platoon leader and—your service to us all, and we thank you for it.

The testimony this morning that General Kagan was welcoming and accommodating to military veterans. Can you tell us a little bit more about that?

Captain WHITE. So, during my time there—I say it really started on my first day with me. I think for most of the veterans I have spoken to, we all went to—we all went into Harvard with some bit of trepidation, going to an Ivy League school which traditionally, I think, don't have the reputation of being as supportive of the military as maybe some other institutions in the country.

So it was really wonderful on that first day to be recognized for our service in front of our classmates and for that to be pointed out and for then Dean Kagan to show her gratitude toward us. So that was really, I guess, what started it. And then I think after that being there while articles were published in the school newspaper as well as on the school website, highlighting veterans and their stories, was something that just really went toward creating an environment that showed that even whatever the policies were regarding military recruiting in the Office of Career Services it was an administration headed by Dean Kagan that was very supportive of the military in general and very much appreciated the service of the veterans that were there at the law school.

Senator KAUFMAN. Thank you.

Professor Clark, you preceded Dean Kagan as dean of the school. Can you give us a brief description of the chronology of the law school's interaction with military recruiters in connection with the Solomon Amendment?

Mr. CLARK. Yes. Well, as you know the law school adopted its nondiscrimination policy rule that said that each person that wanted to recruit and use the OF COURSE had to sign the statement way back in 1979, long before I became dean. After the don't ask, don't tell policy emerged, the practice developed that the military recruiters couldn't sign in, they couldn't use OF COURSE, but we quickly enlisted the veterans students association as a vehicle for getting military recruiters on campus. And the idea there was fairly simple, but it is possible to express disagreement with a policy while still showing respect and appreciation for the military.

The Solomon Amendment came out in 1996 and in 1998 we got an inquiry from, I think it was the Air Force asking us to explain why we thought we had complied with the regulations under that. We sent them a letter and they said, "this seems OK." And it was like that until about December 2001, not surprisingly a few months after 9-11 when perhaps with new members or perhaps because of the new environment we got another letter saying, we no longer see how this constitutes the requisite access what your practice is there and we're going to recommend to the Department of Defense that the funding be cut.

So I consulted at great length with the president of Harvard, Larry Summers, and the general counsel and with student groups of all sorts and faculty members on the placement committee and we tried to respond to that letter. They were not satisfied and cut it short, I guess, and in July 2002 we said, OK, we'll let them use the OF COURSE and then issued a statement to the student body in August explaining the history and what was going on and said, you're still free to express your views on the don't ask, don't tell

policy, but this is the way it's going to be. And so that is the practice that she took over.

And, in effect, what she did after the Third Circuit opinion was to simply revert back to the old pattern which had existed for, I don't know, a very long time and seemed to work while the case was on appeal to the Supreme Court. But changed when she got the msg from that Department of Defense that despite all this she was not going to—they were not—they were going to try to cutoff Harvard's funding.

And as my letter to the Wall Street Journal—my op-ed pointed out, this was really a matter of law school expressing a policy about discrimination. We're a law school, after all. And we did not feel it was our—I did not feel it was our right to put the whole university at risk of funding, you know, by maintaining a policy. Especially, you know, it didn't matter at all to the law school, but it mattered enormously to the medical school and the school of public health which got a lot of funding from the various government departments that were covered in the Solomon Amendment.

Senator KAUFMAN. Thank you, Professor Clark.

Ranking Member Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

A good place for a professor of law to be who is not a lawyer.

Mr. CLARK. Thank you.

Senator SESSIONS. Your remarkable ascendancy here.

Mr. Goldsmith, do you consider yourself a conservative?

Mr. GOLDSMITH. Yes, I do.

Senator SESSIONS. I felt your book on terrorism was a sea or an island of insanity maybe and a sea of some hysteria around. And I have quoted from it a number of times in a debate over how to handle these issues and I respect you for it. But let me just ask you this, I believe Manning and Mule were hired with you by Dean Kagan?

Mr. GOLDSMITH. We were all hired within a few years, yes, sir.

Senator SESSIONS. Of her appearance on campus. Are you aware of any other recognized conservative who was hired under her tenure?

Mr. GOLDSMITH. Well, we don't really think about it as much as people outside the law school do about conservatives and non-conservatives. And I don't know the political or legal views of a lot of my colleagues. I do think it's misleading if you're implying that only three conservatives were hired in her tenure.

Senator SESSIONS. Yeah, I'm implying that.

[Laughter.]

Mr. GOLDSMITH. Yes, sir. I don't think that's accurate.

Senator SESSIONS. Three out of 43.

Mr. GOLDSMITH. I don't think that's accurate, sir. I think you have the numerator wrong. The reason that I would say that the reason the Vermule and Manning and I are picked out is because we write about legal issues and public law and we are taken to have a conservative stance on that.

Senator SESSIONS. Maybe you're right.

Mr. GOLDSMITH. But I don't believe the numerator is accurate. And I would also say that, you know, there were a whole range of

hires right, left, and center of all stripes and I don't know and I don't really care about the political affiliations.

[Simultaneous conversation.]

Senator SESSIONS. There are not many known out of the 100-some-odd faculty conservatives other than you three.

Mr. GOLDSMITH. No, sir. I would disagree with that as well.

Senator SESSIONS. Not a lot. What percentage would you give? Over 10?

Mr. GOLDSMITH. Yes, sir, I would.

Senator SESSIONS. Over 20?

Mr. GOLDSMITH. I don't know.

Senator SESSIONS. I doubt it. I doubt over 10.

Mr. White, the only thing I would say to you is, I appreciate your testimony and respect it. I would just note that when you came in this was after the controversy and Dean Kagan had started having some dinner with the military. But before that, she was not doing that, and that's when the controversy occurred. And I think the other witnesses' testimony that the military wasn't the one that should have been blamed, those in Congress who voted the law are the ones responsible for that law.

Mr. Whelan, you talked about this question of activism and I really do think it's important. I think I used Senator Hatch's formulation of it. I'm not sure he agrees I got it right, but I would say an activist that deserves criticism is one who ceases to be faithful to the legitimate interpretation of the law or the Constitution and allows personal political, religious, social agenda to impact how they decide a case, a non-legal basis for a decision.

And with regard to Ledbetter, in your opinion, were previous cases—that decision consistent with previous interpretations of the statute?

Mr. WHELAN. Absolutely.

Senator SESSIONS. Were there any previous interpretations of a similar type?

Mr. WHELAN. Well, absolutely, Senator. The decision was consistent with four Supreme Court precedents over three decades. The opinion spelled that out in detail. And, again, I really invite you to ask the man who wrote the brief argument in the case for the government. Mr. Garre, I'm sure, will confirm that.

Senator SESSIONS. Is that correct? That's right, Mr. Garre.

Mr. GARRE. That's correct. It was one of the Department of Justice attorneys on the brief. I did not argue the case. I do think that Mr. Whelan is right that the government's position in that case and ultimately the Supreme Court's decision in that case was in line with a number of prior Supreme Court decisions.

Senator SESSIONS. And it would therefore be unfair to accuse the court of an activist ruling in that case?

Mr. GARRE. I agree with that, your honor.

Senator SESSIONS. Your honor?

Mr. GARRE. Senator.

[Laughter.]

Mr. GARRE. Force of habit.

[Laughter.]

Senator KAUFMAN. He liked the former better.

Senator SESSIONS. I would note that Dean Kagan never made that mistake having never argued or been before a judge but a few times in arguing a case.

Mr. ALT, on *Citizens United* people criticized the Court for ordering a rehearing as if this were some error on the Court. It seems to me that showed their great respect and understanding that a case might need to be reversed and it needed great care before such an action would be taken, the *Austin* case, I guess, in particular. Would you consider that the Court ordering a rehearing was a wise thing to do before making a significant decision in that circumstance?

Mr. ALT. I certainly would, Senator. I think it gave the parties ample opportunity to both brief and argue the question. Regrettably the government's position given the failings of the statute didn't get any better. It went from defending it on the basis of it could be used to ban books, to well, the statute could be used to ban pamphlets. And I think that the Court found that equally disturbing in the second argument.

One of the other criticisms that has been frequently made is that they didn't try to avoid the question. But if you look, the Court had been avoiding the constitutional question on this for a long time and it had gotten to the point where they were bending the law to the point where it was breaking. They needed to answer this question. And I do think that rehearing gave the parties ample opportunity to brief and to argue before the action was taken to overturn *Austin*.

Senator SESSIONS. Professor Rotunda.

Mr. ROTUNDA. Just to add to that—

Senator SESSIONS. Before you say, let me just thank you for the serious question on recusal. I think we'll all have to think about that as this nomination goes forward.

Mr. ROTUNDA. Thank you. Just to add to that, *Citizens United* is talked about as a conservative decision. I don't understand that part. That is, the ACLU was very prominent in it filed an amicus brief on behalf of the winning position, the so-called "conservative position." The Court was very clear, the majority, going through the long history. You had politicians like Senator—or President Harry Truman when he signed a particular statute acknowledging he thought the provision on corporate restrictions was unconstitutional. And there was a long series of victims in prior cases from justices like Justice Douglas, who most people would not think of as all that conservative, supporting the position that the majority embraced.

I mean, you can like *Citizens United*, you can not like it, it's a free country. You can say what you want. But to say that that's a conservative opinion is surprising when there were so many liberal supporters embracing the position that the Supreme Court ultimately adopted.

Senator SESSIONS. Thank you.

Senator KAUFMAN. Thank you. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman, I appreciate it. I appreciate each one of you folks who are here today.

Professor Goldsmith, I'm happy to have you there. I think it's a great addition to Harvard.

Captain, we have to respect what you say.

Dean Clark, I've watched you for years and I enjoyed your testimony. It was very frank. You mentioned some concerns you had, but on the other hand it's important testimony.

Mr. Garre, I've had quite a bit to do with a number of you guys here, so I feel very deeply toward all of you.

I've read Professor Rotunda and his constitutional law and his whole series. And I just want to pay tribute to you as well.

You read it too, huh?

[Laughter.]

Senator HATCH. Now, if I understand you, Mr. Alt, and you, Mr. Whelan, you're saying in the Ledbetter case that the Court did nothing wrong, it just sustained a Congressional enactment—enactment; right?

Mr. WHELAN. Well, yes, Senator. It's even beyond that.

Senator HATCH. Sustained a—is it a 180-day statute of limitations?

Mr. WHELAN. A charging period for EEOC filings. But, again, Senator, it's beyond that. My point is that the criticisms that have been leveled against it rest constantly on a misrepresentation of what the Court held. The Court made clear that it was not—

Senator HATCH. That's my point. I mean, I agree with you on that. The fact of the matter is Congress then came back and changed it so that they could correct the so-called "ill." But in all honesty, if it's true that she had 5 years since she left the position, she could have asserted herself in 180 days. Now, that's cloudy in a lot of our minds, but the fact of the matter is, it's not activism to sustain the law that Congress passed. And if it happens to be wrong, Congress can change that law which it did in this particular case. If I get you right, that's what I understand you were saying.

Mr. WHELAN. Well, that's correct, Senator. And, again, the examples that I used of liberal judicial activism were rulings on constitutional grounds that invalidated democratic enactments in hugely important areas in a way that Congress and state legislators cannot possibly address. So that's where you see the core of judicial activism when courts wrongly rule on constitutional issues in a way that invalidates democratic enactments.

Senator HATCH. I don't disagree with you. In the *Citizens United* case, either one of you could answer this or anybody else for that matter, in the *Citizens United* case it seemed to me that that case overruled the Austin decision. But how many decisions were different from Austin before that?

Mr. ALT. Once again, I do think it's apt to refer to it as an orphaned unique. This is a case, if you take a look—

Senator HATCH. You don't have to convince me on Austin. I think they should have overruled Austin. My point is a bigger point than that and that is they really sustained years and years and case after case that had preexisted. Am I right or wrong on that?

Mr. ALT. Absolutely. Dating back from the *U.S. v. the Congress of Industrial Organizations* case in 1948 in which the Court suggested that limitations which would restrict writing by a union would—writings by a union would—

[Simultaneous conversation.]

Senator HATCH. Basically what they did was reaffirm *Buckley v. Bolin*.

Mr. ALT. Certainly with regard to the core. Again——

[Simultaneous conversation.]

Senator HATCH. My point is it doesn't sound like activism to me.

Mr. ALT. No. Buckley said that free speech was the rule and the exception is limitations on corruption and the appearance of corruption. Austin came up with a fanciful expansion on that.

Senator HATCH. When this hearing started, our colleagues on the other side, I think were taking on the Roberts Court as though it was an activist Court. I personally think that's wrong. And I think you've made a fairly decent case here today that it is wrong.

Mr. WHELAN. Senator, if I may add one point about *Citizens United* that I developed more in my written testimony. Solicitor General Kagan declined to defend the actual rationale of Austin, a point which underlies what an outlier that case was. She was criticized by folks on the left for doing so. Chief Justice Roberts in his concurring opinion pointed out her failure to do so. And I think—I'm not faulting her for that, I'm pointing out that it illustrates that Austin was not a precedent worthy of respect.

Senator HATCH. Well, the Court explained that it overruled Austin because Austin was not consistent with the First Amendment. I'll always argue on the part of the First Amendment if I can. In other words, in overruling Austin, the Court was preferring the Constitution to one of its own principles.

Mr. WHELAN. Exactly. And as Professor Rotunda pointed out, it's odd to describe a robust First Amendment ruling that benefits unions equally with corporations and it's sought by the ACLU as a conservative result.

Senator HATCH. My time is up, but isn't adhering more closely to the law in this case to the Constitution an example of judicial restraint rather than judicial activism?

Mr. WHELAN. The Court's obligation is to strike down democratic enactments that violate the Constitution. When it does that, it is not engaging in activism.

Senator HATCH. So that's judicial restraint.

Mr. WHELAN. Entirely consistent with Judicial restraint. Yes, Senator.

Senator HATCH. Thank you.

Senator KAUFMAN. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. And thank you all. Captain, first of all, thank you very much for your service. All of you have provided us important advice about someone who you know well or whose views you have closely studied and your testimony therefore is very helpful to us and we thank you for it.

I have not read the written version of all of your testimony, but I have read yours, Mr. Whelan. I found it up to your usual incisive and impactful standard. I only regret that none of my democratic colleagues except Senator Kaufman are here to be instructed in the error of their ways.

[Laughter.]

Senator KYL. And Professor Rotunda, I too am baffled that upholding political speech in the First Amendment is not considered a liberal decision in either the classical or contemporary sense of

that. I would enjoy being in a legal seminar with every one of you. Thank you very much for your testimony.

Senator KAUFMAN. Thank you. I just have a couple of questions. Professor Goldsmith, just having spent some time around a law school, the vast majority of courses that are taught at a law school are courses that you could not identify who or what someone's political persuasions, Bankruptcy Court, Administrative law; isn't that true?

Mr. GOLDSMITH. You might be able to depending on how they taught it, but likely not.

Senator KAUFMAN. Professor Clark.

Mr. CLARK. Yeah, I think the more general point is there are lots of divisions within faculties at universities and law schools in particular and there are people who you would call right and left. But what they mean by that is very, very different from what you are meaning here in these confirmation hearings.

Senator KAUFMAN. Thank you.

Mr. CLARK. That is, it's usually about some methodologic whether you think historians are worth reading or whether you think economic analysis with a lot of quantitative data means anything. It's that sort of thing rather than what you've been talking about for a few days.

Senator KAUFMAN. Thank you.

Mr. Garre, as a former Assistant General, you have a unique perspective, on that you share with General Kagan. Please tell us a little bit about the relationship between the Supreme Court and the Solicitor General and how you believe service as Solicitor General provide valuable experience in serving on the Court?

Mr. GARRE. Senator, I think it's valuable in a number of different respects. The Solicitor General is an officer of the Court. She is the most frequent litigant before the Court. She is grappling in many respects with the same issues that the Supreme Court is grappling with and it is simply impossible to serve as Solicitor General and not develop a profound respect for the Supreme Court and appreciation for its role in American government. And so in all those respects I think it will be extremely helpful, I'm sure, that General Kagan had a deep knowledge of the Supreme Court before she held that job. But an experienced Solicitor General in practicing before the Court gives you a unique perspective on the workload of the Court, the rhythms of the Court and the role of the Court.

Senator KAUFMAN. Thank you. Senator Sessions.

Senator SESSIONS. Thank you. And, Mr. Garre, you wouldn't know that Solicitor General Kagan made her first appellate argument ever just 9 months ago. And has, I think, actively served as a Solicitor General for only 14 months and has had no other sustained legal experience other than 2 years in a law firm right out of college. And I think Justice Rehnquist had a number of years of full-time practice serving in the Office of Legal Counsel which is an exceedingly critical part of the Department of Justice. But regardless, I just think her experience is, by any standard, thin. It would be difficult for me to imagine anybody to say it's not thin.

And I will back off, Professor Clark. I'm sure I overstated a bit maybe the bias of Professor Goldsmith or imbalance in Harvard. But it is a real legitimate criticism and concern of a lot of us that

law schools do have an extraordinary number of liberal, progressive faculty members as compared to conservatives. Some have felt they need to do better and maybe in that last few years have done a little better. But the balance is real. And law students have to be pretty intellectually vigorous to withstand that when they go through the courses—or hardheaded, like I was when I went through. But thank you all. This was really a good panel.

Professor Presser, I think that this international law issue is important because Americans believe they should not be controlled by anyone that they don't elect to represent them, or getting taxation without representation. How can we have our law controlled, defined, or modified, or influenced by some parliament in Belgium or some potentate somewhere in the world?

Mr. PRESSER. You're absolutely right. We fought a revolution over that and I don't think we can let ourselves be guided by some foreign bodies or some foreign emerging law. I only wish you had had a little bit clearer answers perhaps from General Kagan on that point. I think it's one that you have to be very concerned about.

Senator SESSIONS. I do too. I thought that, you know, if you believe like Justice Kennedy has said, or Justice Ginsberg, or Stevens, why not defend them.

By the way, I'm not sure you mentioned, but I was taken aback by Justice Stevens' opinion Monday in the McDonald case in which he talked about wisdom from a billion people around the world or something. It suggested that that somehow influenced his decision. Am I incorrect?

Mr. PRESSER. No, I don't think so. I think the idea is in the air and I think it would be very important to press it.

Senator SESSIONS. Well, Justice Scalia did his best, and I'll say that. Thank you, Mr. Chairman.

Senator KAUFMAN. Senator Hatch.

Senator HATCH. Just happy to have all of you here. I think the testimony has been across the board.

Senator KAUFMAN. I do too. I think the testimony has been excellent and I really want to thank you all for coming here and helping with this. As we all know this is—as a Senator I have to say that this is the—after sending troops in harms way which is always the toughest decision for a Senator to make, how we vote on Supreme Court nominees is clearly the most important thing we have to do. It's a lifetime appointment and a Supreme Court Justice will be making decisions that are going to affect long after I'm gone or long after anybody at this table is gone. So I really want to thank you for participating in what I think is one of the most important processes we go through.

And with that, I will dismiss you. And if the next panel would please come forward.

Senator KAUFMAN. Good evening, everyone. The hearing has now come back to order.

Because of the number of witnesses on this panel, I'd like to reiterate previous requests and ask all witnesses to please limit your oral statements to 5 minutes or under. If I interrupt, we can just put the rest of it in the record. Whatever you have, we will put in the record, but we would like to keep it to 5 minutes. Your full

statement, written statement, will be put in the record, or any part you haven't finished will be put in the record.

Senators, likewise, will have 5 minutes to ask questions of the panel. Along with Ranking Member Sessions, I am very glad to welcome ABA witnesses Kim Askew and William Kayatta. Together with the ABA witnesses, we will also hear from Professor Ronald Sullivan, Marcia Greenberger, Justice Fernande "Nan" Duffly, Dr. Charmaine Yoest, Tony Perkins, Commissioner Peter Kirsanow, David Kopel, and William Olson.

Now I'd ask you all to stand and be sworn so we may begin. Please raise your right hand.

[Whereupon, the witness was duly sworn.]

Senator KAUFMAN. Thank you.

The ABA customarily assesses the qualifications of potential nominees to the Federal judiciary. Ms. Askew and Mr. Kayatta will address the ABA's evaluation of Solicitor General Kagan to serve in the United States Supreme Court.

Kim Askew is the chair of the ABA Standing Committee on the Federal Judiciary, and William Kayatta is the First Circuit Representative of the ABA Standing Committee on the Federal Judiciary.

Ms. Askew.

STATEMENT OF KIM ASKEW, ESQ., CHAIR, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY ACCOMPANIED BY WILLIAM J. KAYATTA, JR., FIRST CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY

Ms. ASKEW. Thank you, Mr. Chair, Ranking Member Sessions. We are honored to appear here today to explain the ABA Standing Committee on the Federal Judiciary's evaluation of the professional qualifications of Solicitor General Elena Kagan.

The Standing Committee gave General Kagan its highest rating and unanimously found that she is Well Qualified. For over 60 years, the Standing Committee has conducted a thorough, non-partisan, non-ideological peer review of nominees to the Federal courts.

We assess the nominee's integrity, professional competence, and judicial temperament. The Standing Committee does not propose, endorse, or recommend nominees, we only evaluate the professional qualifications of a nominee and then rate the nominee either Well Qualified, Qualified, or Not Qualified.

Of course, a nominee to the Supreme Court of the United States must possess exceptional professional qualifications. As such, our investigations of a Supreme Court nominee is more extensive than nominees to the lower Federal courts in two principal ways. First, all circuit members conduct investigations into the nominee's professional qualifications in every Federal circuit in the United States, not just the circuit in which the nominee resides.

Second, while the Standing Committee independently reviews the writings of the nominee, we also commissioned three reading groups of distinguished scholars and practitioners. We were pleased to be assisted this year by a practitioner's reading group and academic reading groups at Georgetown University Law Cen-

ter and Washington University in St. Louis School of Law. These professors are all recognized experts in their substantive areas, and our practitioners group contains top trial and appellate lawyers.

In conducting General Kagan's evaluation, we contacted by letter some 2,400 persons, including every United States Federal judge, State judges, lawyers, law professors, and deans, and community and bar representatives. We conducted in-depth interviews with some of the preeminent and most experienced lawyers and judges in the country.

We interviewed several justices on the Supreme Court of the United States, Federal and State court judges, lawyers within the Solicitor General's Office, lawyers who had worked with or against General Kagan as she has headed the Solicitor General's Office, and we spoke with former Solicitor Generals from both political parties. We followed her career at the University of Chicago Law School and Harvard Law School, and interviewed law professors and deans there and elsewhere. Aided by our reading groups, the Committee analyzed her academic writings, transcripts of her oral arguments, speeches, and other materials.

Mr. Kayatta and I personally interviewed General Kagan last month. The nearly unanimous consensus of all we interviewed demonstrated that General Kagan's professional qualifications are exceptionally outstanding in every respect.

We concluded that General Kagan's integrity, professional competence, and judicial temperament meet the high standards for appointment to the Supreme Court of the United States. She is Well Qualified. Our rating of Well Qualified reflects the clear consensus of her peers who have knowledge of her professional qualifications and we reached out to a broad range of our legal profession.

By any measure, General Kagan has had an extraordinary legal career. She ably serves our Nation as the Solicitor General. She is the former dean of the Harvard Law School, and before that successfully became a tenured professor at two of our top law schools, where she taught in some four different subject matter areas.

She has held two different positions in the White House under President Clinton. Her skills as a lawyer are described as "brilliant", "remarkable", and "at the highest level." She is exceptionally competent, quickly grasping the most complex of legal issues. She is a gifted writer.

She possesses a keen intellect, strong listening skills, is open-minded, willing to consider different and opposing points of view, and she possesses the ability to find common ground in the most difficult of circumstances. We ask that the ABA's statement be made a part of the record, the written statement that was submitted, and we thank you for the opportunity to present these remarks on behalf of the Standing Committee.

Senator KAUFMAN. Your statement will be put in the record. Thank you, Ms. Askew.

Ms. ASKEW. Thank you.

Senator KAUFMAN. Thank you, Mr. Kayatta.

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

Senator KAUFMAN. Professor Ronald Sullivan is the Edward R. Johnston Lecturer on Law and the director of the Criminal Justice

Institute at Harvard Law School. He's also a founding fellow of the Jamestown Project, a think tank that focuses on issues of democracy. He's a graduate of Moorehouse College and a graduate of Harvard Law School.

Professor Sullivan.

**STATEMENT OF RONALD SULLIVAN, EDWARD R. JOHNSTON
LECTURER ON LAW, DIRECTOR OF THE CRIMINAL JUSTICE
INSTITUTE, HARVARD LAW SCHOOL**

Professor SULLIVAN. Thank you very much, Mr. Chairman, Mr. Ranking Member. Thank you for having me here.

Let me begin with what I take to be the obvious, and that is anyone who has even had a passing acquaintance with Elena Kagan recognizes the fact that she has a first-class mind. She's an outstanding legal scholar and a terrific teacher. Her academic record is unassailable.

Hearings on Supreme Court nominations represent an important—indeed, essential—expression of our democracy. This Committee attempts to carefully balance important norms of judicial autonomy with notions of democratic accountability.

Understandably, the degree to which a particular nominee's judicial philosophy should be taken into account in making your decision is hotly contested, but whether framed in the vocabulary of judicial philosophy or the vocabulary of professional competence, the question—the primary question that animates this hearing and has done so for a long time is, what type of justice will Elena Kagan be if this Senate confirms her?

To the extent that we can know what type of Supreme Court justice she might be, I respectfully suggest that we have to look at the whole person, her entire record as an academic, as an administrator, and as a policy advisor. Equally important, a fair evaluation of General Kagan's character will better illuminate the values that she would bring to the bench, should the Senate confirm her.

Now, with that in mind I'd like to offer a few observations about the person I know, my former colleague, my former dean, and the person whom I'm proud to call my friend.

Now, given that much of my academic work focuses on issues of access to justice, I want to talk to you a minute about Elena's record with respect to developing clinical programs while serving as dean of the Harvard Law School. As this Committee knows, clinical programs provide expert legal services to people, communities, businesses, and even governments that otherwise could not afford such services.

Core principles of our justice system—equal protection under the law, equal access to the law, and the fair distribution of burdens and benefits across the citizenry—were advanced by then-Dean Kagan's support and interest in clinical programs. Concrete people and institutions were provided with legal services, and her efforts as dean demonstrated a firm commitment to these values.

Significantly, the student body responded to her leadership. The number of students participating in clinical programs grew by an astounding 240 percent. Likewise, the number of hours students dedicated to pro bono work rose by 158 percent. I know from personal experience the kind of impact that pro bono work can have

on one's professional career, as my exposure to pro bono work while myself a student at Harvard Law School shaped my choice to serve the under-served and indigent with the best legal training that the country had to offer, expertise that my former clients, when I was a public defender right here in DC, would never have been able to afford.

The clinical work done at Harvard and supported by then-Dean Kagan is not merely another line added to a student's resume. Rather, clinical work is the place where some of our Nation's brightest legal minds decide to use those minds in the public service of our democracy.

I also want to say a brief word about Elena's intellect and her intellectual method. I found her to be an active consumer of knowledge. She has a swift and eager mind and sought to understand complex issues before comment or action. While she had many answers, not a trait uncommon to Harvard law professors, she recognized that she did not have all the answers, which may be a trait less common among some of my colleagues. But she was always willing to engage. Her thought was always in progress and she was always willing to revise an opinion when facts and reasons conspired to produce a different result.

Finally, I shall end by recounting one of General Kagan's first acts as dean. As the incoming dean, she could have decided to accept and hold the Royal Professorship of Law, the law school's first endowed chair. She declined. The Royal Professorship is named after Sir Isaac Royal, Jr., whose family earned its immense fortune from the trans-Atlantic slave trade.

Because the chair was funded by this means, Elena Kagan opted to become the first person to hold the Charles Hamilton Houston professorship, an endowed chair named after one of the most prominent African-American attorneys to ever graduate from the Harvard Law School, and indeed the mentor of the late Justice Thurgood Marshall.

In the end, I submit that any fair read of General Kagan's character, career, and scholarship will inevitably lead to the conclusion that she is intellectually gifted, fair-minded, hardworking, and an independent thinker.

Thank you for the time.

Senator KAUFMAN. Thank you, Professor Sullivan.

[The prepared statement of Professor Sullivan appears as a submission for the record.]

Senator KAUFMAN. Marcia Greenberger is a prominent women's rights lawyer and the founder and the co-president of the National Women's Law Center. She's an expert on sex discrimination and has participated in the development of key legislative initiatives and litigation protecting women's rights. She received both her BA and JD from the University of Pennsylvania.

Ms. Greenberger.

STATEMENT OF MARCIA GREENBERGER, FOUNDER AND CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER

Ms. GREENBERGER. Thank you very much. Thank you, Senator Kaufman, and thank you Senator Sessions and Senator Hatch. I'm Marcia Greenberger, co-president of the National Women's Law

Center, which, since 1972, has been involved in virtually every major effort to secure and defend women's legal rights in this country. I thank you for the invitation to testify, and I do so in strong support of Solicitor General Elena Kagan to be an Associate Justice of the United States Supreme Court.

Elena Kagan shines as an example of the progress made in this country. Hers is a remarkable legal career for anyone, but all the more so because she had to break down barriers along the way. None of the positions she has held came to women with ease, and she excelled at each. When she clerked for Justice Marshall, a giant of a lawyer and a justice, she was just one of 7 out of 30 clerks, 7 women out of 30 clerks who clerked for the Supreme Court that term.

The year before she became a tenured law professor at the University of Chicago Law School, only four women were tenured or even on tenure track at that time. And of course she became the first woman to be dean of Harvard Law School in its almost 200-year history, and in 2009 became the first woman Solicitor General. Kudos have accompanied her performance in each of these demanding roles.

She's clearly a person of extraordinary intellect and capacity, everyone concedes that, and each of the institutions she served benefited enormously from her great talents. The Supreme Court and the country will benefit with her on it not only because of her brilliance, but because of the quality of justice that will be improved for both men and women when the bench is more representative. When, for the first time, three women sit on the court, the court's deliberations will be deeply enriched by their experiences and perspectives.

My written testimony describes in more detail why even one more woman on the court can make such a difference. Moreover, a review of Elena Kagan's record has led the center to conclude that, if confirmed, her approach to legal questions would be open-minded and dedicated to the application of the law's purpose and intent. She would be scrupulously fair and committed to dispensing equal justice.

All women rely upon the Constitution and the law to ensure that fairness and equal opportunity are a reality in our daily lives. Women have a particularly great stake in judges' commitment to equal justice and the protection of their legal rights.

Women's enormous progress toward equal opportunity has rested upon the constitutional right under the Equal Protection Clause, to be free from government-imposed discrimination, and the right to privacy under the Due Process Clause, as well as the core statutory protections that women fought so hard to secure in such fundamental areas as education, employment, health and safety, and economic welfare.

Elena Kagan's record demonstrates that she will bring to the court that commitment to the rule of law and to equal justice for ordinary Americans, including the women of this country who often need its protection, as we heard in earlier panels, in ways that they never expected.

One noteworthy example, which I discuss in my written testimony in more detail, is a case that dealt with the ability of individ-

uals to go to court, to bring criminal contempt proceedings for violations of civil protections orders, and those are orders of particular importance to victims of domestic violence. She argued that case herself. She did so having clearly put enormous time and effort into it. It's been described in earlier panels that the cases that a Solicitor General argues himself or herself are noteworthy, and clearly she saw this one as important.

To us, this evidences what we believe is a hallmark for Solicitor General Kagan, that she understands and has concern for the way the legal system affects people who need its protections most, in this case, victims of domestic violence, who still too often struggle to receive justice in our justice system.

You know, Justice O'Connor recently noted that Canada has four women on its nine justice—on its nine—high court, including a female chief justice, and she said, now, what's the matter with us? You know, we can do better. With the confirmation of Solicitor General Kagan to the Supreme Court, this country is rightfully continuing on its path to doing better.

Ours is a history of the first path breaker, then the second, and the third follows until we reach a point—still in the future but I am sure we will reach it—where we all stop noticing, because it is taken as a given, that there will be representation of all of us in our richness and diversity in this country.

Thank you.

Senator KAUFMAN. Thank you, Ms. Greenberger.

Ms. GREENBERGER. May I just say one quick thing?

Senator KAUFMAN. Absolutely.

Ms. GREENBERGER. I understand my time is expired, but there were a number of comments about the Ledbetter case I see very differently, so I hope in the questioning I'll have an opportunity to discuss it.

Senator KAUFMAN. Thank you.

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

Senator KAUFMAN. The Honorable Justice Nan Duffly is an Associate Justice on the Massachusetts Court of Appeals and a board member of the National Association of Women Judges. Previously she served on the probate and family court. She earned her BA from the University of Connecticut and her JD from Harvard Law School.

Justice Duffly.

STATEMENT OF JUSTICE FERNANDE "NAN" DUFFLY, ASSOCIATE JUSTICE, MASSACHUSETTS COURT OF APPEALS ON BEHALF OF THE NATIONAL ASSOCIATION OF WOMEN JUDGES

Justice DUFFLY.—for this Committee to speak in support of Solicitor General Elena Kagan's nomination to the Supreme Court. I am honored to be here today as past president of the National Association of Women Judges as its current co-chair of the Judicial Selection Committee, and on behalf of NEWJ's current president, Alaska Supreme Court Justice Dana Favre.

The National Association of Women Judges is the voice of our Nation's female jurists. It has supported the advancement of

women in the judiciary since our founding in 1979, when we first sought the appointment of the first woman to the Supreme Court. In September 1981, Joan Dempsey Kline, the co-founder of NEWJ, testified before this Committee on behalf of Sandra Day O'Connor, also a founding member.

The first female attorney in what would be the United States, Margaret Brent, arrived in Maryland in 1683, but women were not admitted to State bars in this country until 1869, and there were no women judges until 1870 when the first woman was appointed a justice of the peace in Wyoming. A century would pass before every State had a woman on the bench.

The advancement of women in the legal profession has not been rapid nor inevitable, but we are now past celebrating firsts. We look forward to celebrating full diversity on our Nation's courts.

Judge Favre and I are appellate judges with nearly two decades of judicial experience each. We well recognize the essential qualifications that a justice of our highest court must have: superior intellectual capacity, an intimate knowledge and deep understanding of constitutional law, and the driving principles of legal jurisprudence in this country. General Kagan has these qualifications in abundance, as you've heard from our prior witnesses.

Not all judges appointed to our appellate courts have, or need, prior judicial experience. Elena Kagan's rich and varied legal career as a private attorney, a White House lawyer, a professor, a dean, and the government's attorney in matters before the Supreme Court will provide her with a unique constellation of experiences that will bring fresh ideas to the court.

The depth and breadth of General Kagan's educational and professional experience, coupled with her intellectual aptitude and preparedness, will serve her well on the high court, should she be appointed. A brilliant and highly regarded lawyer, law professor, whose communication skills are renowned, as you probably already experienced, her views will be respected and welcomed, if not adopted, by her colleagues.

My interactions with General Kagan occurred largely during the year she served as the dean of Harvard Law School, from 2003 to 2009, which coincided with my leadership positions in the NAWJ. Among other things, we worked together on an initiative that sought to provide information to law students about women and minority advancement in our country's law firms.

At her request, I worked on educational programming for the Women's Leadership Summit that she convened at Harvard in 2008, and as an active alumna I've had a number of opportunities to interact with her and to hear her speak. I learned from these interactions that she comes prepared as a quick and nimble intellect, humor, and a respect for her audience.

I believe that the presence of women and minorities on a court has an impact on overall decision-making that goes beyond the opinions of the female or minority judges themselves. When judicial colleagues respect each other they are open to the interchange of new ideas that those from diverse backgrounds can bring. Women judges bring unique experiences that inform their own decisions, but the interchange between male and female colleagues has, in my

experience, profoundly affected the decisions of both the female and the male jurists.

Now, that Elena Kagan would be one of three women on the Supreme Court is also significant, would also be significant. In order to benefit from the diversity of background and experience that women bring to the bench, the presence of women cannot be occasional or token. Our courts, but most important our Nation's highest court, must reflect the diversity of our people.

For well over two decades, women and men have been graduating from our law schools in nearly equal numbers, which likely means that the men and women are equally represented in the current pool of attorneys eligible for judicial appointment.

With the appointment of Elena Kagan, the Supreme Court would come a step closer to reflecting the broad diversity of those who call America home. The National Association of Women Judges supports with enthusiasm and without qualification the nomination of Elena Kagan to the Supreme Court of the United States.

Thank you.

Senator SCHUMER. [Presiding] Thank you, Justice Duffy.

Now, Charmaine Yoest. Dr. Charmaine Yoest is president and CEO of Americans United for Life. Dr. Yoest began her career in the White House during the Reagan administration. She's also worked as the project director of the Family, Gender, and Tenure project at the University of Virginia, and as vice president at the Family Research Council.

She has also worked as the Project Director of the Family, Gender and Tenure Project at the University of Virginia, and as Vice President at the Family Research Council. She received her BA from Wheaton College and her MA and Ph.D. from the University of Virginia.

Dr. Yoest, your entire statement will be read in the record, and you may proceed.

**STATEMENT OF CHARMAINE YOEST, PRESIDENT AND CEO,
AMERICANS UNITED FOR LIFE**

Ms. YOEST. Mr. Chairman, Ranking Member Sessions, Senator Hatch, thank you very much for the opp to testify today on behalf of Americans United for Life, the Nation's oldest pro-life public interest law and policy organization.

Our vision at AUL is a nation where everyone is welcomed in life and protected in law. We have been committed to defending human life through vigorous judicial, legislative, and educational efforts since 1971, and have been involved in every abortion-related case before the Supreme Court, including *Roe v. Wade*.

In fact, 30 years ago this week, AUL successfully defended the constitutionality of the Hyde amendment before the Supreme Court in *Harris v. McRae*, a landmark case in defense of unborn human life.

I am here tonight because of AUL's strong opposition to the nomination of Solicitor General Elena Kagan to the United States Supreme Court. Based on our research, we believe that Ms. Kagan will be an agenda-driven justice on the Court and that she will oppose even the most widely accepted protections for unborn human life.

The hearings have strengthened our opposition to Ms. Kagan's appointment. As the record shows, she was willing to manipulate the facts to pursue her own personal political agenda while serving as an adviser to President Clinton.

Indeed, she demonstrated a pattern of behavior of letting her passion for a particular policy, in this case, partial abortion, overwhelm her judgment.

Tonight, I would like to make three points. First, I urge this Committee to officially investigate the discrepancies that have arisen this week between Ms. Kagan's testimony and the written record about her actions related to potentially lobbying the American Medical Association and the American College of Obstetricians and Gynecologists during her tenure in the Clinton White House.

The questions surrounding this period are troubling and call into question Ms. Kagan's ability to adopt an impartial judicial temperament.

Second, Ms. Kagan, has an extensive record that demonstrates her hostility to regulations of abortion and any protections for unborn human life. We believe that Ms. Kagan would undermine any efforts by our elected representatives to pass or defend even the most widely accepted, common sense regulations of abortion, like bans on partial birth abortion, parental notification, and informed consent.

Her testimony this week, particularly her response to Senator Feinstein that any regulation of abortion requires the Doe health exception has added to this concern.

Third, we believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United Supreme Court, and we believe that Ms. Kagan's agenda-driven judicial philosophy makes her unqualified to serve on the Court.

We are asking this Committee to investigate Ms. Kagan's record related to her interaction with both the AMA and ACOG during her tenure as a policy adviser to President Clinton.

I would like to focus attention tonight on her apparent efforts to influence and distort the record on the medical science related to partial birth abortion. In a December 14, 1996 memo, Ms. Kagan addressed the pending release of a proposed statement by ACOG that partial birth abortion is never medically necessary. "The release of such a statement," she argued, "would be a disaster."

In response, White House documents show that Ms. Kagan drafted an amendment to ACOG's statement, dramatically altering their language, which stated that partial birth abortion, and I quote, "may be the best or most appropriate in a particular circumstance to save the life or preserve the health of a woman."

ACOG subsequently adopted Ms. Kagan's handwritten change into their final statement.

Ms. Kagan claimed before this Committee that she was simply a scribe for changes coming from ACOG, but her response raises more questions than it answers. And this was not an isolated case.

We have further evidence that she pursued the same strategy with the AMA. Similar to ACOG's original position, the AMA issued a policy stating that no situations had been identified where partial birth abortion was the only appropriate method of abortion and that ethical concerns surround it.

In a White House e-mail dated June 1, 1997, Ms. Kagan wrote that she just came from a meeting which focused on, quote, "whether the AMA policy can be reversed at its convention on June 23." She then concluded, "We agree to do a bit of thinking about whether we could contribute to that effort."

Ms. Kagan was so opposed to the passage of a ban on partial birth abortion that she appears to have advocated for ACOG and the AMA to suppress or modify their medical view. She made a deliberate decision to advocate for partial birth abortion, even to the point of working to deceive the American public about the medical science related to the procedure.

On this panel tonight, we have heard quite a bit about the role of women in the judicial system. Let me just say, as a woman, that this deeply offends me.

Thank you.

[The prepared statement of Charmaine Yoest appears as a submission for the record.]

Senator SCHUMER. (Off microphone) and will be read in the record.

Tony Perkins. Mr. Perkins is the President of the Family Research Council. He is a former member of the Louisiana legislature, and a veteran of the United States Marine Corps. He received his undergraduate degree from Liberty University and his MPA from Louisiana State University.

Mr. Perkins, your entire statement will be read in the record, and you may proceed.

STATEMENT OF TONY PERKINS, PRESIDENT, FAMILY RESEARCH COUNCIL

Mr. PERKINS. Thank you, Mr. Chairman, Ranking Member Sessions, and the remainder of the committee, Senator Hatch. Thank you for the invitation to testify.

As one who spent a number of years in uniform as a Marine and a police officer, my remarks will focus primarily on Ms. Kagan's treatment of military recruiters at Harvard Law School.

As has been pointed out, while dean of the law school, she defied the requirements of Federal law known as the Solomon Amendment. Her violation of this Federal law was motivated by her vehement opposition to the military's prohibition against open homosexuality.

This protracted incident, combined with the just made public report of her rewriting of the medical finding of ACOG on partial birth abortion as an adviser in the Clinton White Houses, raises doubts as to whether she possesses the requisite judicial temperament and impartial nature required of a Supreme Court Justice.

On the former topic, when Ms. Kagan did comply with the law, she wrote to the campus, making clear just how grudging her cooperation with the military was in light of the military's, quote-unquote, "repugnant policy."

She declared, quote, "I abhor the military's discriminatory recruitment policy," and she added that "The policy was a profound wrong, a moral injustice of the first order," end quote. A moral injustice of the first order.

Of all the moral injustices throughout history that man has inflicted on man, she equates them to a military policy enacted by Congress.

Mr. Chairman, the purpose of our military is to fight and win this country's wars. War is the most difficult human activity, bar none. It requires organized groups of men and women to act with strategic and tactical lethality, while its members are simultaneously being wounded and killed.

In war, the normal ways of living are completely sacrificed in the harsh, punishing environment of combat. Even in peacetime settings, in units not engaged in combat, great sacrifices are required.

Military life, by its nature, must be characterized by regular lack of privacy and repeated situations of forced intimacy.

As military experts have testified and this Congress has affirmed, in such an environment, it is not a moral injustice of the first order to minimize the sexual exposure that such conditions force on soldiers, sailors, Marines and airmen. It is the only sensible and effective way to run a military organization.

It should be noted that the current law on homosexuality in the military has been repeatedly challenged and upheld by the Federal courts, and the Supreme Court unanimously upheld the Solomon Amendment.

Now, some have defended Ms. Kagan's actions regarding the military, claiming they do not demonstrate that she is anti-military. And there is truth in that, only in that she does not oppose the military simply because they are the military.

However, clearly, she does oppose the military, because they have not yet bowed to the demands of the sexual counter-culture.

Her record would suggest that it is not that Ms. Kagan does not want the military to defend our Nation against terrorists. It's just that she wants to use the military to advocate radical social policies more.

This becomes very clear when one examines the amicus brief that Ms. Kagan signed on to in the *Solomon* case. The brief began with a sweeping declaration that is startling in its implications. Quote, "We are deeply committed to a fundamental moral principle. A society that discriminates based on sexual orientation or tolerates discrimination by its members is not a just society," end quote.

Note that Kagan and the professors condemned not only a society that discriminates, but a society that tolerates discrimination by its members. I abhor discrimination based on race and other immutable characteristics, but the implications of this statement are chilling for the freedom of speech and the freedom of religion in America.

It should alarm those who live in the 45 states that define marriage a union of a man and a woman, and to the tens of millions of Americans who affirm biblical moral teaching.

Her own statements make obvious that Elena Kagan would strike down any marital statute, including the Federal Defense of Marriage Act, which defines marriage as being the union of one man and one woman.

At question is not whether Ms. Kagan is a good person or even if she is skilled in the law. What is in question is her ability to be an impartial jurist.

Her record makes clear that she is an impassioned activist that only sees laws and, in some cases, science as mere obstacles to overcome in pursuit of a far left agenda.

We do not need a justice on the Supreme Court who sees it as her life mission to write the homosexual version of *Roe v. Wade* by striking down one man-one woman marriage all across America.

These positions and the temperament accompanying them make her unfit to sit as an associate justice on the Supreme Court, and I urge the Senate to reject her nomination.

[The prepared statement of Tony Perkins appears as a submission for the record.]

Senator SCHUMER. Thank you, Mr. Perkins.

Now, Peter Kirsanow. Mr. Kirsanow is a partner in the labor and employment practice group of Benesch Friedlander and serves on the U.S. Commission on Civil Rights.

He is a former member of the National Labor Relations Board, to which he received a recess appointment from President George W. Bush. He received his BA from Cornell University in New York State, and his J.D. from Cleveland State University.

Commissioner Kirsanow.

STATEMENT OF PETER KIRSANOW, BENESCH LAW FIRM

Mr. KIRSANOW. Thank you, Mr. Chairman, Ranking Member Sessions, and Senator Hatch. I am Peter Kirsanow, a member of the U.S. Commission on Civil Rights, and a partner with the labor employment practice group of Benesch Friedlander, and I am here in my personal capacity.

The U.S. Commission on Civil Rights was established pursuant to the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to denials of equal protection and discrimination.

In furtherance of the clearinghouse function, my assistant and I reviewed the documents related to civil rights authored by Ms. Kagan from her time as a clerk to Justice Marshall through her tenure as Solicitor General, all in the context of prevailing civil rights jurisprudence.

Our view revealed at least two significant concerns with respect to Ms. Kagan's approach to cases involving racial preferences and school assignments, which approach has been rejected by the Supreme Court in at least six cases.

The first concern pertains to Ms. Kagan's position on the third circuit case of *Piscataway v. Taxman*, contending that Title VII permits the nonremedial use of racial preferences by employers for the purpose of achieving diversity.

In *Taxman*, the Piscataway Board of Education laid off a white teacher rather than a black colleague for the express purpose of increasing diversity in the school's business education department. However, this was done despite the fact that there was no evidence of discrimination against black teachers, no evidence of workforce segregation, and no evidence of a manifest racial imbalance in a traditionally segregated workforce.

In fact, black teachers were actually over-represented on Piscataway's faculty relative to the general population.

Ms. Kagan's position went beyond what the Supreme Court has held to be permissible voluntary affirmative action under *Johnson v. Transportation Agency* and *Steelworkers v. Weber*. In essence, Ms. Kagan's position would give employers wider berth to make employment decisions on the basis of race.

The second concern pertains to Ms. Kagan's endorsement of three Texas school districts' plan to assign students to schools on the basis of race. Again, solely for the interest of racial balancing, but without any evidence of either de jure or even de facto segregation or discrimination.

Although Ms. Kagan found the school bridge's approach to be, quote, "amazingly sensible," the Supreme Court also rejected this approach in *Parents Involved v. Seattle School District* and *Meredith v. Jefferson County*.

Taken together, Ms. Kagan's position in *Taxman* and *Goose Creek* would give employers and administrators license to engage in racial engineering on a far more expansive scale, effectively making decisions, counting winners and losers on the basis of race in many circumstances.

Evidence produced before the Civil Rights Commission shows that when the courts have opened the door to racial engineering just a bit, preferences have expanded exponentially.

For example, evidence adduced in two recent Civil Rights Commission hearings shows that more than 10 years after the Supreme Court's decision in *Adarand*, Federal agencies persist in using race-conscious programs in government contracting versus race-neutral alternatives.

Moreover, even though the Supreme Court struck down the use of raw numerical weighting in college admissions in *Gratz v. Bollinger*, thereby requiring that race be no more than a thumb or feather on the scale in the admissions process, powerful racial preferences have shown absolutely no signs of abating.

A recent study by the Center for Equal Opportunity shows that at one major university, racial preferences are so great that the odds that a minority applicant would be admitted overly similarly white comparative are 250-to-1. At another major university, the odds are 1,115-to-1.

That's not a thumb or a feather on the scale. That's an anvil or a bus. Were Ms. Kagan's position to prevail, the concept or principal of equal treatment would yield increasingly to preferential treatment.

Furthermore, Ms. Kagan's endorsement or embrace of racial engineering by employers would actually harm the very minorities who are the intended beneficiaries of the preferences.

Evidence from a 2006 Civil Rights Commission hearing shows that there is increasing data that racial preferences create what is known as a mismatch effect that increase the probabilities that minorities will fail.

For example, black law students, who are the beneficiaries of preferences, are 2.5 times more likely than their white comparatives not to graduate; four times more likely to fail the bar exam on the first try and six times more likely never to pass the bar exam, despite multiple attempts.

It is respectfully submitted that Ms. Kagan's interpretative doctrine permits employers, administrators and others to single out certain groups for preferential or differential treatment. Today, there is nothing that prevents those same employers from shifting their preferences to some other group tomorrow, contrary to the colorblind ideal contemplated by the 1964 Civil Rights Act.

Thank you, Mr. Chairman.

[The prepared statement of Peter Kirsanow appears as a submission for the record.]

Senator SCHUMER. We thank all the witnesses for staying within the 5-minute time limit.

David Kopel is the Research Director of the Independence Institute and an Associate Policy Analyst at the Cato Institute. He is also an adjunct professor of advanced constitutional law at Denver University.

Mr. Kopel received his J.D. from the University Law School and his B.A. from Brown University.

You may proceed.

**STATEMENT OF DAVID KOPEL, RESEARCH DIRECTOR,
INDEPENDENCE INSTITUTE**

Mr. KOPEL. Thank you very much, Senator Schumer.

The last 3 days have raised rather than allayed concerns that Justice Kagan could destroy rather than defend Second Amendment rights.

You have been offered platitudes that *Heller* is settled law and that the nominee knows that Second Amendment rights are very important to many Americans.

Last summer, Ms. Sotomayor offered nearly identical assurances. Yet, this Monday, Justice Sotomayor and Justice Breyer declared that *Heller* should be overruled.

Those rights which so many Americans consider so important would be eliminated by judicial fiat.

Ms. Kagan has rejected every opportunity which this Committee has offered to provide any meaningful commitment to the Second Amendment. To the contrary. She has even refused to affirm that the Declaration of Independence has any value in guiding constitutional interpretation.

While the Declaration states that the protection of inalienable natural rights is the very purpose of government, Ms. Kagan will not answer whether the natural right of self-defense is among those inalienable rights.

We know from history that Jefferson and Madison and the rest of the founders and their intellectual ancestors, such as John Locke, considered self-defense to be one of the most fundamental of all rights.

As Supreme Court clerk, Justice Kagan wrote, "I'm not sympathetic," when a man challenged the DC handgun ban, which *Heller* later found to be unconstitutional. "I'm not sympathetic" is, obviously, the expression of her own opinion.

The 1996 comparison of the National Rifle Association to the Ku Klux Klan indicates great hostility even to the political advocacy of Second Amendment rights. There has been no credible explanation of this comparison.

As my written testimony details, a few weeks ago, the White House provided one explanation, which, on its face, was not credible. On Tuesday, Ms. Kagan provided an entirely different explanation. She said that the NRA/KKK line was her record of a phone conversation with someone else.

But a memo from Fran Allegra at the Department of Justice to Ms. Kagan at the White House reflects that it was Ms. Kagan herself who specifically wanted to know if the Volunteer Protection Act would apply to either the Klan or the National Rifle Association.

As Ms. Kagan has accurately testified, Supreme Court judging is not a robotic process. There is a great deal of judgment involved.

In the near future, there will be judgment about whether to overrule *Heller* or *McDonald v. Chicago*. Even if those cases remain intact, there will be judgment about what types of anti-gun laws infringe Second Amendment rights.

A court which is unsympathetic to the Second Amendment could construe the Second Amendment so narrowly that it would provide little practical protection for the rights of the American people.

In the Clinton White House, Ms. Kagan was the architect of a unilateral executive ban on the import of 58 rifles. Her White House aide, Jose Cerda, accurately characterized the Kagan-Clinton ban.

"We are taking the law and bending it as far as we can to capture a whole new class of guns." Senator Leahy wrote to the Clinton White House to strongly protest what he called "using a Presidential directive to avoid the normal legislative process."

The Kagan-Clinton gun ban required that the word "or" in a statute be read to mean "and." It required that the term "sporting purposes" be read to mean only hunting and not target shooting.

The Kagan ban was premised on the legal theory that the only type of legitimate hunting rifle is the type which would be used by a wealthy person who could afford to pay for a professional hunting guide.

The ban further defined legitimate sport hunting according to the restrictive rules of 13 states rather than the rules of the majority of states.

On Tuesday, Ms. Kagan told this Committee that her gun control work in the Clinton White House was just to keep guns out of criminal hands. But the Clinton-Kagan gun ban prevented all law abiding citizens from acquiring those rifles, even after passing a background check.

The Second Amendment cannot long endure without a robust First Amendment. Based on Ms. Kagan's scholarly works, it is clear that not since Robert Bjork has the Senate Judiciary Committee held hearings on a Supreme Court nominee with such a well established record in favor of substantially constricting First Amendment rights.

Ms. Kagan was a great dean at Harvard, and her testimony has shown you that she is expert on constitutional law, highly intelligent, and has a fine sense of humor. Neither her testimony nor her professional record have given you plausible reasons to believe that she would protect the Second Amendment rights of the American people.

Thank you.

[The prepared statement of David Kopel appears as a submission for the record.]

Senator SCHUMER. Thank you, Mr. Kopel.

And our last witness is William Olson. He is the principal of the law firm of William J. Olson, PC. He received his J.D. from the University of Richmond and his B.A. from Brown University.

Mr. Olson.

STATEMENT OF WILLIAM OLSON, PRINCIPAL, WILLIAM J. OLSON, PC

Mr. OLSON. Thank you, Senator Schumer, and Senator Sessions, and Senator Hatch.

Our law firm represents one of the Nation's leading Second Amendment groups, Gun Owners of America, and we have filed amicus briefs in Supreme Court cases, such as *Heller* and *McDonald*.

Despite the Court's decisions in *Heller* and *McDonald*, Americans understand that the right to keep and bear arms continues to be in jeopardy. Both victories were achieved by narrow 5-4 votes. And Ms. Kagan is not a person who could be expected to defend the Second Amendment.

Early in her career, Ms. Kagan evidenced visceral hostility to the people's right to keep and bear arms as a law clerk to Justice Thurgood Marshall in the *Sandidge* case. I am familiar with that case, because, with Dan Peterson, I filed the only amicus brief supporting Mr. Sandidge.

I searched for my Sandidge file, and here is what I found. Mr. Sandidge was an African-American man who worked at a laundromat in the District. He was required to carry his cash receipts with him to his apartment over the laundromat, which necessitated him leaving the building and walking around the street briefly between the two entrances.

Mr. Sandidge had been robbed previously. When arrested, he was carrying a .25 semiautomatic pistol to protect himself.

Ms. Kagan urged Justice Marshall to deny the petition for cert for one reason—"I'm not sympathetic." Supreme Court rules set forth the standards for granting cert. "I'm not sympathetic" is not among them.

If Ms. Kagan meant that she was not sympathetic with his legal position, remember that the Sandidge court had ruled that the Second Amendment was only a collective right, not an individual right.

If Ms. Kagan meant she was not sympathetic with Mr. Sandidge, Ms. Kagan turned her back on a man who was made into a felon for exercising his right to keep and bear arms.

In 1997, in *Printz v. United States*, the Supreme Court struck down the Brady bill requirement that state and local law enforcement officers must work for the Federal Government, doing background checks on handgun sales.

While that case was still pending, the Clinton White House was designing an end-run strategy should it lose the case, and Ms. Kagan was in the thick of it.

An e-mail reveals her role. "Based on Elena's suggestions, I have sought options as to what POTUS could do by executive action. For example, could he, by executive order, prohibit a Federal firearms

licensee from selling a handgun without a chief law enforcement officer certification?"

Ms. Kagan appears to have believed that the President could circumvent Congress and act without statutory authority to impose restrictions on firearms.

Ms. Kagan then worked on the Presidential directive that would suspend the importation of firearms that were legal under the law that Congress had passed.

When asked in these hearings by Senator Grassley on Tuesday of this week whether the Second Amendment codified a preexisting right or whether the right to keep and bear arms was created by the Constitution, she replied, "I never really considered the question."

When Senator Grassley asked whether the Second Amendment right was a fundamental right, Ms. Kagan said it was, because the majority of justices in the *McDonald* case said so.

The Kagan view of rights is that they are whatever a majority of the Supreme Court rules at a particular time in a particular case. But under that philosophy, what the Court grants, the Court may take away.

If Ms. Kagan does not know whether our inalienable right to defend ourselves from criminals and tyrants comes from God, as the Declaration of Independence states, or from government, she cannot be trusted to protect our God-given right to self-preservation.

During these hearings, Ms. Kagan also acknowledged that *Heller* had precedential weight and agreed to abide by it, but refrained from providing her own personal views or whether the case was rightly decided.

When asked whether the Second Amendment protected an individual right, she said, "There's no question after *Heller* that the Second Amendment contains such a guarantee."

That is nice. But what about before *Heller*? *Heller* did not rewrite the Second Amendment. The Supreme Court decision only rejected a false notion that it protected only collective rights.

Ms. Kagan's answer that she is bound by *Heller* provides us no assurance that, as a justice, she is bound by the Second Amendment, as written by the framers.

Thank you, Mr. Chairman.

[The prepared statement of William Olson appears as a submission for the record.]

Senator SCHUMER. Thank you, Mr. Olson.

Now, I will give myself 5 minutes, and then we will call on Senator Sessions, then Senator Hatch.

My first question is to Kim Askew. The standing committee's report, ABA, focused on the concerns raised by some critics that Solicitor General Kagan does not have experience as a judge.

In fact, according to your report, the overwhelming view of those interviewed thought it was important to also have judges who have spent a number of years outside the judiciary.

Why do you believe broad legal experience outside the Judicial Branch would be beneficial to Elena Kagan, if she is confirmed as a justice on the Supreme Court?

Ms. ASKEW. Thank you. The standing Committee is reporting the information that we received from the many lawyers and judges

that we interviewed as part of our peer review. And so what we present to you we think is the overwhelming position that we obtained in talking about that issue.

We learned that many of the outstanding lawyers and judges believe that it is important to have former judges, and it is also important to have those who have some other background, as academicians, as practitioners, as government officials.

When we look at the professional qualifications of a nominee, we look at the distinguished accomplishments that they bring in whatever area they have focused their careers in.

That is what we did with General Kagan. There is no question that when we look at an appellate court, such as the Supreme Court, in addition to trial experience, we do not always require trial experience. We look at those things that relate to what an appellate court judge will do.

We look for a high degree of legal scholarship. We look for academic talent. We look for analytical and writing abilities, and we look for overall excellence. And based on what we were able to conclude, she is certainly preeminent in all of those areas, and that is why the standing Committee came to its well qualified rating.

Senator SCHUMER. Thank you.

For Ms. Greenberger. A number of the witnesses had a view of *Ledbetter* that might be different than yours. Why do you view the *Ledbetter* case as a departure from precedent and practice?

Ms. GREENBERGER. Well, let me just give a few specifics. When the Supreme Court decided *Ledbetter*, and it did so 5-4, it overturned 9 out of 10 court of appeals circuit decisions that would have decided the legal issue of whether she was allowed to bring her claim in court in Lilly Ledbetter's favor.

The only case out of the 10 circuits that decided differently was the *Ledbetter* court. That was a major departure.

Second, although the government did, in the Solicitor General's office, in the last administration when the opinion was issued, as was discussed in the panel earlier, side with *Goodyear Tire*. The case below had the government on Lilly Ledbetter's side.

The official and expert agency, the Equal Employment Opportunity Commission, that is charged with interpreting our anti-employment discrimination law for decades, had interpreted the law to allow cases like Lilly Ledbetter's to go forward and was in her case on her side.

Third, there was actually an extremely disturbing suggestion that her testimony that she did not learn about the nature of the pay discrimination until she received an anonymous note was not accurate. And there was a waived deposition supposedly establishing that she knew about this discrimination years before she filed the charge.

No deposition that I have seen indicates that she had such knowledge. She has testified repeatedly that she had no knowledge. The jury below had believed that, as well.

So for both the set of facts at issue, the law at issue, government longstanding interpretations at issue, this was a major change in the law by a 5-4 decision. And the dissenting opinion had gone through in great detail the distress of the four dissenting justices in the Supreme Court, and let me say it is not because it is the—

the concern is not because of a desire to have one driven agenda result versus another.

The concern was because the role of the justices on the Supreme Court is to interpret the intent of the law and apply it as Congress intended it to apply.

The pretty quick reversal demonstrated that the five justices had distorted Congress intent, had shifted what the intent of the law had meant to a point that it eviscerated the ability to ever bring a pay discrimination case in court.

Senator SCHUMER. Thank you.

Senator SESSIONS.

Senator SESSIONS. Ms. Greenberg, I would just say that I am going to go back and look at that case. It is amazing we have such disagreements about it, and it went out on the floor and I am not sure I fully understand it.

I do know that Congress felt that the statute was not artfully drawn and rewrote it so it would be clear. And one of the reasons lawyers are cautioned about criticizing courts is because they may be ruling on a basis of law that might not be apparent to others. So I think we need a fair analysis of it.

Ms. Askew, when you say you talked to judges about Dean Kagan, I presume, unless it was in the last few months before the Supreme Court, there were not judges before whom she had practiced or tried cases. Is that correct?

Ms. ASKEW. Mr. Kayatta, who is the lead evaluator on this, has informed me that he is not a potted plant and as the lead evaluator, he would like to add something.

Senator SESSIONS. Well, just a question. Did you talk with any judge before whom she actually tried a case before a jury or before a judge?

Mr. KAYATTA. No. Since she had not tried a case, we could talk to no judge. We did talk to judges before whom she had appeared and argued and we did talk to judges who knew her quite well in other circumstances, judges from what would be fairly described as both sides of—appointed by Presidents of both parties.

Senator SESSIONS. Well, according to the Bar Association rules, as I understand it, in examining professional competence, the Committee has expressly stated that it, quote, "believes that a prospective nominee to the Federal bench ordinarily should have at least 12 years of experience in the practice of law," closed quote; and that, quote, "substantial courtroom and trial experience as a lawyer or trial judge is important," closed quote.

Now, I would just say that I learned so much more in the practice of law about how this magnificent, beautiful system operates than I did in law school, because it is difficult to have your hands around the reality of it.

I found it difficult to understand how, when she did not meet those qualifications, that the Committee reached the highest rating for the highest score in the land.

I know that the nominee is bright and that kind of thing, but I do think that perhaps the highest rating was not called for, and I would just share that.

Mr. Chairman, I think received today or late yesterday, a letter from the National Rifle Association, who studies the issue and de-

fends the rights of individual Americans to keep and bear arms, has written a letter, at the conclusion of the hearing, opposing the nomination of Dean Kagan, Solicitor General Kagan, and I would offer that for the record.

Chairman LEAHY. [Presiding.] without objection.

[The letter appears as a submission for the record.]

Senator SESSIONS. Mr. Olson, I think it was an important point you made, just briefly, because my time is short, the statement about the right to keep and bear arms, individual rights, those statements related, I think, as you correctly stated, to her statement of what the court held.

It had no connection to whether she might conclude. That was very similar to now Justice Sotomayor, who made the same statement and was in the minority, the 5-4 case voting on not to uphold gun rights. Is that right?

Mr. OLSON. Yes, sir. Actually, that is a characteristic displayed by some people who have a philosophy called judicial supremacism, which is to say that they respect what their fellow justices say, they respect what their predecessor justices say, but not so much what the framers said when they wrote the Constitution. And that was the danger of her view, as expressed yesterday.

Mr. Kirsanow, I want to say I appreciate the Civil Rights Commission taking action to deal with the new Black Panther case and seeking to find the truth about that, because the Department of Justice should have the integrity in that division, among any division, all the divisions that is required, and I'm concerned about that and I believe this committee, Mr. Chairman, is going to have to have hearings on it. I appreciate the Civil Rights Commission for raising that.

Mr. *Kopel*. Is my time out?

Senator SCHUMER. We can go to a second round, if you wish.

Senator HATCH.

Senator HATCH. Thank you, Mr. Chairman.

Let me begin with you, Dr. Yoest. As you know, whether an abortion in general or an abortion procedure in particular is medically necessary. It's a very important issue in both the political and the legal arenas.

Yesterday, I asked General Kagan about a 1996 memo that she wrote regarding legislative and political strategy in partial birth abortion issues. She noted that the American College of Obstetricians, or ACOG, had concluded that it could identify, quote, "no circumstances," unquote, in which partial birth abortion would be the only option.

General Kagan wrote, "This, of course, would be a disaster," unquote, in her own memo. The memo includes her handwritten alternative language that the procedure, quote, "may be the best or most appropriate procedure in a particular circumstance," unquote.

Now, that is obviously a completely different spin, and it could easily have very different impact, both politically and legally.

I have two questions for you about this memo. First, am I right that ACOG, in fact, adopted General Kagan's positive language over its own language and that the Supreme Court relied on it in striking down Nebraska's ban on partial birth abortion in the case of *Stenberg v. Carhart*?

Ms. YOEST. Yes, sir. You are correct.

Senator HATCH. My second question is this. General Kagan told us yesterday that she characterized ACOG's original no circumstances language as a disaster, because it did not accurately reflect ACOG's own medical position.

In other words, General Kagan told us that it would not be a political disaster for the Clinton Administration, but a public relations disaster for ACOG, if I interpreted her testimony correctly, and I think I did or I am.

It seems a little odd that she would make a comment about medical accuracy in a memo about political and legislative strategy.

It strikes me that this medical group was probably more qualified to state its own medical opinion about a medical issue than the White House staffer would be.

But I'm wondering if, in your research and analysis of this issue, do you have any information or an opinion on the best or most possible way to do this? And was this an example of General Kagan trying to be medically accurate or politically savvy?

Ms. YOEST. I appreciate you asking the question and raising the question, Senator Hatch, and this is one of the reasons we have asked the Committee to investigate the question further, because we believe there are a host of questions that this whole incident raises about her ability to set aside her tendency toward activism on this issue.

As we look at the documentation that has come out of the White House in terms of the time line of her meeting with ACOG in June, this memo in December, the final statement coming out in January, we just think there are a lot of questions about what the interaction was between Ms. Kagan and the medical record.

It seems to be very puzzling. Her statements seemed to be quite cryptic. And I would also just add that one of the reasons that we actually revised my oral testimony was to ensure that the record reflected that it was not just the ACOG situation, but, also, there was a pattern of behavior which was followed-up by us seeing a similar kind of interaction between her office at the White House and the American Medical Association.

So this did not happen just in isolation in one case, but that there were two cases where a medical opinion that partial birth abortion was not medically necessary was—shall we say, there was an attempt to repackage it, possibly.

Senator HATCH. Thank you.

Mr. Chairman, I might take a little bit longer than the 35 seconds I have left.

Senator SCHUMER. You have a second round, but we could do your second round now.

Senator HATCH. I think it will be my last question or series of questions.

Let me go to you, Mr. Kopel. Many of my constituents are concerned about how judicial appointments will affect the status of the right to keep and bear arms, especially in our State of Utah.

Despite what some people, including a number of my Senate colleagues, may claim, I think the vast majority of Americans are pleased with the Court's ruling in both the *District of Columbia v.*

Heller, that was in 2008, as well as *McDonald v. City of Chicago* earlier this week.

Now, these decisions embody the obvious interpretation of the Second Amendment that the right to keep and bear arms is an individual right, a fundamental right, and a right that local, state and Federal Government must at all times respect.

Now, some may fear that in the future, an activist Supreme Court may overturn these landmark decisions. They were both 5-4 decisions.

The more immediate concern, however, may be that the lower courts might apply the *Heller* and *McDonald* decisions so narrowly that they have little or no practical effect, and that is the present concern.

Courts can claim to be applying these precedents while strangling them and undermining the rights of law abiding gun owners.

Now, how legitimate is this concern? And given what you know about General Kagan's record in this area, is this something we should be thinking about as we consider whether to vote for or against her in our confirmation?

Mr. KOPEL. I think, certainly, there are many issues about what is the legitimate scope of gun control, which the *Heller* and *McDonald* cases have not answers.

So, for example, the *Heller* case said that you can ban the carrying of guns in sensitive places, such as schools and government buildings, and that seems to imply that there is a right to keep and bear arms in general public places.

But that has not yet been litigated and a future Supreme Court might allow lower courts that were hostile to the right to say, "Oh, you can only have a right to have a gun in the home."

In fact, Mayor Daley is right now proposing replacement gun laws in Chicago, which would say you can only have one handgun per person in the home and you can never take the handgun outside the home. You cannot even take it onto the porch.

So if someone is on your porch trying to burn your house down, you cannot step outside on the porch to do something about it.

There are plenty of lower court judges who are, unfortunately, hostile to the right and without giving proper guidance by the Supreme Court, they might well uphold laws that would drastically reduce the practical effect of the Second Amendment.

We also clearly saw that Justices Breyer, Sotomayor and Ginsberg want to overturn *Heller*. They are not content to merely chip away at it, but want to get rid of the—get the right as a meaningful individual right entirely.

They have replaced it with a right that said, "Oh, it is individual, but it is only for the militia," and who knows what the militia is. Maybe that is just when you are on duty in the National Guard.

So they would make the second amendment, in a practical sense, nullified.

Senator HATCH. Do you have any comment, Mr. Olson?

Mr. OLSON. Yes, Senator. If you read the *Heller* case carefully, the opinion of even the dissenting judges, Justice Breyer and others, accepted the fact that the Second Amendment protected an individual right, but then went on to say it is all a matter of the scope of the right.

You have not even gotten that commitment from Solicitor General Kagan. In other words, if she were to go onto the Court with what we know about her now, she could be the most anti-gun justice on that Court.

Senator HATCH. I appreciate all of your testimony here. I know you have all sincerely given us the best you can.

This is a particularly difficult thing for a lot of us, because you cannot help but like Elena Kagan. You cannot help but recognize that she's a scholar. You cannot help but recognize that she has a good sense of humor and that she is a decent person.

But I remember—it was hard for me to vote against Sonia Sotomayor. But her comments before us, it seems to me, have not been lived up to with regard to this issue alone, and there may be others, as well. And the things that we were so worried about turned out to be proper worries.

So this is always a difficult thing for us, especially when you have a nice, intelligent person and you want to support them.

All I can say is this, Mr. Chairman. I am appreciative of all these witnesses. I understand that there are differing points of view and differing feelings about these matters. But we are talking about one of the most important positions in the world, one of nine, in the greatest court in the world, and it is something I take really seriously.

So I am anguishing over this, without question. And I just want to thank each one of you for appearing. And, Mr. Chairman, thank you for being kind to me and letting me go ahead here.

Senator SCHUMER. Thank you, Senator Hatch.

Senator SESSIONS, do you want to ask some questions? I have one question. You can go first, and then I will ask my one question.

Senator SESSIONS. All right. Thank you. I would offer, for the record, a recent op-ed or article on National Review Online concerning General Kagan's abortion history or analysis of that.

Senator SCHUMER. Without objection.

[The article appears as a submission for the record.]

Senator SESSIONS. Ms. Yoest, one thing that bothered me was that I had indicated in my opening statement that it appeared that Ms. Kagan, when she was working in the Clinton White House, convinced President Clinton, who was prepared to sign the partial birth abortion ban, apparently, that had passed with over 60 votes in the Senate, and that she perhaps convinced him not to do so.

But she testified at the hearing, "I was, at all times, trying to ensure that President Clinton's views and objectives with respect to this issue were carried forward," suggesting that she simply—she did not provide any input one way or the other into that debate.

Is that the way you read the record? What is a fair analysis of the facts on that?

Ms. YOEST. Well, sir, in my written testimony, we detail that the counsel that she gave to President Clinton after she discovered that he was inclined to support a weak ban on the partial birth abortion, she wrote a memo to him claiming that a ban, a pre-viability ban on partial birth abortion would be unconstitutional.

This is particularly troubling to us and I think should be to the committee, because bans on partial birth abortion are among the

most supported by the American people, by the vast majority of the American people.

Yet, through her argument to President Clinton in that written record, she has already clearly indicated that she has prejudged, that she believes that the ban that has currently been upheld by the Supreme Court would be unconstitutional.

So our concern is that she has demonstrated through that record a real hostility to very common sense regulations on abortion and that she would actually work toward taking our jurisprudence on the pro-life issue far beyond even what we have in *Roe v. Wade* right now.

Senator SESSIONS. Well, thank you, for you and your leadership on the abortion issue. It is a matter of legitimate interest by millions of Americans who deeply are concerned about what they think is a procedure that is indecent and does not speak well of our Nation.

I would ask, Mr. Perkins, maybe you and Ms. Yoest, briefly, since my time is about out, to share with us what you feel when a judge or a slim majority of the Court declares that the Constitution answers the question of whether abortion should be legal in America or not, and how much—when that happens, how difficult it is for the American people to see redress from a constitutional declaration on an intense social issue and moral issue as abortion.

Mr. OLSON. Well, Senator Sessions, I believe that is the reason it is still being debated today, is because the Court interjected itself into that issue. And my concern over Elena Kagan and her propensity to advance these created rights for homosexuals, that we are going to see her write the *Roe v. Wade* of gay rights into the Supreme Court.

So it is very concerning, because what happens is these issues are never resolved. And 35-plus years later, we are still debating this issue of life, and it will not go away until it is addressed in the right and appropriate forum.

Senator SESSIONS. Do you agree, Ms. Yoest?

Ms. YOEST. I think it is really important for us to recognize in the record that even scholars who support an abortion right agree that *Roe v. Wade* represents more of a political and policy agenda than anything that is rooted in the Constitution.

Senator SESSIONS. I could not agree more. I am afraid that is so, and it has not gone away, like some justices thought, and it is still with us.

Mr. Kopel, briefly, I do not think a lot of people who believe in the right to keep and bear arms, who believe that is a constitutional right, realize how fragile it is; how, with one vote different in *Heller* or one vote difference in *McDonald*, any city, any state, any county in America could possibly completely ban firearms, because they would basically be saying either it is not an individual right and it only applies to a militia of some sort or that if it is an individual right, the states are not bound to follow that constitutional principle.

Am I overstating that?

Mr. KOPEL. No. I think that is exactly right. And then what was at issue in *McDonald* was really the point of why the 14th Amendment was enacted, which was to make—after the Civil War and all

the troubles we had seen were caused by states being able to violate First and Second Amendment rights and other rights of American citizens, there was a decision to say that the whole Bill of Rights should apply to the whole country.

If *McDonald* had gone the other way, maybe the right to arms would be still robust in places like Colorado under local decisions. But we do not want to just have the right be robust in places where it is has strong popular support. If you are an unpopular speaker, you should have your First Amendment rights, even if you are someplace where everybody else hates what you are saying.

Likewise, your inalienable human right of self-defense exists wherever you live in the United States. You should not have to flee from one part of the country to another hopscotching around where your constitutional rights exist. That is the point of *McDonald*. The Constitution is for all of us, all over the country.

Senator SESSIONS. Senator Schumer, I thank you and Chairman Leahy. I do believe it is healthy to have this panel and have people come before the country and be on C-SPAN and present official positions before this Senate, and I think it is a healthy part of democracy and I appreciate the Chairman allowing us to have this opportunity.

Senator SCHUMER. Thank you. On behalf of the chairman, thank you for your kind remarks and thank you for your very avid participation in the entire hearing.

I have one final question for Professor Sullivan. Some mention was made tonight about positions that General Kagan advocates on affirmative action while she was in the Clinton Administration. I have two questions.

First, in general, were the Clinton Administration's positions on affirmative action in line with the mainstream at the time? And second, did she ever, to your knowledge, while dean at Harvard, act inconsistently with the law on affirmative action?

Mr. SULLIVAN. The answer to the first question is yes, and the answer to the second question is no. She did not act inconsistent, meaning that she acted quite consistently with those laws.

One thing I would add, Senator Schumer, is I would just caution the public in inferring too much from positions as an advocate, as though those positions necessarily will translate into positions as a judge.

We learn from the first day in law school that advocacy does not entail necessarily an acceptance of the position, but rather it is a particular skill that lawyers are quite well trained in.

Now, it may imply something, but it is just not necessarily so. And sometimes I think that we prove too much in our statements with respect to people in different sort of roles.

Senator SCHUMER. Thank you.

Ms. Greenberger, do you want to say something?

Ms. GREENBERGER. Just indulge me for a moment, yes. I know, of course, there are very deeply held views about whether *Roe v. Wade* should be overturned and that is not something that I wanted to address right now. And I do know, obviously, that that is a very important goal for Dr. Yost and for Mr. Perkins, as well.

What I did want to address was what sounded to me like a very serious charge regarding the actual record of women's health. And

I think what would be very important and that I would commend this Committee to look at is the actual record in the cases, the physicians who testified under oath.

For example, Justice O'Connor, in her opinion, referenced to a significant body of medical opinion regarding the fact that for some patients, and, of course, that means for some women, that it was a procedure that led to greater safety, with a detailing of the particular conditions.

So I think that people can have a lot of different opinions, but, of course, because we are talking about a justice, the facts, what records show, what the trial courts found, that that is where the real wisdom would lie in this.

I would urge looking at those facts, which are very consistent with Elena Kagan's record in her attempt to bring the facts to the President's attention.

Senator SCHUMER. Thank you, Ms. Greenberger.

With that, I want to thank all 10 of our witnesses for their differing, but all interesting and heartfelt testimony. And you have helped the panel and, I think, helped the country move further along in this process.

So with that, these hearings are now adjourned.

[Whereupon, at 8:08 p.m., the hearing was concluded.]

[Questionnaire and questions and answers and submissions for the record follow.]

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, Summer 1983

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/Applesseed 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/annual2007/thursday/index.html#plenary
12/1/06	Welcome -- HLS American Society for International Law Conference	HLS	Press Provided Press Provided Tape at HLS
11/30/06	Remarks -- Q&A with Justice Scalia	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 Dellav 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	
	Remarks -- Dinner Celebrating New Faculty Chair (Robert C. Clark Professorship)	HLS	
6/3/04			
5/15/04	Speech -- North American Meeting of Lex Mundi	Boston, MA	Text Provided
5/6/04	Remarks -- Boston Alumni Regional Campaign Kickoff	HLS	
	Remarks -- Introduction to Lecture by Jeremy Waldron ("Safety, Security & Public Goods With Structure")	HLS	
5/4/04			
	Remarks -- Massachusetts Superior Court Judges Lunch	Dedham, MA	
4/29/04			
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	
	Moderate Panel -- Dean's Forum on Faculty Book (David Kennedy: The Dark Side of Virtue)	HLS	Tape at HLS
4/21/04			
4/13-17/04	Various Remarks -- Brown v. Board of Education at 50 Conference	HLS	Press Provided Tape at HLS
4/7-26/04			
3/17-18/04	Remarks -- Third-Year Student Graduation Dinners	HLS	
	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	
	Moderate Panel -- Dean's Forum on Gender and the Classroom	HLS	Tape at HLS
2/17/04			
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, Original 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 <i>Shaw v. Reno</i> 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

- c. 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. Between 1999 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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Opposing Counsel: John R. Gerstein
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Eleni Constantine
 Department of the Treasury
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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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Hon. John G. Koeltl
 Judge, U.S. District Court for the
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Opposing Counsel: Stephen J. Blauner
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 Now – Latigo Partners
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Cynthia Cunningham
 Then – Milbank, Tweed, Hadley & McCloy
 Now – Unknown

(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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Opposing Counsel: John E. Mulhearn, Jr.

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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			

Elena Kagan 46

Other special debt:			
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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.

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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

QUESTIONS AND ANSWERS

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.

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

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

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 uncharted 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

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?

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?

- 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 Ginsburg'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.

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?

- 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

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.

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

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

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).

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."

- 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

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.

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

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?

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?

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

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.

**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).

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?

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.

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 not 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

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 any 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, all 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

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.

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.

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.

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

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

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?

- 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 you 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.

July 9, 2010

Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy and Senator Sessions:

I greatly appreciate the courtesy that you have extended to me throughout this process. Attached are my responses to the written questions for the record from Senators Sessions, Grassley, Kyl, Graham, Cornyn, and Coburn.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Elena Kagan', with a stylized flourish extending to the right.

Elena Kagan

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

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

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

Response:

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

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

Response:

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

c. What are your own “conceptions of value”?

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

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

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

Response:

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

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

Response:

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

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

Response:

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

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

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

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

Response:

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

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

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

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

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

Response:

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

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

No.

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

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

Response:

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

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

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

Response:

Please see above.

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

11) Do you believe that this country’s death penalty jurisprudence can continue to “evolve”?

Response:

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

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

Response:

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

Do you agree with Justice Breyer?

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

Written Questions of Senator Tom Coburn, M.D.*Solicitor General Elena Kagan**Nominee, U.S. Supreme Court*

U.S. Senate Committee on the Judiciary

July 2, 2010

- 1. You were dean of Harvard Law School when Professor Mark Tushnet was hired. Like you, Professor Tushnet also clerked for Justice Thurgood Marshall, and when he received an endowed chair position at Harvard, you introduced him and called him as "one of the world's leading law scholars, particularly one of the world's leading constitutional law scholars" and praised his "contributions to the world of scholarship."**

In a 1981 law review article entitled "The Dilemmas of Liberal Constitutionalism, Professor Tushnet asserted that, if he were a judge, he "would decide what decision in a case was most likely to advance the cause of socialism."

- a. Is this one of Professor Tushnet's "contributions to the world of scholarship?"**

Response:

My introduction for Professor Tushnet was not intended to suggest my agreement with any particular aspect of his scholarship or any particular article. It was intended to recognize his general standing in the sphere of constitutional law scholarship.

- b. How would you characterize such an approach to the law?**

Response:

If Professor Tushnet meant that a judge should decide cases based on her own policy views about the best result, then I would characterize that approach as contrary to the rule of law.

- c. Would you endorse it? Why or why not?**

Response:

No. Judges should decide cases based on legal sources, not on policy or political views.

- 2. As an undergraduate, you wrote a thesis entitled: "To The Final Conflict: Socialism in New York City, 1900-1933," and so I assume you are familiar with the tenets and beliefs of socialists. Please explain what the limits of government are in a socialist state.**

- a. What is the role of government in a socialist state?**

Response:

Other than writing an undergraduate thesis on a single aspect of the history of the American Socialist Party, I have not explored in any significant way the tenets or beliefs of socialists. My general view is that the role of government in a socialist state is more extensive than in a state based on free markets.

b. Can you explain what a socialist's views on the role of corporations under the Constitution would be?

Response:

Please see above. The role of a judge in interpreting the Constitution is to analyze cases based on legal sources, not political beliefs.

- 3. According to Harvard Law's website, the Critical Legal Studies movement seeks to demonstrate the indeterminacy of legal doctrine and show how any given set of legal principles can be used to yield contradictory results. Proponents of this movement are convinced that law and politics cannot be separated; they focus on the ways that law contributed to illegitimate social hierarchies and claim that neutral language and institutions, operated through law, mask relationships of power and control. They also adapt ideas drawn from Marxist and socialist theories to demonstrate how economic power relationships influence legal practices and consciousness.**

a. Do you agree with the views of the Critical Legal Studies movement?

Response:

No.

b. If not, with which of their views do you disagree?

Response:

I do not agree with any of the ways of understanding law and the legal system that are described above.

- 4. According to Harvard Law's website, "Legal Realists call into question three related ideals cherished by most Americans: the notion that, in the United States, the people select the rules by which they are governed; the conviction that the institution of judicial review reinforces rather than undermines representative democracy; and the faith that ours is a government of laws, not of men." Realists suggest that judges often come to a decision first, then work backward to locate legal rules and construct legal arguments in support of the decision. Urging greater candor, the Realists wanted this process to occur openly, the better to evaluate judges' decisions. Do you ascribe to that theory?**

Response:

No.

5. Professor Tushnet has recommended reconsidering the 1883 Civil Rights cases in which the Supreme Court held that the 14th Amendment prohibited only the abridgement of individual rights by the *state*, rather than by private individuals and institutions. The Supreme Court has stated: "It is state action of a particular character that is prohibited. ... The wrongful act of an individual is simply a private wrong and if not sanctioned in some way by the state, or not done under state authority, the [individual's] rights remain in full force." Professor Tushnet stated: "The state-action doctrine contributes nothing but obfuscation to constitutional analysis. It works as a bogeyman because it appeals to a vague libertarian sense that Americans have about the proper relation between them and their government. It seems to suggest that there is a domain of freedom into which the Constitution doesn't reach. We would be well rid of the doctrine."

- a. Do you agree with Professor Tushnet's desire to be rid of the state action doctrine? Why or why not?

Response:

No. The state-action doctrine has been repeatedly reaffirmed by the Supreme Court, and the decisions adopting and applying the state action doctrine are entitled to stare decisis effect. These decisions, indeed, function as a basic postulate of our constitutional system.

6. Last year, the Oklahoma Legislature passed a resolution that provides for a public referendum on whether to make English the official language of the state. The resolution, which will appear on the election ballot in November, makes English the official language of the State of Oklahoma, and requires all official actions be conducted in English. In the past, states such as Missouri and Arizona have passed official English referendums via statewide ballot by 86% and 74%, respectively.

During your time in the Clinton Administration, you advised the president that the administration should stay out of a case, *Arizonans for Official English v. Arizona*, in which the Ninth Circuit struck down an Arizona constitutional amendment mandating that state officials use only English in documents and state business. You stated "all in all, it seems that the best course here is to do nothing. From a political standpoint, we don't want to highlight this issue. From a legal standpoint, we don't want to defend the Ninth Circuit's decision." From these comments, I assume you believe the Ninth Circuit made the wrong decision.

- a. Why do you believe the court's decision was something the federal government should not defend?

Response:

My comments were meant to indicate that the filing of an amicus brief defending the Ninth Circuit's decision would not advance President Clinton's legal views or policy objectives.

- b. If adopted, Oklahoma will become the 31st state to declare English as its official language. Do you believe states have the right under the 10th Amendment to declare English as their official language? Why or why not?**

Response:

If Oklahoma adopts this resolution and a challenge to it comes before the Court, I would fairly consider all the briefs and arguments presented.

- 7. In response to a question from Senator Feinstein asking whether you believe the Constitution requires that the health of the mother be protected in any statute restricting access to abortion, you responded that "with respect to abortion generally, putting that [partial birth abortion] procedure aside, I think that the continuing holdings of the Court are that the woman's life and the woman's health must be protected in any abortion regulation."**

- a. Please explain what you meant by "any abortion regulation."**

Response:

I meant to refer to statutes or regulations that restrict a woman's access to an abortion generally, rather than restricting the procedure specified in the Federal Partial-Birth Abortion Ban Act. My statement was meant to conform to the Court's statement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 878 (plurality opinion) (citation omitted). The Court has reaffirmed this principle in recent decisions. *See, e.g., Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327 (2006) ("New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.") (citing *Casey*); *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (noting that "[t]he prohibition in the [Federal Partial-Birth Abortion] Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks,'" but "whether the Act creates significant health risks for women has been a contested factual question" with respect to the procedure at issue in that case) (citing *Casey*).

- b. Do you believe there must be a health exception included in abortion funding restrictions?**

Response:

The Supreme Court has held that there is no constitutional right to abortion funding and has not subjected abortion funding regulations to heightened constitutional scrutiny. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). My statement to Senator Feinstein, which was intended to reflect my understanding of the prevailing law, was not meant to suggest that abortion funding regulations must contain a life or health exception.

c. Do you believe there must be a health exception included in parental involvement laws?

Response:

The Supreme Court has held that a parental involvement statute is constitutional provided it contains a provision to protect the health of the minor in medical emergencies. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). My statement to Senator Feinstein was meant to be consistent with this holding.

d. Do you believe there must be a health exception included in informed consent laws?

Response:

As noted above, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed the holding of *Roe v. Wade* that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,” *id.* at 878 (plurality opinion) (citation omitted), and the Court has reaffirmed this principle in recent decisions. But the Court has not considered how this principle would apply to an informed consent statute that did not contain an exception for a medical emergency. (The informed consent statute upheld in *Casey* did contain such an exception. *Id.* at 881.) My statement to Senator Feinstein was not intended to state any view on this question.

8. **I believe each profession has an obligation to serve the less fortunate. I take that belief personally and apply it in my career as a physician. While I am not a lawyer, I do know the legal profession encourages and actively promotes, as does my medical profession, *pro bono* services. In fact, Rule 6.1 of the ABA Model Rules of Professional Conduct, which governs the behavior of attorneys, states “[e]very lawyer has a *professional responsibility* to provide legal services to those unable to pay. A lawyer should aspire to render *at least* 50 hours of *pro bono* public legal services per year.” It goes on to note the various ways that responsibility should be fulfilled, stating the lawyer should provide those services to “persons of limited means or charitable, religious, civic, community, governmental and educational**

organizations in matters that are designed primarily to address the needs of persons of limited means.”

Comment 1 of Rule 6.1 reinforces the importance of *pro bono* services when it states, “[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay...” Comment 9 goes even further by stating, “[b]ecause the provision of *pro bono* services is a professional responsibility, it is the individual ethical commitment of each lawyer.”

Based on the Model Rules and your comments in the committee-required questionnaire for your nomination as solicitor general, which merely notes Harvard Law School’s institution of a tuition-free third year and loan forgiveness for students engaged in public service, I am concerned by your personal lack of *pro bono* legal services.

- a. In your Supreme Court questionnaire, you note that you have “served on the boards of numerous non-profit organizations” and “promoted public service and *pro bono* work” while Dean at Harvard. But, you “did not engage in any individual representation of clients.” In fact, your *pro bono* work appears to be far less than prior Supreme Court nominees, despite some of those nominees’ restrictions on providing these services due to their careers as judges. Both Chief Justice John Roberts and Harriet Miers listed extensive *pro bono* activities, including representing indigent clients, in their questionnaires. Even Justices Sotomayor and Alito, who had spent most of their careers as judges and were prohibited from representing clients in *pro bono* work, had more meaningful volunteer work for the underprivileged and indigent.
 - i. Since graduating from law school, have you ever volunteered your time for *pro bono* legal services that would qualify you to fulfill the yearly requirements of Rule 6.1 of the Model Rules of Professional Conduct? Why or why not?

Response:

My *pro bono* work as a lawyer is listed in my questionnaire response except that I may have done some *pro bono* work at Williams and Connolly that I do not now recall. My general practice as both a government lawyer and an academic was not to represent individual clients (whether for pay or *pro bono*). I do not know whether my efforts to expand *pro bono* opportunities as Dean of Harvard Law School or my service on the boards of several organizations devoted to representation of needy persons falls within Rule 6.1.

- ii. Please list the cases or clients you have participated in or in which you have represented a client *pro bono*.

Response:

Please see above.

- b. While I realize the legal profession does not institute disciplinary measures for those who do not provide at least 50 hours of *pro bono* services, Rule 6.1 and its commentary very clearly states the provision of these services is a “professional responsibility” and the “individual ethical commitment of each lawyer.” Do you believe you have failed in your responsibilities and ethical commitments to the legal profession by choosing not to provide *pro bono* services? Why or why not?**

Response:

No. As noted above, my general practice as a government lawyer and academic was not to represent individual clients (whether for pay or *pro bono*). I therefore undertook other efforts to promote *pro bono* service. As Dean of Harvard Law School one of my highest priorities was expanding the *pro bono* service opportunities available to students. In particular, I oversaw a significant expansion on the Law School’s clinical programs, which provide needed representation to indigent clients, in areas ranging from housing and employment to child advocacy to gender violence. In addition, I have served on the boards of several organizations devoted to increasing public interest and *pro bono* opportunities for lawyers. I have tried to make a difference in this sphere by devoting substantial time and energy to these activities.

- 9. Please identify specifically all legislation and executive orders on which you or someone under your supervision were consulted by anyone in the current administration, including any Executive Branch Agency or the Office of the President, while you were serving as the Solicitor General.**

Response:

The primary function of the Office of the Solicitor General is to represent the United States before the Supreme Court and to oversee the representation of the federal government in the courts of appeals. In the normal course, the Office does not review draft legislation or executive orders. In some circumstances, a lawyer in the Office may be consulted on such matters—as when a draft legislative provision concerns Supreme Court review or some other topic within the lawyer’s expertise. For example, I recall that I was consulted, along with several other lawyers in the Office, about a draft executive order regarding preemption and a draft statutory provision concerning Supreme Court review of cases arising under financial regulatory reform legislation. These consultations are usually informal and are often performed as a courtesy to Justice Department colleagues in other divisions that have primary responsibility over the matters. Because these consultations are usually informal, the Office does not keep records of them.

- 10. Please identify specifically all cases, motions, policies, regulations, and other matters in which you or someone under your supervision were consulted by an Executive**

Branch Agency or the Office of the President while you were serving as the Solicitor General.

Response:

Lawyers in the Solicitor General's Office frequently consult with lawyers in executive agencies. These contacts ensure that all relevant agencies participate in formulating the position taken by the United States before the Supreme Court in a particular case. They occur on a daily basis, and the Office does not keep records of them. Contacts with the Office of the President are governed by Justice Department policy and are more limited. The Office also does not keep records of these contacts. I do not believe that it would be appropriate for me to disclose the executive branch entities consulted in a particular case, or to describe the content of the communications.

Senator Lindsey Graham
Elena Kagan Questions for the Record

1. **As Solicitor General, you chose not to file a brief on behalf of the United States in the landmark case *McDonald v. Chicago*. Why did the government decide not to file a brief in this case?**

Response:

It has long been the practice of the Office of the Solicitor General not to file an amicus brief in cases concerning the application of a constitutional provision to the states (so-called incorporation cases). Although incorporation cases raise important issues of constitutional interpretation, and may matter greatly to individual citizens, those issues do not implicate the responsibilities and obligations of the federal government under the Constitution. Incorporation cases therefore do not fall within the category of cases in which the Office of the Solicitor General files amicus briefs: those where the federal government itself has a clear and specific interest in the resolution of the case. *McDonald v. City of Chicago* was an incorporation case. The issue in *McDonald* was whether the Second Amendment individual right to bear arms recognized in *District of Columbia v. Heller* also applies to the states. The application of the Second Amendment individual right to bear arms to the federal government was settled by *Heller*, and the decision not to file an amicus brief in *McDonald* was consistent with the longstanding practice of the Office of the Solicitor General.

2. **Justice Kennedy's opinion in *Boumediene* set out a multi-factor test for determining whether habeas corpus rights extend to detainees held at Guantanamo Bay. Is this multi-factor test relevant to whether other constitutional rights extend to detainees held at Guantanamo or other areas abroad? How would you analyze whether other constitutional rights extend to detainees held at Guantanamo or other areas abroad?**

Response:

In *Boumediene v. Bush*, the Supreme Court held, among other things, that foreign nationals apprehended abroad and detained at Guantanamo Bay have the constitutional privilege of habeas corpus. The Court based its conclusion on the following factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 128 S. Ct. 2229, 2259 (2008). Some or all of these factors may be relevant in deciding whether and to what extent other constitutional provisions apply to detainees held at Guantanamo or other areas abroad, depending on the particular constitutional provision at issue. In considering whether other constitutional rights apply abroad, the Court has looked to the text, structure, and history of the particular constitutional

provision. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-68 (1990) (looking to text and Framers' intent to conclude that the Fourth Amendment does not apply to a search of a nonresident alien located outside the United States by United States agents). The Court has also found relevant the citizenship status of the claimant, *id.*, and the status of the territory, *see, e.g., Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). The practical consequences of applying the particular constitutional right abroad might also be relevant to the Court's analysis. *See, e.g., Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1 (1957) (Harlan, J., concurring in the judgment) (looking to the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" in concluding that the constitutional right to a trial by jury applied to spouses of American soldiers tried before military courts on military bases in England and Japan).

- 3. How would you analyze whether enemy belligerents held in the United States are entitled to a particular constitutional right by virtue of their presence in the United States? For example, if non-citizen military detainees were transferred from abroad to a domestic prison, how would you determine whether their presence in the United States entitled them to particular constitutional rights?**

Response:

The Supreme Court has never considered whether non-citizen military detainees transferred from a location abroad to a domestic prison are entitled to greater constitutional protections by virtue of their presence in the United States. Whether and to what extent a particular constitutional provision applies to an enemy belligerent held in the United States likely would depend on the facts of the case, as well as the text, structure, and history of the constitutional provision at issue. In such a case, the detainees might argue that constitutional provisions typically apply with greater force in the United States than they do abroad. But the United States presumably would argue that the mere transfer of detainees from a prison abroad to a domestic prison should not affect their constitutional status given that the detainees have no substantial connection with this country.

- 4. How would you determine whether the Authorization for Use of Military Force authorizes the detention of citizen or non-citizen enemy belligerents captured in the United States? How would you analyze whether the President's power under Article II of the Constitution authorizes the**

detention of citizen or non-citizen enemy belligerents captured in the United States?

Response:

Whether the Authorization for Use of Military Force authorizes the detention of citizen or non-citizen enemy belligerents captured in the United States is a question of statutory interpretation. In considering whether Congress meant to confer such authority on the President when it enacted the AUMF, the Court would look to the text of the statute as the best evidence of Congress's intended meaning. If the text is ambiguous, the Court would look to the structure and legislative history of the statute. In a prior case interpreting the AUMF, a plurality of the Court also looked to principles of the law of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004). In *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), the Fourth Circuit held that the AUMF authorizes the President to detain a non-citizen legal resident as an enemy combatant. The Supreme Court granted certiorari, 129 S.Ct. 680 (2008), but vacated and remanded the case after the detainee was transferred from military to civilian custody, 129 S. Ct. 1545 (2009). Whether the President has the authority under Article II of the Constitution to detain a citizen or non-citizen enemy belligerent captured in the United States is a question of executive power that the Court likely would analyze under the framework set forth in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

5. How would you analyze whether particular questioning falls within the public safety exception to *Miranda*, as established by *Quarles*?

Response:

In *New York v. Quarles*, 467 U.S. 649, 657 (1984), the Supreme Court held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." The Court concluded that "overriding considerations of public safety" justified a police officer's decision to ask an arrestee questions about the location of an abandoned weapon before providing him with *Miranda* warnings. In analyzing whether particular questioning falls within the public safety exception, the Court likely would consider the gravity and immediacy of the public safety threat and whether the questions were directed to addressing that threat. The Court might also consider whether *Quarles* should apply differently in terrorism cases than in ordinary criminal cases because of the distinctive public safety needs involved in the former.

Senator Grassley's Written Questions for Elena Kagan, to be an Associate Justice, United States Supreme Court

CONSTITUTIONALITY OF THE FALSE CLAIMS ACT

In 2000, the Court decided *Vermont Agency of Natural Resources v. United States*, holding that *qui tam* relators filing claims on behalf of the Government under the False Claims Act have Article 3 standing to sue on behalf of the United States or a State (or state agency) because of the Government's injury in fact. However, some continue to question whether *qui tam* statutes are constitutional under Article 2 because they interfere with the Executive Branch's ability to prosecute cases.

- Are you familiar with these arguments?

Response:

I am familiar with these arguments, although to the best of my recollection I have never written or spoken in my personal capacity on the constitutionality of the False Claims Act.

- Do you agree with the Court's reasoning that a *qui tam* relator has Article 3 standing because of the United States' injury in fact? Why or why not?

Response:

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a *qui tam* relator filing a claim under the False Claims Act has standing under "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," because the Act "can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id.* at 773. The Court concluded that "the United States' injury in fact suffices to confer standing on" the relator. *Id.* at 774. None of the Justices disagreed with that conclusion. *Vermont Agency of Natural Resources* is a precedent of the Court entitled to stare decisis effect.

- Do you have an opinion on the arguments that the *qui tam* provisions are unconstitutional because they impede the Executive Branch? If so, what is your opinion and why?

Response:

In its many cases involving the *qui tam* provisions of the False Claims Act, the Supreme Court has never suggested that these provisions are unconstitutional because they impermissibly interfere with the President's Article II powers. If a claim of this kind is ever brought to the Court, I would fairly consider all the briefs and arguments presented.

- **The Framers of the Constitution, in the First Congress, enacted several *qui tam* statutes. What deference do you give this fact when assessing the constitutionality of *qui tam* statutes in the present day?**

Response:

The practice of the First Congress is relevant to interpreting the Constitution. The enactment of *qui tam* statutes by the Framers of the Constitution would suggest that the Framers did not think that *qui tam* statutes were unconstitutional.

BACKGROUND AND INVOLVEMENT WITH FALSE CLAIMS ACT

It appears you have only been involved with one False Claims Act case in your brief tenure as Solicitor General, Graham County Soil and Water Conservation District et al. v. United States ex rel. Wilson.

- **Are you familiar with the False Claims Act?**

Response:

My familiarity with the False Claims Act is based mostly on my representation of the United States as Solicitor General. In that capacity, I have served as counsel of record in two Supreme Court cases concerning the False Claims Act: *Graham County Soil and Water Conservation District v. United States ex rel. Wilson* and *United States ex rel. Eisenstein v. City of New York*. I have also authorized filings in the following lower-court cases concerning the Act: *United States ex rel. Daniel Kirk v. Schindler Elevator Corp.* (2d Cir.); *United States ex rel. Jolene Lemmon v. Envirocare of Utah* (10th Cir.); *United States ex rel. Mark Radcliffe v. Purdue Pharma, L.P.* (4th Cir.); *United States v. Caremark* (W.D. Tex.); *United States ex rel. Roger L. Sanders v. Allison Engine Co.* (S.D. Ohio); *United States ex rel. Terri Dugan v. ADT Security Systems, Inc.* (4th Cir.); *United States ex rel. Dimitri Yannacopoulos v. General Dynamics and Lockheed Martin Corp.* (7th Cir.); *United States ex rel. Bahrani v. Conagra, Inc.* (10th Cir.); *United States ex rel. Sadek R. Ebeid, M.D. v. Theresa A. Lungwitz* (9th Cir.); *United States ex rel. Jerre Frazier v. IASIS Healthcare Corp.* (9th Cir.); *United States ex rel. Mary Cafasso v. General Dynamics C4 Systems, Inc.* (9th Cir.).

- **Have you ever written or spoken publicly about the False Claims Act?**

Response:

Other than in the briefs listed above, to the best of my recollection I have not written or spoken publicly about the False Claims Act.

- **What about the issue of the constitutionality of the *qui tam* or any other provisions of the False Claims Act? If so, please explain the circumstances and context and**

whether you wrote anything on the subject or provided anyone with your views on the subject.

Response:

To the best of my recollection, I have not written or spoken about the constitutionality of any provision of the False Claims Act.

- **Have you ever written about the constitutionality of *qui tam* provisions in any other federal law? If so, please explain the circumstances and the context and whether you wrote anything on the subject or provided anyone with your views on the subject.**

Response:

As Solicitor General, I have authorized filings in the following lower-court cases defending the constitutionality of the *qui tam* provision contained in 35 U.S.C. § 292(b): *Brule Research Associates Team, LLC v. A.O. Smith Corp.* (E.D. Wisc.); *Raymond E. Stauffer v. Brooks Brothers, Inc.* (S.D.N.Y.); *Public Patent Found., Inc. v. Glaxosmithkline Consumer Healthcare, L.P.* (S.D.N.Y.); and *Public Patent Found., Inc. v. McNeil-PPC* (S.D.N.Y. and 2d Cir.). To the best of my recollection, I have not otherwise written or spoken about the constitutionality of any *qui tam* provision in any federal law.

- **Do you feel you have any bias against the False Claims Act that would impact on your ability to fairly decide a case involving the statute? If so, please explain.**

Response:

No.

WHISTLEBLOWER PROTECTIONS

Do you believe that the Legislative Branch has the constitutional authority to provide meaningful whistleblower protections for Executive Branch employees?

Response:

Congress has the constitutional authority to enact legislation providing meaningful whistleblower protections for Executive Branch employees, so long as the legislation is based on an enumerated power granted by Article I and does not violate any other constitutional provision.

Do you believe that Congress has the constitutional authority to restrict how the Executive Branch uses taxpayer dollars?

Response:

Congress has the power to appropriate taxpayer funds. Pursuant to that power, Congress may place limits on how the Executive Branch spends taxpayer funds, provided those limits do not violate any other constitutional provision.

Specifically, does Congress have the authority to limit appropriated funds from paying the salary of any Executive Branch employee that “prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct...communication or contact with any Member...of Congress?” If not, why not?

Response:

If a challenge to such a statutory provision were to come before the Supreme Court, I would fairly consider all the briefs and arguments presented.

WHISTLEBLOWERS AND THE FIRST AMENDMENT

In 2006, the Supreme Court issued a 5-4 decision in *Garcetti v. Ceballos*, which held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. This decision creates a different set of First Amendment rights for public employees and private employees. I’m concerned that the decision has created an incentive for public employees to go outside their chain of command and report wrong doing to the media or some other outside channel because an employer could retaliate against them for speaking up inside the government agency.

- **Do you agree with the Court that public employees that speak up pursuant to their employment responsibilities they should not be entitled to First Amendment protections?**

Response:

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee’s official duties. *Garcetti* is a precedent of the Court entitled to stare decisis effect.

- **Do you believe that there should be two standards for First Amendment speech for public employees and private employees?**

Response:

In *Garcetti*, the Supreme Court recognized that “public employees do not surrender all their First Amendment rights by reason of their employment.” Instead, “the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” 547 U.S. at 417. The Court’s decisions in this area, including *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), establish the general proposition that a public employee is protected by the First Amendment from discipline based on speech made in the employee’s private capacity, but is not protected from discipline based on speech made pursuant to the employee’s official duties. The First Amendment does not apply to the actions of private employers. *Pickering*, *Connick*, and *Garcetti* are precedents of the Court entitled to stare decisis effect.

- **Do you agree with the Court that the limitation on First Amendment speech by Government employees acting pursuant to their employment responsibilities is necessary for providing “public services efficiently”?**

Response:

In *Garcetti*, the Court explained that its decisions “have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.” 547 U.S. at 420. The Court concluded that the plaintiff was not entitled to First Amendment protection for speech made pursuant to his duties as a prosecutor, on the ground that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Id.* at 421. *Garcetti* is a precedent of the Court entitled to stare decisis effect.

- **Under *Garcetti*, the Court created a system where there are now two types of First Amendment analysis for Government employees. First, if they speak pursuant to their employment responsibilities to report wrongdoing, they are afforded no First Amendment protection. However, if they speak as a citizen, presumably to the media or some other outside source to relay the concerns, the possibility of First Amendment protection arises, subject to the Court’s precedent in *Pickering v. Board of Ed. Of Township High School Dist. 205* and *Connick v. Myers*. Do you agree that this two-step approach creates an incentive for a public employee to report wrongdoing outside of the chain of command? If not, why not?**

Response:

The Ninth Circuit's decision in *Garcetti* noted this concern, stating, "To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason." *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004). The Supreme Court rejected this argument, reasoning that if "a government employer is troubled by" this state of affairs, "it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." 547 U.S. at 424. As noted above, *Garcetti* is a precedent of the Court entitled to stare decisis effect.

ADHERENCE TO FEDERAL SENTENCING GUIDELINES

The Federal Sentencing Commission and the Federal Sentencing Guidelines have faced a number of challenges that have come before the Supreme Court. The Supreme Court upheld the constitutionality of the Sentencing Commission in 1989.

In 2005, the Supreme Court held that the mandatory nature of the Federal Sentencing Guidelines violated defendant's sixth amendment right to a jury trial. As a result, the Court held that the guidelines are not to be considered mandatory and are instead merely advisory.

The Court has continued to find problems with the Sentencing Guidelines and recently stated in *Nelson v. United States*, "The Guidelines are not only *not* mandatory on sentencing courts; they are also not to be *presumed* reasonable."

- **Do you agree with the Supreme Court that the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness? Why or why not?**

Response:

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that a mandatory Federal Sentencing Guidelines System violates the Sixth Amendment. The Court further held that the proper remedy was to sever the provision of the federal sentencing statute making the Guidelines mandatory and directing appellate courts to apply a de novo standard of review to departures from the Guidelines. As a result, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are reasonable. In *Rita v. United States*, 551 U.S. 338 (2007), the Court held that when a district judge imposes a sentence within the Guidelines range, the appellate court may presume that the sentence is reasonable. This presumption, said the Court, "reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the

Commission carried out that task.” *Id.* at 347. As *Rita* made clear, this presumption applies to appellate review only; “the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.” *Id.* at 351. Instead, the sentencing court should “make an individualized assessment based on the facts presented.” *Gall v. United States*, 552 U.S. 38, 50 (2007). In *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam), the Supreme Court summarily reversed a Fourth Circuit decision upholding a sentence imposed by a district judge who justified the sentence on the ground that “the Guidelines are considered presumptively reasonable.” The *Nelson* Court reaffirmed the conclusion in *Rita* that “the Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable.” *Id.* at 892. *Rita* and *Nelson* are precedents of the Court entitled to stare decisis effect.

- **If the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness, in your view, is the Sentencing Commission necessary? Should we instead, just commission universities or academics to do statistical analysis of judicial sentences?**

Response:

In *Rita*, the Supreme Court described the Sentencing Commission’s role as follows: “The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly. . . . The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.” 551 U.S. at 350. Whether the Sentencing Commission is still necessary is a policy judgment for Congress. Presumably, Congress will make that judgment based on its view of how the Commission is carrying out its remaining duties and what alternative mechanisms are available to do this work.

- **Do you believe that decisions by the Sentencing Commission to amend the Guidelines and impose them retroactively are healthy for the Courts? Why or why not?**

Response:

I am aware that the Sentencing Commission has on occasion decided to give retroactive effect to amendments to the Federal Sentencing Guidelines pursuant to its authority under 28 U.S.C. § 994(u). A federal district court then has the authority to modify a sentence based on the Commission’s decision under 18 U.S.C. § 3582 (c)(2). The Court has recognized that retroactivity decisions fall within the discretion of the Commission. *Dillon v. United States*,

2010 WL 2400109, at *7 (June 17, 2010). Whether such decisions are healthy for the courts is a policy question for the Commission and ultimately for Congress.

TAXATION AND THE TAKINGS CLAUSE

The Fifth Amendment to the Constitution states that “private property [shall not] be taken for public use, without just compensation.” What are your thoughts on what extent this may limit Congress’ taxing power?

Response:

The Supreme Court has long recognized the power of the government to tax its citizens. *E.g.*, *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice John Marshall noted that the “security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.” *Id.* at 428. The Court has never held that the Fifth Amendment limits Congress’s taxing power. Rather, the Court has said that a tax is generally not a constitutional “taking.” *County of Mobile v. Kimball*, 102 U.S. 691 (1880).

Obviously, a tax always, in some sense, constitutes a “taking,” but couldn’t there be a situation where the tax was so onerous, and the benefit received by the taxpayer from the onerous tax was little-to-none, that such a tax would constitute a constitutionally-prohibited “takings”? Saul Levmore, dean of the University of Chicago Law School, has argued that expenditures from tax revenues must provide roughly commensurate reciprocal benefit to avoid a takings claim.¹ Do you agree? Please explain your answer.

Response:

The Supreme Court’s precedents in this area have not recognized a Fifth Amendment limitation on Congress’s taxing power. I am aware that some academics have urged the Court to do so, but I have never studied this scholarship. If a claim of this kind is ever brought to the Supreme Court, I will fairly consider all the briefs and arguments presented.

Professor Calvin Massey of the University of California Hastings College of the Law has written that “Surely an income tax of 100 percent imposed on a single individual – for example, Bill Gates – would violate the Takings Clause. If that is so, then the problem becomes a matter of degree.”² Do you agree? If not, please explain. If you do agree, how would you think the line could be articulated between taxes that violate the takings clause, and taxes that do not?

¹ See Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 292 (1990).

² See Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 Harv. J. L. & Pub. Pol’y 85, 104 (1996).

Response:

Please see above.

16th AMENDMENT

Under Article I, Section 9 and the 16th Amendment, a direct tax must be apportioned according to the populations of the states, unless it's an income tax. If a tax purported to be an "income tax," but in fact were more akin to a property tax, and assuming it were not apportioned according to the populations of the states, then it would be unconstitutional. Do you agree? Please explain your answer.

Response:

The Supreme Court has explained that the Sixteenth Amendment "shall not be extended by loose construction . . . Congress cannot by any definition [of income] it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). *Eisner* thus suggests that the Constitution does place limits on Congress's power to define a particular tax as an income tax rather than a property tax.

Generally, the income tax applies to the increase in value of an asset, recognized at the time of sale of the asset. That is, generally the income tax applies to the amount a taxpayer receives that exceeds his basis in the asset. However, Congress might decide to impose a tax on the entire amount the taxpayer receives upon sale of an asset – regardless of his basis. Would such a "gross proceeds" tax still be an income tax? Doesn't the very term "income" or "incomes" suggest profit or increase in wealth? Is the concept of basis constitutionally required?³

Response:

The income tax today generally applies to the increase in value of an asset, recognized at the time of sale. Any change to this system would require new federal legislation. If a constitutional challenge to such legislation were to come before the Court, I would fairly consider all the briefs and arguments presented.

³ See generally Deborah A. Geier, Murphy and the Evolution of 'Basis', 113 Tax Notes 576 (Nov. 6, 2006).

Senator Kyl
Questions for Elena Kagan

1. You wrote an article in which you called Justice Marshall's "vision" a "thing of glory." During your testimony, you said that you were simply praising Justice Marshall's "vision" that "the courts are open to all people and will listen respectfully and with attention to all claims."

In the same paragraph of the article where you call Justice Marshall's "vision" a "thing of glory," you note that "some recent Justices have sniped at that vision."

- a. Please identify which Justices had "sniped" at Justice Marshall's "vision" that "the courts are open to all people and will listen respectfully and with attention to all claims."

Response:

The essay does not cite any particular Supreme Court Justice and I do not remember whether I had one in mind. It is likely that this was a catchall reference to people who criticized or mischaracterized Justice Marshall's view that the Supreme Court served in significant part to provide a fair forum for people who could not gain access to any other part of our governmental system.

- b. If other Justices had not, in fact, "sniped" at the notion that the "the courts are open to all people and will listen respectfully and with attention to all claims," but had instead "sniped" at something else, please take this opportunity to correct your testimony and explain what you actually meant in your article when you referred to Justice Marshall's "vision."

Response:

Please see above.

2. As we discussed during the hearing, you approved a brief filed in *Chamber of Commerce v. Candelaria*. That brief was signed by the top two political appointees in the DOJ Civil Rights Division and two career lawyers in the Civil Rights Division Appellate Section. The brief was not signed by any lawyers from DHS (which operates the E-Verify program) or by any career attorneys from the DOJ Civil Division (the division with jurisdiction over immigration matters).
 - a. The Arizona law at issue did not criminalize any behavior by employees (legal or illegal)—it was targeted exclusively at employers. In addition, the Arizona law did not in any way disturb existing Federal laws prohibiting national origin discrimination. Why was the Civil Rights Division so heavily involved in the process?

Response:

On May 28, 2010, the United States filed an amicus curiae brief in *Chamber of Commerce v. Candelaria*. The brief was signed by lawyers from the Solicitor General's Office, the Civil Division, and the Civil Rights Division—that is, by all the components of the Justice Department that participated in the drafting of the brief. I do not believe it would be appropriate for me to comment on the internal deliberations of the Justice Department regarding this brief, including the extent of the Civil Rights Division's involvement in the case. I will note, however, that the federal legislation at issue in the case was designed to strike a balance between “ensuring that employers do not undermine enforcement of immigration laws by hiring unauthorized workers, while also ensuring that employers not discriminate against racial and ethnic minorities legally in the country.” Br. for the United States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, No. 09-115, at 9. Indeed, another provision of the statute at issue in the case, 8 U.S.C. § 1324b, creates a civil rights remedy for victims of employment discrimination based on citizenship, immigration status, or national origin.

b. Why was DHS not represented on the brief?Response:

Because the brief was filed after the President nominated me to the Supreme Court and I ceased doing sustained work as Solicitor General, I have no knowledge of discussions (if any) relating to whether names of DHS attorneys should appear on the brief.

c. Without divulging the substance of any deliberations, was Secretary Napolitano at any time asked about her views on the brief? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

As in all cases handled by the Office of the Solicitor General, all relevant agencies and Justice Department components were consulted in formulating the United States' position. As your question notes, DHS has substantial responsibility for the enforcement of federal immigration laws and, particularly, for operation of the E-Verify program. I do not believe it would be appropriate for me to comment further on any specific internal deliberations of the Executive Branch regarding this case. My response to Senator Coburn concerned whether I personally had participated in a particular matter, not whether I had consulted with particular government officials.

d. Without divulging the substance of any deliberations, were other officials at DHS asked about their views on the brief? (I would note that you answered

a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

Please see above.

3. Although the Solicitor General's brief in *Candelaria* did not ask the Supreme Court to review the part of the Arizona law that requires all employers to participate in the E-Verify program, the brief spends considerable time criticizing this provision of state law and suggests that Congress also intended to preempt it. This section of the brief (Section B), however, fails to acknowledge that Congress has legislated in this area repeatedly—by reauthorizing the E-Verify program—after the Arizona law had been enacted. Thus, Congress was fully aware that states, like Arizona, were requiring employers to use E-Verify, yet it chose not to amend the law when it was reauthorized. This seems like a critical fact, one that undercuts your argument that Congress meant to preclude E-Verify requirements like Arizona's.

- a. Doesn't an advocate have a duty to bring relevant information or legal authority to a court's attention, even if it is adverse to her case?¹

Response:

Yes.

- b. Isn't this duty of candor heightened when the advocate is the Solicitor General or someone from her office?

Response:

The Solicitor General has a heightened duty of candor to the Supreme Court.

- c. Why didn't your office raise these reauthorizations in its discussion of the E-Verify requirements?

Response:

The brief specifically noted that, "Since 1996, Congress has on four occasions extended the program's term and scope," Br. for United States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, No. 09-115, at 3 (filed May 28, 2010). Further, Section B of the brief argued that the Court should not review the Ninth Circuit's decision upholding the provision of the Arizona law regarding E-Verify precisely because E-Verify is "a still-evolving federal program whose nature and

¹ Rule 3.3, Model Rules of Professional Conduct ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

scope have changed in numerous respects since its creation and which may change again in the near future.” *Id.* at 20. The brief gave the Court a full and candid presentation of the relevant considerations to the petition for certiorari.

4. **In *Lopez-Rodriguez v. Holder*, the Ninth Circuit held that the Exclusionary Rule applied to civil immigration proceedings. As five dissenting Ninth Circuit judges noted in a strongly worded dissent to denial of *en banc* review, this decision squarely conflicted with the controlling Supreme Court case which held that the Exclusionary Rule should not apply to immigration proceedings. It also created a circuit split with two other circuit courts of appeals.**
5. **This case presented an attractive opportunity to seek *certiorari*. The case created a split among the courts of appeals. It involved significant constitutional issues. There was a strong dissent, which was sure to catch the attention of the Justices. And the effect on the government’s interest is very significant—the decision means that ordinary deportation hearings (which are civil, not criminal) can now be bogged down by long legal fights over the admissibility of clear evidence that a person is illegally here and should be deported.**

- a. **Can you explain why you chose to not appeal this case when there were numerous factors supporting a successful grant of *certiorari*?**

Response:

I do not believe it would be appropriate for me to comment on the internal deliberations of the Justice Department concerning whether to file a petition for certiorari in a particular case. In deciding whether to file a petition for certiorari in any case, one of the factors the government considers is whether the factual record and circumstances of the case increase or decrease the likelihood that the government will prevail on the legal issue in which the government has an interest. In *Lopez-Rodriguez*, for example, the Ninth Circuit’s published opinion noted that the INS agents who conducted the search at issue were unavailable to testify before the Immigration Judge, and the IJ therefore fully credited the alien’s description of the search. The opinion also placed some weight on the fact that the search at issue was a search of a home, which courts often view as central to the protections of the Fourth Amendment. Moreover, the circuit split noted in your question did not concern whether the exclusionary rule applies at all to civil immigration proceedings—all three circuits to consider the question have held that it does apply in egregious circumstances—but rather the standard that courts should use in deciding whether conduct counts as egregious such that the exclusionary rule should apply. *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1105 (9th Cir. 2009) (Bea, J., dissenting from denial of rehearing *en banc*) (“The Ninth Circuit is not alone in reading the *Mendoza* dicta as permitting the application of the exclusionary rule in cases of egregious Fourth Amendment violations. The First and Second Circuits have done so as well.”)

- b. During the hearing, I asked whether you at any point spoke with individuals at the White House—including staff in the Executive Office of the President—about the *Rodriguez* case. You declined to answer. Please take this opportunity to respond to my question.**

Response:

I do not believe it would be appropriate for me to comment on the internal deliberations of the Executive Branch.

- c. Did you at any point speak with an outside group— such as an advocacy or interest group—about the *Rodriguez* case?**

Response:

No.

- 6. On April 1, 2009, the *Washington Post* reported that the Office of Legal Council at the Department of Justice issued a legal opinion that the DC voting rights legislation being considered by Congress was unconstitutional.² The story further states that, upon getting this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General's office. According to the story, lawyers in the Solicitor General's office "told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment."**

The story says that the Solicitor General's office was asked for the legal opinion before you were confirmed on March 19, 2009. But it does not say when the Solicitor General's office gave the Attorney General an answer to his question.

- a. When did the Solicitor General's office inform the Attorney General of its legal opinion of the DC voting rights legislation?**

Response:

All aspects of this event occurred before I became Solicitor General.

- b. Without divulging the substance of any advice given, were you at any time asked to express an opinion on the DC voting rights legislation? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)**

² Carrie Johnson, *A Spit At Justice On D.C. Vote Bill: Holder Override Ruling That Measure Is Unconstitutional*, Wash. Post (Apr. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html>.

Response:

No.

- c. Do you believe it was appropriate for the office of the Solicitor General to render an advisory opinion about a pending bill that was not even yet a law?

Response:

I was not yet Solicitor General when this matter occurred, and do not know the circumstances well enough to render an opinion. The Attorney General did not ask the Office of the Solicitor General for any opinion of this kind while I served as Solicitor General.

7. It has been reported that “a senior administration official [has said] that the federal government will . . . formally challenge . . . Arizona’s immigration law [SB1070] when Justice Department lawyers are finished building the case.”³ More specifically, the Secretary of State said that the Justice Department “will be bringing a lawsuit” against the law. We also know that the Justice Department began considering such a challenge to SB1070 almost as soon as it became law on April 23, 2010.⁴ This was more than two weeks before your nomination to Supreme Court.

- a. Without divulging the substance of any advice given, were you at any time asked to express an opinion on SB1070? (I would note that you answered a similar question posed to you by Senator Coburn about the health care legislation.)

Response:

No.

8. Do you think that *Brandenburg v. Ohio* was correctly decided? Specifically, do you think that a call for violence falls outside the protections of the First Amendment only if it is likely to result in “imminent” violence?

Response:

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), the Court reversed the defendant’s conviction under a statute that made it a crime to “advocate . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a

³ Brian Montopoli, *Senior Official: Obama Administration Will Challenge Arizona Immigration Law*, CBS News (June 18, 2010), http://www.cbsnews.com/8301-503544_162-20008171-503544.html.

⁴ *Holder: U.S. May Challenge Arizona Immigration Law*, Fox News (Apr. 27, 2010), <http://www.foxnews.com/us/2010/04/27/lawsuits-sec-fly-arizona-officials-defend-new-immigration-law/>.

means of accomplishing industrial or political reform” and to “voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” *Id.* at 444-45. The Court explained that its precedents had established the proposition that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447. *Brandenburg* is a precedent of the Court entitled to *stare decisis* effect.

9. Assume that a religious authority, like Sheikh Abdul Rahman (the Blind Sheikh) or Mufti Usmani, issues a fatwa calling for all Shariah adherent Muslims to either engage in violent jihad against the infidels of the West or to provide material support in the form of charity. In your view, can this “speech” be prosecuted, or is it protected under the First Amendment?

Response:

Whether any particular expression could be the basis for a criminal prosecution consistent with the First Amendment depends on the content and context of the expression, and the scope of the criminal statute. This Term, the Supreme Court upheld as against a First Amendment challenge the application of the federal criminal “material support” statute to expressive activity that facilitated the lawful, nonviolent purposes of terrorist organizations. *Holder v. Humanitarian Law Project*, 2010 WL 2471055 (2010). I argued this case on behalf of the United States before the Supreme Court.

10. In a recent *Washington Post* editorial, George Will suggested some questions that I would like you to answer.

- a. Can you name a human endeavor that Congress could not regulate through the Commerce Clause, if it made some pretense that the endeavor has an effect on the national economy?

Response:

In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Court recognized that “Congress’ regulatory authority” under the Commerce Clause “is not without effective bounds.” *Morrison*, 529 U.S. at 608. In particular, the Court stressed that the activities regulated by the statutes at issue in *Lopez* and *Morrison* were not economic in nature. Under *Lopez* and *Morrison*, therefore, Congress could not regulate non-economic activity based on a mere “pretense that the endeavor has an effect on the national economy.”

- b. If courts reflexively defer to that congressional pretense, in what sense do we have limited government?

Response:

Lopez and *Morrison* make clear that the courts should not “reflexively defer” to “congressional pretense.” Instead, courts must evaluate the nature of the activity that Congress seeks to regulate and the link between that activity and interstate commerce. In performing that evaluation, courts should be deferential to congressional fact-finding.

11. Again, I would like you to answer another question posed by George Will. In Federalist 45, James Madison said: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite.”

a. Does the doctrine of enumerated powers impose any limits on the federal government?

Response:

Yes. As the Supreme Court recognized just this past Term, “the Federal Government is acknowledged by all to be one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers.” *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (internal quotation marks and citations omitted).

b. Can you cite some things that, because of that doctrine, the federal government has no constitutional power to do?

Response:

As noted above, *Lopez* and *Morrison* make clear that Congress does not have the constitutional authority under the Commerce Clause to regulate non-economic activity with no substantial effect on interstate commerce. Similarly, the Court has imposed limits on congressional action taken pursuant to Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*, the Court held that Congress’s enumerated power under Section 5 is limited to enacting legislation that enforces constitutional rights previously recognized by the Court, and does not include the power to determine what is a constitutional violation. 521 U.S. 507, 519 (1997).

Senator Jeff Sessions
Questions for the Record
Elena Kagan

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

“I would recuse myself from any case in which I’ve been counsel of record at any stage of the proceedings, in which I’ve signed any kind . . . brief.

And I think that there are probably about 10 cases . . . I haven’t counted them up particularly, but I think that there are probably about 10 cases that are on the dockets next year in which that’s true, in which . . . I’ve been counsel of record on a petition for certiorari or some other kind of pleading. So that’s a flat rule.”

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

Response:

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

- b. During your testimony, you also stated

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

"[W]hen a text is ambiguous, which, you know, frequently happens, then I think that the job of the courts is to use whatever evidence is at hand to understand Congress's intent, and that includes exploration of Congress's purpose by way of looking at the structure of the statute, by way of looking at the title of the statute, by way of looking at when the statute was enacted, and in what circumstances, and by way of looking at legislative history."

Now, I think courts have to be careful about looking at legislative history and make sure that what they're looking to is -- is reliable, but courts should not

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

- i. **Do you agree with Justice Stevens’ statement?**

Response:

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

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

Response:

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

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

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

8. **In response to a question from Senator Feinstein alluding to *Heller* and *McDonald*, you said that “there are various reasons for why you might overturn a precedent. If the precedent . . . proves unworkable over time or if the doctrinal foundations of the precedent are eroded, or if the factual circumstances that were critical to why the precedent -- to the original decision, if those change.”**
- a. **Please explain the standard the Court has, or in your view should, apply in determining whether a precedent has become “unworkable.”**

Response:

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

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

Response:

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

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

Response:

Please see above.

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

Response:

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

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

Response:

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

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

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

Response:

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

10. At your hearing, Senator Leahy said:

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

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

Response:

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

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

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

Response:

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

b. What did you mean by “this court”?

Response:

I meant the Supreme Court.

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

Response:

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

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

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

a. When would reversing prior decisions be a “great idea”?

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

15. In a memorandum you wrote to Justice Marshall concerning the case of *Citizens for Better Education v. Goose County Consol. Independent School District*, 484 U.S. 804 (1987) (dismissing appeal for want of substantial federal question), you endorsed a school rezoning plan that explicitly took race and ethnicity into account. The plan did so even though there was no history of segregation in the schools at issue.
- a. You called this rezoning plan “amazingly sensible,” “fair-minded[,],” and “good sense.” Please explain how your belief that the rezoning plan was “amazingly sensible” is relevant to the constitutional analysis.

Response:

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

18. **In a memorandum you wrote to Justice Marshall concerning the case of *Miner v. New York Dept. of Correctional Services*, 488 U.S. 941 (1988) (cert. denied), you endorsed the use of the Full Faith and Credit Clause to impose one state’s definition of marriage on another state. In *Miner*, a prisoner in New York entered into a sham marriage in Kansas via proxy, so that he could take advantage of rights to conjugal visits. The prisoner had been convicted of committing a murder-for-hire by stabbing a woman 21 times for \$1,000, which he wanted so that he could buy a new motorcycle. *People v. Safian*, 396 N.Y.S.2d 432, 433-35 (N.Y.A.D. 1977). The marriage was illegal under New York law, but the prisoner argued that the Full Faith and Credit Clause required New York to recognize the sham marriage as valid.**
- a. **Nowhere in your memorandum did you mention the circumstances concerning the prisoner’s heinous crime. Why did you think that this information was not relevant to Justice Marshall’s consideration of these cases?**

Response:

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

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

Response:

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

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

- c. **In your memorandum, you wrote that the prisoner's argument was "arguably correct."**
 - i. **Was that your own assessment of the prisoner's argument, or the argument you believed Justice Marshall would want you to make to him?**

Response:

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

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

Response:

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

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

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

Response:

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

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

Response:

Please see above.

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

Response:

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

20. **In a 1988 memorandum to Justice Marshall concerning *Vacanti v. United States*, 488 U.S. 821 (cert. denied), you wrote that you were “a bit shocked” that the federal government publishes a newsletter soliciting child pornographers to send items through the mails. Your successor clerk added by handwritten note a crucial fact – that the petitioner had been swapping and collecting child pornography for a decade prior to his arrest.**
- a. **Given that predisposition is key to the government’s argument that a criminal was not entrapped, why did you consider it unimportant for Justice Marshall to know this child pornographer’s decade-long history?**

Response:

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

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

Response:

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

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

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

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

Response:

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

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

Response:

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

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

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

Response:

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

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

- a. What was the “disservice” you thought was done to *Miranda*?

Response:

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

Response:

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

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

Response:

Yes.

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

Response:

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

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

Response:

Yes.

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

Response:

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

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

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

Response:

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

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

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

Yes.

SUBMISSIONS FOR THE RECORD

**We Will Always Remember**

LIZ J. ABZUG CONSULTANT SERVICES
105 DUANE STREET #21 C
NEW YORK, NY 10007

June 30th, 2010

Dear Members of the Senate Judiciary Committee:

I am writing this letter to strongly support that Supreme Court Nominee Elena Kagan be confirmed as the next Justice appointed to the United States Supreme Court.

Ms. Kagan is eminently qualified for the position of Supreme Court Justice. She is an accomplished attorney, legal scholar, held the position of law Clerk to Justice Thurgood Marshall, professor at University of Chicago Law School, former Dean of Harvard Law School and currently serves as the Solicitor General. Along with many women lawyers across the country as well as women from all different professions, backgrounds and geographic regions, I hope that the Judiciary Committee will move the confirmation hearings forward in a fair and expeditious manner.

I believe that Solicitor General Kagan understands the complexities of the law, issues and cases that will come before the Supreme Court. She has been open and forthcoming during the judiciary committee hearings. I believe that she will show great fairness, judicial judgment and temperament. She has shown that she possesses great intelligence, depth of knowledge, relevant experience, a very strong character, and a deep commitment to analyze issues and act within the statutory framework of the law. I am confident that Ms. Kagan will protect the lives and the reproductive rights of women as well as the rights of LGBT citizens, two constituencies of which I am a part and care a great deal about. I believe that she will uphold the law and has a commitment to equal justice for all, regardless of our gender, race, ethnicity, class, sexual orientation or any other factor. For instance, she will deal with complex matters such as a right to abortion and gun control based on legal precedents and the wise application of the United States Constitution and relevant laws.

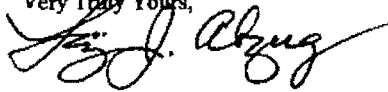
I am thrilled and excited as are women all across the country, about the possibility of having three female justices on the Supreme Court for the first time in our nation's history.

Also, during the current hearings, I believe that Ms. Kagan has revealed her personal humanity, poise and great sense of humor, both qualities that I believe will serve her well as a Supreme Court Justice.

I hope and expect that Solicitor General Kagan will be overwhelmingly confirmed by the Judiciary Committee and that during the remainder of the hearings and confirmation process, she will be treated with the fairness and the respect that she deserves.

Thank you very much.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Liz J. Abzug". The signature is fluid and cursive, with the first name "Liz" being particularly prominent.

Liz J. Abzug, New York City


ALL INDIAN PUEBLO COUNCIL Office of the Chairman

Joe Garcia, Chairman

Greg Ortiz, Vice Chairman

June 11, 2010

The Honorable Patrick Leahy
 United States Senate committee on Judiciary
 224 Dirksen Senate Office Building
 Washington, D.C. 20515

Re: Support for US Solicitor Elena Kagan's nomination to the US Supreme Court

Dear Senator Leahy:

On May 27 at a duly called All Indian Pueblo Council meeting the member tribes consisting of 19 Pueblos of NM and 1 Pueblo of Texas passed Resolution 2010-10 endorsing President Obama's nomination of US Solicitor Elena Kagan to the US Supreme Court. The All Indian Pueblo Council expresses strong support for the Honorable Kagan.

With her background and the number of years of service in different capacities she will be a true asset to the US Supreme Court.

Issues in Indian country are very complicated and diverse. We trust that she will be prudent, fair, and dedicated to the cases that will come her way.

Please accept this letter and the AIPC Resolution 2010-10 as official documents for the records in support of US Solicitor Elena Kagan to the US Supreme Court.

Thank you for your time and consideration. Should you have questions, please feel free to contact me directly at (505) 881-1992 or (505)-927-0348.

Sincerely

Joe Garcia
 Chairman
 All Indian Pueblo Council

All Indian Pueblo Council - 2401 12th Street NW - Albuquerque, NM 87104
 Phone: 505-881-1992 Fax: 505-883-7682

Testimony of Robert Alt
Before the United States Senate
Committee on the Judiciary
Hearing on the Nomination of Elena Kagan
To be an Associate Justice of the United States Supreme Court

My name is Robert Alt. I am a Senior Legal Fellow in and Deputy Director of the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Thank you, Chairman Leahy and Senator Sessions, for inviting me to testify on the nomination of Elena Kagan to the Supreme Court.

As these hearings opened, numerous members of this Committee lamented what was variously described as the judicial activism and pro-corporatism of the Roberts Court. Indeed, C-SPAN viewers could be excused if they mistakenly believed that they were watching “Classic” C-SPAN coverage of the confirmation hearings for John Roberts or Samuel Alito, given the references to those justices. Singled out for special condemnation by members of this Committee were the Roberts Court’s decisions in *Citizens United v. FEC* and *Ledbetter v. Goodyear Tire & Rubber Co.*¹ The complaints raised closely tracked those of liberal activists, who issued reports which both highlighted their grievances and served as talking points on these cases and the Roberts Court in anticipation of the hearings.

The story of a conservative, activist, pro-corporatist Roberts Court may sound compelling at first blush, particularly with its repetition and regrettable distortion of the cases involved, but it is just a story—and a fictional one at that. This story applies a flawed definition of judicial activism, a deliberately skewed sample of the business decisions of the Roberts Court, and misrepresentations of key decisions of the Roberts Court. I will address each of these issues in turn, before concluding with my thoughts and concerns regarding the nomination of Elena Kagan.

Defining Activism Down

Judicial activism—real judicial activism—occurs when judges write subjective policy preferences into their legal decisions rather than apply the Constitution according to its original meaning or statutory law based on its plain text. Judicial activism may be either liberal or conservative; it is not a function of outcomes, but one of interpretation. Judicial activism does not necessarily involve striking down laws, but may occur when a judge applies his or her own policy preferences to uphold a statute or other government action which is clearly forbidden by the Constitution.²

¹ 558 U.S. ___, 130 S.Ct. 876 (2010); 550 U.S. 618 (2007).

² Ed Whelan refers to this as judicial passivism. While our nomenclature is different, the substance of our critique is, I believe, nearly identical.

Dissatisfied with this accepted definition, critics of the Roberts Court (and the Rehnquist Court before that) engaged in a concerted effort to redefine judicial activism downward. Under one formulation, judicial activism occurs any time that a statute is struck down.³ While this may seem appealing given its seemingly objective, value-neutral approach, judicial activism has traditionally been understood as a term of reproach for judicial decisions which overreach proper judicial authority. However, the act of striking down clearly unconstitutional statutes is not only within proper judicial authority, but the failure to do so based upon policy preferences would itself fall into the traditional definition of activism. Accordingly, this definition distorts the traditional understanding of activism, and has been used in a concerted way to equate rightful acts of the Roberts Court with wrongful, genuinely activist acts of prior liberal courts.

In another popular version, judicial activism is all-but-meaningless—a term of derision that means little more than “I don’t like the policy outcome of this decision.” Both definitions of judicial activism are incorrect, and both are in full display in the recent criticisms of the Roberts Court, and its decisions in *Citizens United v. FEC* and *Ledbetter v. Goodyear Tire & Rubber Co.* In order to determine whether these cases are truly activist, it is necessary to carefully review the cases. When this is done free of distortions to the factual record and exaggerations of precedent, it is clear that the Court was not activist in these cases.

The “Pro-Corporatist” Distortion

The claim the Roberts Court is a pro-business or pro-corporatist court frequently turns on little more than a claim that the court has decided cases in favor of particular business parties, or has sided with businesses more than non-business parties in recent cases. At the outset, it is worth noting that neither of these claims, if true, says anything about whether the judgments are correct, or would support a claim for activism. Given the small and discretionary docket that the Supreme Court hears, there is no empirical reason to believe that the winners and losers as between any set of opposing interest groups should be evenly distributed.

The allegation that the Court is too pro-business became fashionable following Jeffrey Rosen’s 2008 article, *Supreme Court Inc.*⁴ Even at the time of this article, however, legal scholars questioned whether the evidence offered was sufficient to support the premise of a pro-business court.⁵ For example, Rosen’s observation that “the Roberts Court has heard seven [antitrust cases] in its first two terms — and all of them were decided in favor of the corporate defendants”

³ See, e.g., Cass Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42-43 (2005). It is worth noting that this formulation is frequently utilized in a highly skewed fashion—one which focuses exclusively on striking down federal legislation in order to permit the argument made by Sunstein and others that the Rehnquist and Roberts courts are more activist than prior courts. Leaving aside the obvious error in ascribing what is well-understood to be a pejorative to what may be a positive act—e.g., correctly striking down clearly unconstitutional laws—such a formulation lacks any basis for failing to include the striking down of *state* laws—acts which, to borrow Sunstein’s words, similarly would “preempt the democratic process.” The key distinction seems to be that the inclusion of such acts would force the true radicals in academia and elsewhere to confront that tens-of-state-laws swept aside in numerous decisions by the Warren Court—data which would upset their thesis that conservative courts are more activist.

⁴ Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAGAZINE, Mar. 16, 2008.

⁵ See, e.g., Eric Posner, *Is the Supreme Court Biased in Favor of Business*, SLATE (Mar. 17, 2008, 3:16 PM), *avail at* <http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx> (last visited June 29, 2010).

seems much less impressive when you discover that five of those seven cases involved businesses suing other businesses.⁶ So yes, a corporation won those cases, but another corporation *lost* those cases. Are we then to take it that the Roberts Court was simultaneously pro-business and anti-business? Similarly, the Rosen's assertion that "[o]f the 30 business cases [in the 2006-07 term], 22 were decided unanimously, or with only one or two dissenting voices" is hard to square with the claim that there has been any significant pro-corporatist shift in the Roberts Court. After all, most of the justices, including the most liberal justices, remained the same when Roberts and Alito joined the Court. The frequent unanimity and near unanimity, with supermajorities comprising justices of both ends of the ideological spectrum, suggests that rather than a pro-business bias motivating the outcome, that the Court ruled in favor of businesses because those parties' claims were simply meritorious. To suggest otherwise would require one to accept not only that the recent additions to the Court exercised pro-business activism, a claim that is not borne out by the facts, but that liberal Justices like Stevens, Ginsburg, Breyer, and Souter were frequently motivated by pro-business activist impulses.

By the end of the last term, the media and academics increasingly acknowledged that the claim that Roberts Court was decidedly pro-business was meritless—as perhaps typified by the *Washington Post* headline: Court Defies Pro-Business Label.⁷ A string of decisions negative to business interests fueled this conclusion, and made clear that the pro-business allegation was either premature, overblown, or both.

A non-comprehensive list of cases in which the Supreme Court ruled adversely to business interests includes notably:

- *Wyeth v. Levine*,⁸ in which the Court held that plaintiffs may sue a drug manufacturer alleging inadequate warning of risk even when the warning label was approved as sufficient by the Food and Drug Administration.
- *Massachusetts v. EPA*,⁹ in which the Court created a novel new rule for standing and opened the door for the EPA to regulate virtually every business (and non-business activity), including manufacturing, farming, and transportation, which produces carbon dioxide.
- *Federal Express v. Holowecki*,¹⁰ in which the Court stretched the meaning of the word "charge" in order to allow an ADEA case to go forward where the plaintiff had not met the prerequisite of filing a formal charge with the EEOC as required by statute, but had filed an intake questionnaire.

⁶ *Id.*

⁷ Robert Barnes, *Court Defies Pro-Business Label*, WASHINGTON POST, Mar. 8, 2009, *avail at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/07/AR2009030701596.html> (.). See also Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009).

⁸ 555 U.S. ___, 129 S.Ct. 1187 (2009).

⁹ 549 U.S. 497 (2007).

¹⁰ 552 U.S. 389 (2008).

- *Altria v. Good*,¹¹ in which the Court found that the Federal Cigarette Labeling and Advertising Act did not preempt lawsuits against tobacco companies based upon alleged misrepresentation under a state act which prohibits deceptive trade practices.
- *Burlington Northern and Santa Fe Ry. Co. v. White*,¹² in which the Court provided an expansive definition of the grounds for Title VII retaliation claims.

To this list could easily be added numerous others, which I omit merely due to time constraints. And yet, as additional cases adverse to business interests rolled in, the “story” of the conservative, activist, pro-business Roberts Court continued unabated by liberal activists, and judging by these hearings, members of this Committee.

To further the conservative, pro-corporatist fiction, in addition to cherry-picking cases, critics of the Roberts Court have also assiduously avoided revealing the fact that liberal members of the Court have been the authors of some of the very cases of which they complain, and of some of the more pro-business cases that they conveniently omit. These cases include notably the Court’s recent decision limiting the scope of the honest services fraud statute¹³ in *Skilling v. U.S.*,¹⁴ in which Ginsburg wrote the opinion of the Court, and which three liberal justices on the Court (Sotomayor, Stevens, and Breyer) would have gone further, and granted the former Enron executive fair trial relief; the limitation of punitive damages in maritime law in *Exxon Shipping Co. v. Baker*¹⁵ (authored by Justice Souter); the *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*¹⁶ decision (authored by Justice Ginsburg and joined by, *inter alia*, Justices Souter and Breyer), which raised the standard for pleading scienter in securities actions; and from the Rehnquist Court, *BMW v. Gore*¹⁷—an activist case finding a constitutional limitation on punitive damages in a decision authored by Stevens and joined by, *inter alia*, Souter and Breyer. Unless we are to believe that the most liberal members of the Court are in fact conservative, pro-business activists, this “story” quickly falls apart.

It is worth noting that the pro-corporatist myth is just a subspecies of the larger, “conservative activist” complaint leveled by some members of the Committee and liberal activists against the Court—a phenomenon which, so the story goes, has intensified since *Bush v. Gore*. But as my colleague Todd Gaziano has persuasively argued, this too is a myth belied by the regrettable facts of the Court’s string of liberal decisions.¹⁸ In areas including national security law, the death penalty, the constitutionality of life sentences without parole for violent juvenile offenders, and the use of foreign law, this Court simply cannot be meaningfully dubbed “conservative.”

¹¹ 555 U.S. ___, 129 S.Ct. 538 (2008).

¹² 548 U.S. 53 (2006).

¹³ It should be noted that given the broad application of this statute, its implications extend far beyond businesses.

¹⁴ ___, U.S. ___, ___ S.Ct. ___, 2010 WL 2518587 (June 24, 2010).

¹⁵ 554 U.S. ___, 128 S.Ct. 2605 (2008).

¹⁶ 551 U.S. ___, 127 S. Ct. 2499 (2007).

¹⁷ 517 U.S. 559 (1996).

¹⁸ Todd Gaziano, *What Conservative Court?*, TOWNHALL 49 (July 2010).

Key Cases Misrepresented

Having addressed the sampling error of the larger label, it is necessary to address a few particular cases, which have been cited in these hearings as examples of pro-business activism on the part of the Roberts Court. Many of the cases that are discussed are ones of statutory construction. This is important first because the policy complaints that are raised by members of this Committee are frequently policies that Congress itself enacted—that is, if there is a pro-business culprit (which is often doubtful) it is not the Supreme Court, which in the cases listed in this Committee’s bill of particulars is merely acting as a handmaiden, but Congress. For example, in *Ledbetter*, it is not the Court which wrote the statute of limitations, it was Congress, and the complaint levied is essentially that the Court should have ignored or rewritten the statute of limitations. And second, if Congress changes its mind about what the policy should be, or believes that the Court did not interpret its requirements appropriately, it can always change the law, as they did in the wake of *Ledbetter*.

Citizens United¹⁹

In *Citizens United v. FEC*, the Supreme Court threw out the federal ban on independent political expenditures by corporations and unions because, by effectively limiting speech, such a ban violates the First Amendment. Liberal activists and the mainstream media were swift to attack the decision as bad policy. For example, one article about the case decries the fact that it has “opened the floodgates of unlimited corporate spending in federal elections.”²⁰ Another discusses the terrible consequences of spending in elections by “the pharmaceutical companies, the insurance companies, Big Oil, or what President Eisenhower called the ‘military-industrial complex.’”²¹

But these policy assessments are quite skewed. First, one would never know from reading these liberal critiques that the Court’s decision applied equally to *labor unions* as well as corporations—a key omission which distorts the scope of the decision and the lack of even incidental favoritism for groups which could be characterized as favoring any particular political party. Perhaps relying on this mischaracterization and the public’s lack of knowledge about the applicability of *Citizens United* to unions, liberals in Congress have proposed legislation in the form of the so-called DISCLOSE Act,²² which purports to “correct” *Citizens United* by imposing significant new restrictions on corporations, while exempting unions from many of the act’s more onerous, speech restrictive requirements.²³

¹⁹ This analysis of the *Citizens United* and *Ledbetter* cases is excerpted from my and my colleague’s prior work on the subject. See Robert D. Alt and Hans von Spakovsky, *The Liberal Mythology of an “Activist” Court: Citizens United and Ledbetter*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 54, June 15, 2010.

²⁰ Nan Aron, Roberts Court Protects the Powerful, POLITICO, (May 5, 2010, 5:10 AM), <http://www.politico.com/news/stories/0510/36755.html>.

²¹ People for the American Way Foundation, THE RISE OF THE CORPORATE COURT: HOW THE SUPREME COURT IS PUTTING BUSINESS FIRST, 7 (2010).

²² Democracy is Strengthened by Casting Light on Spending in Elections Act, S. 3295, H.R. 5175.

²³ For example, the Act will ban corporations with government contracts over a certain size from making any independent expenditures, while unions with contractual relationships with the government over collective bargaining terms for union members who are government employees can spend unlimited amounts on such expenditures. H.R. 5175m § 101(a). Corporations with more than 20 percent foreign shareholders will be banned from independent expenditures while unions with foreign members will not be affected. *Id.* at § 102(a).

Second, the depiction of multinational or “military industrial complex” corporations belies the actual facts of the case, and the genuine diversity of corporations whose free speech rights the Court vindicated. Just take the named party, Citizens United, a small, issue-oriented organization that will never be mistaken for, say, BP. Citizens United has an annual budget of only \$12 million and most of its funds are donations from individuals.²⁴ It is a grass roots advocacy organization dedicated to reasserting “the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security.” The organization’s objective is “to restore the founding fathers’ vision of a free nation, guided by the honesty, common sense, and good will of its citizens.”²⁵

By characterizing corporations exclusively as for-profit organizations, detractors fail to recognize that Americans tend to influence the political process by joining together with other like-minded individuals—something that the First Amendment, through its protection of associational rights, protects. Many times, these groups of like-minded people adopt corporate forms to take advantage of limited liability or tax advantages. Even the archetype of modern grassroots movements—the tea partiers—have adopted, through organizations like Tea Party Patriots, non-profit corporate operating structures. The fact that individuals who seek to influence the political process take a corporate form for the purposes of limited liability should not affect their ability to speak on issues of public concern. Indeed, the First Amendment does not permit government to restrict speech rights in exchange for adopting a corporate form. Were government able to do so, it could then restrict political speech of news agencies, which are almost universally corporations.

Leaving aside the misguided policy arguments made by opponents, the more serious criticism of the decision comes from those who claim that the five justices in the majority²⁶ were engaging in judicial activism. Specifically, these critics claim *Citizens United* is activist because the Court declared a federal statute unconstitutional and overturned prior precedent, *Austin v. Michigan State Chamber of Commerce*,²⁷ which had upheld a state ban on independent expenditures by a nonprofit trade association, and part of *McConnell v. FEC*,²⁸ which had upheld the “electioneering communications” provision of the Bipartisan Campaign Reform Act (a provision expanding the independent expenditure ban).

However, those criticisms ignore the fact that the *Austin* decision on independent expenditures and the part of the *McConnell* decision on electioneering communications were outliers in the Court’s First Amendment jurisprudence. The majority’s actions in *Citizens United* did not constitute judicial activism, but rather upheld basic First Amendment protections against unlawful encroachments by Congress. It is not judicial activism when a judge overturns two relatively recent decisions that were wrongly decided and that are in conflict with a long line of other precedents—particularly if the decision corrects constitutional errors. If this were not true,

²⁴Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S.Ct. 886, 887 (2010).

²⁵Citizens United, <http://www.citizensunited.org/about.aspx> (last visited June 13, 2010).

²⁶Chief Justice Roberts and Justices Kennedy, Alito, Thomas, and Scalia.

²⁷494 U.S. 652 (1990).

²⁸540 U.S. 93 (2003).

then the same critics of the *Citizens United* decision must believe that *Plessy v. Ferguson*²⁹ should still be the law of the land today and racial segregation should still be considered “constitutional” since under their slanted and sophomoric definition, the justices of the Supreme Court engaged in judicial “activism” in *Brown v. Board of Education*.³⁰ After all, the justices in *Brown* overturned *Plessy* and repudiated the “separate but equal” doctrine as unconstitutional—and arguably did so when they decided subsequent cases striking down similar policies by recalcitrant jurisdictions that acted contrary to *Brown* and its progeny.

The 100-Years-of-Precedent Distortion: Independent Expenditure Law Before *Austin*

The claims by some, including President Obama, that the Supreme Court’s *Citizens United* decision overturned 100 years of precedent are simply untrue. While Congress implemented a statutory ban on direct corporate contributions to federal candidates in 1907, a ban that *Citizens United* did not disturb, it did not impose a ban on independent political expenditures by corporations and unions until 1947 when it passed the Labor Management Relations Act.³¹ Congress overrode President Truman’s veto of the Act even though he “warned that the expenditure ban was a ‘dangerous intrusion on free speech.’”³² The constitutionality of such a ban was not reviewed by the Supreme Court for almost three decades after its passage, although the Court expressed its doubts about the act in more than one case.

As Justice Kennedy’s majority opinion in *Citizens United* points out, that question was in the background of a case considered in 1948 in which a labor union endorsed a congressional candidate in its weekly periodical. The Court did not reach the constitutional question because it held that the statute did not cover the publication, but it “stated that ‘the gravest doubt would arise in our minds as to [the federal expenditure prohibition’s] constitutionality’ if it were construed to suppress that writing.”³³ Four justices said they would have reached the constitutional question and held the expenditure ban unconstitutional, including staunch liberal Justices Hugo Black and William Douglas.

In two other later cases in 1957 and 1972, the Supreme Court refused to decide the constitutional issue, remanding one case on statutory grounds after which a jury promptly found the defendant not guilty of violating the statutory ban, and overturning another conviction under the ban again on statutory grounds without reaching the constitutional issue.³⁴ But in the 1957 case, three justices dissented, “arguing that the Court should have reached the constitutional question and the ban on independent expenditures was unconstitutional.”³⁵ The dissenters included Chief Justice Earl Warren, probably the most renowned liberal justice of the last century.

The seminal decision on campaign finance reform is *Buckley v. Valeo*,³⁶ the case in which the Court considered various challenges to the Federal Election Campaign Act of 1971. In addition

²⁹163 U.S. 537 (1896).

³⁰347 U.S. 483 (1954).

³¹This ban is codified at 2 U.S.C. § 441b.

³²*Citizens United*, 130 S.Ct. at 900 (citations omitted).

³³*Id.* at 900–901 (citing *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121–122 (1948)).

³⁴*United States v. Automobile Workers*, 352 U.S. 567 (1957); *Pipefitters v. United States*, 407 U.S. 385 (1972).

³⁵*Citizens United*, 130 S.Ct. at 901.

³⁶424 U.S. 1 (1976).

to placing limits on direct contributions to federal candidates, this legislation also enacted a new independent expenditure ban that applied to individuals as well as associations, partnerships, corporations, and unions. The ban prohibited spending more than \$1,000 “relative to a clearly identified candidate...advocating the election or defeat of such candidate.”³⁷ Although the Court upheld the limits on direct contributions because the governmental interest in the “prevention of corruption and the appearance of corruption” was sufficiently important, the Court threw out the limits on independent expenditures. As Justice Kennedy noted in *Citizens United*, the *Buckley* Court “explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that ‘the independent expenditure ceiling...fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,’ [] because ‘[t]he absence of prearrangement and coordination...alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.’”³⁸ Only one justice dissented from this invalidation of independent expenditures limitations as a violation of the First Amendment.

The separate 1947 ban on all independent expenditures by corporations and unions codified in §441b was not considered by the Court in the *Buckley* decision because it was not challenged, but as Justice Kennedy correctly states, if it had been, “it could not have been squared with the reasoning and analysis of that precedent.”³⁹ In fact, the *Buckley* case cited approvingly to the dissent authored by liberal Justice Douglas in the *Automobile Workers* decision from 1957.⁴⁰

Only two years after the *Buckley* decision, the Court once again struck down an independent expenditure ban in *Bellotti v. First National Bank of Boston*.⁴¹ In an opinion written by Justice Lewis Powell, the Court ruled that a Massachusetts statute prohibiting corporations from spending any funds to influence or affect voters’ opinions on referenda issues violated the First Amendment. According to the Court, there was no support “for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation...In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”⁴² In fact, *Bellotti* was just the latest decision from the Court recognizing that First Amendment protections extend to corporations—Justice Kennedy cites to 22 such cases in his majority opinion in *Citizens United*.⁴³ Ironically, some of these involved corporations like the New York Times Company that have condemned the majority for its affirmation of free speech rights for corporations in *Citizens United*.

The Break with the Constitution and Precedent: *Austin*

It was not until *Austin v. Michigan Chamber of Commerce*⁴⁴ in 1990 that five justices of the Supreme Court suddenly overrode the long string of prior precedents and upheld a Michigan ban

³⁷*Buckley*, 424 U.S. at 44.

³⁸*Citizens United*, 130 S.Ct. at 901–902 (citations omitted).

³⁹*Id.* at 902.

⁴⁰*Buckley*, 424 U.S. at 43.

⁴¹435 U.S. 765 (1978).

⁴²*Bellotti*, 435 U.S. at 784–785.

⁴³*Citizens United*, 130 S.Ct. at 899–900.

⁴⁴494 U.S. 652 (1990).

on corporate independent expenditures that supported or opposed a candidate for state office, a crime punishable as a felony. As Justice Kennedy notes, the Court simply bypassed *Buckley* and *Bellotti* as if they did not exist, creating a new justification for limiting political speech: “preventing the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁴⁵ What the Court did in *Austin* satisfies the very definition of judicial activism—it ignored the plain language of the First Amendment that “Congress shall make no law . . . abridging the freedom of speech” and ignored decision after prior decision recognizing the First Amendment rights of corporations and invalidating other independent expenditure bans.

The Court’s Consistent Rejection of *Austin*’s Logic

The Supreme Court’s *Buckley* decision made it clear that the only basis for upholding campaign finance regulations is to prevent “corruption or the appearance of corruption” in the election process. This “exception” to the rule of free speech guaranteed by the First Amendment was applied by the Court in a series of cases after *Buckley*. While it is not clear that the mere appearance of corruption should be sufficient to prohibit core, First Amendment speech, the Court has time and again rejected other theories justifying campaign finance regulations such as “speech equalization.” In *Buckley*, the government argued that it had an interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” that justified limits on independent expenditures.⁴⁶ However, as the justices said in the *per curiam* opinion, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁴⁷ This was upheld by the Court most recently in *Davis v. FEC*, in which the Court noted once again that preventing corruption or the appearance of corruption is the only legitimate and compelling governmental interest for restricting campaign finances and that the Court has continuously rejected equalizing the relative ability of different individuals and groups to influence elections as justification for a cap on independent expenditures.⁴⁸ Even in *McConnell*, the Court noted when assessing standing that there is no legal right to have the same resources to influence the electoral process.⁴⁹

In 1985, the Court struck down a provision of the presidential public funding law that made it a criminal offense for a political committee to make an independent expenditure of more than \$1,000 to further the election of a candidate receiving public financing.⁵⁰ In rejecting this ban on independent expenditures, the Court repudiated “the notion that the PACs’ form or organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases.”⁵¹

⁴⁵ *Austin*, 494 U.S. at 660.

⁴⁶ *Buckley*, 424 U.S. at 48.

⁴⁷ *Id.* at 48-49.

⁴⁸ 128 S.Ct. 2759, 2773 (2008), citing *Nixon v. Shrink Missouri Government*, 528 U.S. 377, 428 (2000) and *FEC v. National Conservative Political Action Commission*, 470 U.S. 480, 496-497 (1985).

⁴⁹ *McConnell*, 540 U.S. at 227.

⁵⁰ *National Conservative Political Action Committee*, 470 U.S. 480.

⁵¹ *Id.* at 494.

Justice Breyer wrote the opinion in *Colorado Republican Federal Campaign Committee v. FEC*⁵² in 1996 that threw out state limitations on independent expenditures by political parties, noting that such expenditures fall “within the scope of the Court’s precedents that extend First Amendment protection to independent expenditures.”⁵³ When Justice Breyer authored the Court’s opinion in *Randall v. Sorrell* in 2006 that struck down expenditure limitations imposed by Vermont on individuals running for office, he once again cited preventing corruption and its appearance as the primary justification for governmental restrictions. Breyer noted that the Court had “considered other governmental interests advanced in support of expenditure limitations. *It rejected each.*”⁵⁴ Breyer pointed out, in contrast to his dissent in *Citizens United*, that over the past thirty years, “this Court has repeatedly adhered to *Buckley*’s constraints, including those on expenditure limits” and cited to seven other opinions since *Buckley*.⁵⁵

All of these decisions that struck down various federal and state attempts to limit independent expenditures by individuals, political parties, candidates, political action committees, and associations, make it very clear that the Court’s decision in *Austin* was truly an outlier that conflicted with the Court’s jurisprudence on independent expenditures. It was directly contrary to the leading and most significant precedent in this area—*Buckley v. Valeo*.

Restoring Established Precedent: *Citizens United*

As Justice Kennedy recognized in *Citizens United*, the Court was “confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”⁵⁶ Yet in defending the independent expenditure ban, the Solicitor General, Elena Kagan, basically abandoned the only justification given by the five-member majority in the *Austin* case—the antidistortion rationale that the justices had created. As Justice Kennedy said, Kagan instead tried to claim that the ban was justified on an anticorruption rationale and a shareholder-protection interest, grounds that had never been used to justify the ban on independent expenditures. The problem, of course, with the anticorruption rationale, is that such a justification—if accepted by the Court—would allow the government to “prohibit a corporation from expressing political views in media beyond those presented here.”⁵⁷

Under the rationale advanced by those critics, the Supreme Court should have upheld this federal statute and thus the ability of the government, as conceded in oral arguments by the government, to ban books or pamphlets with a political message—a claim that crystalizes the radical, anti-free speech nature of the law. Indeed, given that media corporations are only statutorily exempted from this federal law, had the Supreme Court deviated from the well-established *Buckley* line of

⁵²518 U.S. 604 (1996).

⁵³*Id.* at 614.

⁵⁴548 U.S. 230, 241 (2006) (emphasis added).

⁵⁵*Id.* at 242.

⁵⁶*Citizens United*, 130 S.Ct. at 903.

⁵⁷*Id.* at 904. In addition to the independent expenditure ban, the electioneering communication provision of FECA was also at issue in this case, which prohibits corporations and labor union from making any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office even if there is no appeal to vote for or against the candidate that is made within 60 days of a general election or 30 days of a primary and that can be received by 50,000 or more persons. 2 U.S.C. § 434(f) (3).

cases and upheld the burdensome speech restrictions in the law, then consistent with the opinion, Congress at some future point could have eliminated the corporate media exemption, giving the government the authority to ban political speech by any media organization availing itself of a limited liability structure—from the *New York Times* to Fox News. Those who would seek to uphold the restrictions on non-media corporate speech while seeking broader protection for media corporations rest their claims on the argument that the press has a greater First Amendment right than individuals or associations, a view the Court has previously correctly rejected.⁵⁸

The reasons for correcting the outlier error that is *Austin* are clear, and were articulated by the Court in *Citizens United*. First, the Court noted that precedent should be respected “unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”⁵⁹ The *Austin* decision was poorly reasoned and “itself contravened this Court’s earlier precedents in *Buckley* and *Bellotti*.”⁶⁰ Second, the government did not even defend *Austin*’s antidistortion rationale, and when a party does not defend “the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.”⁶¹ Third, and most importantly, *Austin* relied on a faulty historical record of campaign finance laws and “abandoned First Amendment principles.”⁶²

The majority’s opinion in *Citizens United* was not an act of judicial activism; it was an act of correction, overruling a twenty-year old case erroneously decided by five justices who clearly substituted their policy views on how elections should be conducted for the dictates of the First Amendment—contravening a long line of other precedents and the Constitution itself. Instead, the Court returned to the principles that had been established in prior decisions, particularly *Buckley* and *Bellotti*, that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”⁶³ As Chief Justice Roberts pointed out, the Court had “no way to avoid *Citizens United*’s broader constitutional argument” because the applicable statute clearly applied to *Citizens United* and prohibited its actions.

The dissent clearly believed that *Citizens United* should lose the statutory and constitutional claims it was making in the case, yet those justices then bizarrely argued that “the majority should nonetheless latch on to one of [the narrower statutory or constitutional claims] in order to avoid reaching the broader constitutional question of whether *Austin* remains good law... It even suggests that the Court’s failure to adopt one of these concededly meritless arguments is a sign that the majority is not ‘serious about judicial restraint.’”⁶⁴ As the Chief Justice correctly observed, this argument is based on the false premise that avoiding deciding constitutional questions “somehow trumps our obligation faithfully to interpret the law.”⁶⁵ Here, the majority

⁵⁸ *Austin*, 494 U.S. at 691.

⁵⁹ *Id.* at 911–912.

⁶⁰ *Id.* at 912.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 913. Since the part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) that upheld the electioneering communication provision had relied on the antidistortion interest from *Austin*, the Court also overruled that portion of *McConnell*.

⁶⁴ *Citizens United*, 130 S.Ct. at 918–919 (Roberts, concurring).

⁶⁵ *Id.* at 919.

faithfully interpreted the constitutional protection in the First Amendment against the abridgement of that right by Congress—it would have constituted judicial activism to studiously ignore the First Amendment as the dissent urged and uphold an obviously unconstitutional federal statute.

Ledbetter

In *Ledbetter v. Goodyear Tire & Rubber Co.*,⁶⁶ the Supreme Court held that the discriminatory acts that triggered the time limit for filing a claim with the Equal Employment Opportunity Commission could only be discriminatory pay decisions, not later nondiscriminatory pay decisions that supposedly perpetuated the effects of the earlier discrimination. As another example of supposed judicial activism, one critic of the five-member majority's opinion written by Justice Alito claimed the Court had ruled against a "woman paid less than her male peers for 20 years" because she failed to file her suit "within 180 days of the first instance of discrimination" (a statutory requirement) and even "though she had no way of learning about the discrimination until years later,"⁶⁷ a patently false claim. Another report criticizing the "infamous" and "outrageous" decision of the majority, again falsely stated that Ledbetter was unaware of the discriminatory treatment and claimed that the majority was "twisting employment and labor law to serve corporate wrongdoers."⁶⁸

Contrary to all of these criticisms, the majority's opinion in *Ledbetter* was a straight-forward application of the law passed by Congress governing discrimination claims. Ledbetter, a female employee of Goodyear Tire & Rubber Company, had filed a claim with the EEOC asserting that Goodyear had discriminated against her in her job evaluations because she was a woman, actions that resulted in her receiving lower pay. She then filed a lawsuit claiming violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The Equal Pay Act claim was dismissed but a jury found in favor of Ledbetter's Title VII claims.⁶⁹

Title VII makes it unlawful to discriminate "against any individual with respect to his compensation...because of such individual's...sex."⁷⁰ Congress placed a statute of limitations in Title VII, requiring an employee to first file a charge with the EEOC within a specified period, either 180 or 300 days depending on the state, "after the alleged unlawful employment practice occurred."⁷¹ If a claim is not filed with the EEOC within that time limit, no lawsuit can be filed.⁷² In trying to determine whether Ledbetter filed her lawsuit in compliance with the applicable statutory time limit, the Court emphasized "the need to identify with care the specific employment practice that is at issue."⁷³ Under a disparate treatment claim such as was asserted by

⁶⁶550 U.S. 618 (2007).

⁶⁷Aron, *supra* note 19.

⁶⁸People for the American Way Foundation, *supra* note 20.

⁶⁹*Ledbetter*, 550 U.S. at 621–622.

⁷⁰42 U.S.C. §2000e-2 (a) (1).

⁷¹*Id.* §2000e-5 (e) (1).

⁷²*Id.* §2000e-5 (f) (1).

⁷³*Ledbetter*, 550 U.S. at 624.

Ledbetter, prior precedent specified that the central element of the Court's analysis must be determining the discriminatory intent of the defendant.⁷⁴

Ledbetter claimed her case was timely filed because she was issued discriminatory paychecks during the 180 days before her EEOC filing, and also pointed to a decision to deny her a raise that was made during that same time period. However, she did not claim that any of these occurrences were the result of *intentional* discriminatory treatment by Goodyear; instead, she claimed that "the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period. Similarly, she maintains that the 1998 decision [to deny her a raise] was unlawful because it 'carried forward' the effects of prior, uncharged discrimination decisions."⁷⁵ In other words, Ledbetter was claiming that her lawsuit was timely even though the intentionally discriminatory treatment (her negative job evaluation) had occurred *before* the charging time period because the evaluation "had continuing effects during that period."⁷⁶ Under her view, every paycheck that gave a woman less pay would be a separate violation of Title VII, with a new statute of limitations beginning to run with each paycheck, "regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period."⁷⁷

The problem with this view of the law was that it was contrary to the prior precedents of the Court, not that the five justices in the majority were engaging in judicial "activism" to "twist" the law in favor of a corporate defendant. In *United Air Lines, Inc. v. Evans*,⁷⁸ the Court rejected an almost identical claim because it was untimely. The plaintiff, Evans, was forced to resign because United refused to employ married flight attendants, but she did not file an EEOC claim. When she was later rehired, United refused to give her credit for her prior employment for purposes of seniority. Although Evans admitted she had not filed an EEOC claim based on the original, intentional discrimination that caused her resignation, she argued that United's refusal to give her credit for her prior service gave "present effect to [its] past illegal act and thereby perpetuated[d] the consequences of forbidden discrimination."⁷⁹ The Court rejected the claim as untimely in an opinion authored by none other than Justice Stevens:

United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the [relevant time period]. A discriminatory act which is not made the basis for a timely charge...is merely an unfortunate event in history which has no present legal consequences."⁸⁰

As Justice Alito pointed out in the majority opinion in *Ledbetter*, "[i]t would be difficult to speak to the point more directly."⁸¹

⁷⁴*Id.* at 624 (citing *Chardon v. Fernandez*, 454 U.S. 6 (1981) (*per curiam*); *Teamsters v. United States*, 431 U.S. 324 (1977); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (Blackmun, J., joined by Brennan, and Marshall, JJ., concurring in part and concurring in judgment)).

⁷⁵*Ledbetter*, 550 U.S. at 624–625.

⁷⁶*Id.* at 625.

⁷⁷*Id.* (citations omitted).

⁷⁸431 U.S. 553 (1977).

⁷⁹*Ledbetter*, 550 U.S. at 625.

⁸⁰*United Air Lines*, 431 U.S. at 558.

⁸¹*Ledbetter*, 550 U.S. at 626.

The *United Air Lines* decision was simply one opinion out of a number of others that applied the same rule—that the intentional act of discrimination must occur within the relevant time period under Title VII and it is not sufficient that the later effects of that discrimination occur during the time period. The time in which to file with the EEOC begins to run from the date that the intentional discrimination occurs. In the majority’s opinion, Justice Alito pointed to *Delaware State College v. Ricks*,⁸² in which a college professor’s claim was dismissed as untimely because he filed his claim after he was terminated, not when he was denied tenure, which was the act of intentional discrimination he was contesting. Justice Alito also noted *Lorance v. AT&T Technologies, Inc.*,⁸³ in which the claim of female union workers was dismissed as untimely because they filed their claim after they were laid off due to low seniority, not when the rules governing seniority were changed in the union contract, which was the specific act that the women were claiming was intentionally discriminatory. As Justice Alito wrote, the Court held in these prior cases “that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt.”⁸⁴

After the *Lorance* decision, Congress actually amended Title VII to cover the specific seniority problem in that case, allowing liability from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application.⁸⁵ But it did *not* amend the law to change the results of the *Delaware State College* or *United Air Lines* decisions. Critics of the *Ledbetter* decision apparently wanted the Court to overlook these prior precedents, the legislative history of the law, and the law’s statutory text, in order to change the results of the case for a sympathetic plaintiff.

Ledbetter’s attempt in her case to circumvent the intent requirement and the time limit imposed by Congress in the statute was “unsound.” As Justice Alito noted, this would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent.⁸⁶ It would also distort the integrated, multi-step enforcement process of Title VII. Furthermore, such a holding would have violated the Court’s stated desire to be respectful of the legislative process that crafted this statute and “give effect to the statute as enacted.”⁸⁷

Ledbetter also claimed that another Supreme Court case required different treatment of a pay claim. *Bazemore v. Friday* involved employees of a state agency that originally segregated it’s employees into “a white branch” and “a Negro branch,” with the latter receiving less pay.⁸⁸ In 1965, the branches were combined but the disparate pay continued. After Title VII was amended in 1972 to cover public employees, the black employees sued over the dual pay disparity. The Court held that those claims were not time barred because the state agency had adopted a facially

⁸²449 U.S. 250 (1980).

⁸³490 U.S. 900 (1989). Justice Stevens also joined this opinion.

⁸⁴*Ledbetter*, 550 U.S. at 627.

⁸⁵42 U.S.C. § 2000e-5(e)(2). See *Ledbetter*, 550 U.S. at 627, n. 2.

⁸⁶*Ledbetter*, 550 U.S. at 629.

⁸⁷*Id.* at 630 (citations omitted).

⁸⁸478 U.S. 385 (1986)(per curiam).

discriminatory pay structure that continued after 1972. Therefore, “the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.”⁸⁹

But the situation in *Bazemore* was distinctly different than the situation in *Ledbetter*: “*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied. The fact that precharging period discrimination adversely affects the calculation of a neutral factor...that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.”⁹⁰ There was no evidence (and no claim) that Goodyear had adopted its pay system in order to discriminate on the basis of sex, so the *Bazemore* rationale did not apply to the *Ledbetter* case.

The claims made by critics that *Ledbetter* did not know about the discrimination and that the limitation should have been stayed are also not in accord with the facts in that case. The Court noted in its decision that it was not addressing the discovery issue because *Ledbetter* did “not argue that such a rule would change the outcome in her case.”⁹¹ In other words, she made no claim that she did not know about the discrimination; in fact, her claims of sex discrimination “turned principally on the misconduct of a single Goodyear supervisor, who, *Ledbetter* testified, retaliated against her when she rejected his sexual advances during the early 1980’s and did so again in the mid-1990’s when he falsified deficiency reports about her work.”⁹² And in her deposition, she admitted that she was aware of the pay disparity of which she complained more than 5 years before she filed her claim. It is obvious that *Ledbetter* could not argue that the statute of limitations for filing an EEOC claim should be stayed because she clearly knew about the unwelcome sexual advances and the deficiency reports being filed by her supervisor. The fact that the supervisor who was accused of wrongdoing had died by the time this case went to trial also provides a good example of why statutes of limitation are important—if *Ledbetter* had filed her claim in accordance with the time limit in the statute, the supervisor’s testimony would have been available to the EEOC and the courts. Such limitation periods put defendants on notice of claims and prevent stale claims from being brought at a time when witnesses are no longer available or documentary evidence has been destroyed under normal document retention policies.

Many of *Ledbetter*’s arguments in this case were “policy arguments in favor of giving the alleged victims of pay discrimination more time before they are required to file a charge with the EEOC.”⁹³ But those policy arguments were being made to the wrong branch of the federal government. It was Congress, not the Court, which chose a very short deadline for filing employment discrimination claims with the EEOC. Critics who did not like that short deadline

⁸⁹*Id.* at 634.

⁹⁰*Id.* at 637.

⁹¹*Id.* at 642, n. 10 (emphasis added).

⁹²*Id.* at 632, n. 4.

⁹³*Id.* at 642.

apparently wanted the Court to “twist” Title VII to write that deadline out of the statute. Because the majority refused to do so, but instead applied the statute as written, they are supposedly “activist” judges who were defying Congress in favor of a corporate defendant.

These charges simply cannot be supported by what happened in this case. The decision and its legislative aftermath actually demonstrate the best features of the U.S. constitutional system and the separation of powers designed and built into it by the Framers. The Supreme Court followed *stare decisis* and its own precedents and interpreted Title VII’s statute of limitations as it was promulgated by Congress. Congress did not like the result and, listening to the policy (as opposed to legal) arguments made in this case, changed the law with the Lilly Ledbetter Fair Pay Act of 2009. This act amended the 180-day statute of limitations for filing a pay discrimination claim with the EEOC to make it clear that liability would accrue (and the time limit would begin to run) not just when the discriminatory employment practice occurs, but with respect to discriminatory compensation:

[W]hen a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practices, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wage, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.⁹⁴

Following President Obama’s unseemly (and inaccurate) attack on the Supreme Court’s ruling in *Citizens United* during this year’s State of the Union address, a chorus of liberals, including Obama’s press secretary, congressional Democrats, and a number of liberal activist organizations, have mimicked the claim that the Supreme Court is controlled by “conservative activists.” This most recent attack comes on the heels of similar criticism that has been made about the Court’s ruling in the *Ledbetter* case.

But the facts of these cases and an examination of the legal analysis applied by the justices in their majority opinions show that there is no merit to any of these claims. These criticisms are actually evidence of the vulnerability to the charge of Left-wing activism that has been properly and correctly leveled against some liberal federal judges for refusing to follow the law and imposing their social and ideological views in the courtroom. By ascribing the “activist” label to conservative judges, liberals appear to be attempting to damage the public image of the Supreme Court and specific justices. These attacks are also clearly an attempt to propagate a moral equivalency with liberal judges who are, in actuality, activists. It is unfair to the justices on the Court who participated in these decisions and is a cynical and derisive tactic that injures the public’s faith and confidence in the judicial system.

The Kagan Nomination

The key question for any nominee is how will they approach the judicial process—what is their judicial philosophy. There is a reason that critics of the Roberts Court have chosen the nomenclature of activism, for that term embodies precisely how a judge should *not* carry out their duties. What a judge should do is interpret the Constitution and the law as it is written, not

⁹⁴42 U.S.C. § 2000e-5(e)(3)(A).

as they would have written it, nor according to how foreign nations would interpret it. To do so, a judge must seek to apply the text according to its plain and original meaning. This is not easy. There are sometimes real disagreements. But originalism and textualism are truest to the enacted law, and these interpretive methodologies reduce the risk that the judge will simply use the interpretive process as pretext for asserting preferred policy biases as law.

With this as the framework, there are a number of issues in Kagan's record and hearings that are cause for concern. In the course of the hearings, Kagan has suggested that she would be open to consulting foreign law and virtually any other sources in interpreting text. In addition seemingly embracing the Supreme Court's illegitimate and regrettable "world opinion poll" usage of foreign law in the Eighth Amendment context, this suggests that Kagan has rejected textual and originalist approaches in favor of more pragmatic ones. While pragmatism may be fine in the legislative sphere, in the judicial context it is often a source of activism.

Another major issue of concern is Kagan's treatment of the military, and what that says about how she approaches the law. Kagan claimed in her response to questions from Senator Sessions that she thought that she had an obligation to return to Harvard's prior policy of restricting access for military recruiters to Harvard's career services office based upon the decision of the Third Circuit Court of Appeals striking down the Solomon Amendment. At best, this seems disingenuous; at worst, her answer suggests that she is willing to use the thinnest veneer of law—even law which she knows is not applicable (the Third Circuit's decision) in the face of law which she knew was applicable (the Solomon Amendment)—in order to impose her desired policy preference.

The Third Circuit decision had not taken effect—the mandate had not been issued—when she reinstituted Harvard's policy of denying military recruiters the full and equal access to which they were entitled under the Solomon Amendment. Additionally, the Third Circuit's ruling was stayed pending Supreme Court review, preventing it from interfering with the operation of the Solomon Amendment. Dean Kagan knew that Harvard's previous separate and unequal treatment of the military recruiters was deemed noncompliant by the DoD, which led her predecessor to reverse course and permit equal access in order to avoid loss of federal funds. Since there was no change in the law effectuated by the Third Circuit's stayed decision, there was no basis to return to a position she knew to be noncompliant.

But even if the mandate had issued or the case had not been stayed, the Third Circuit decision did not even cover Harvard. The federal government generally applies non-acquiescence to lower court opinions which are adverse to federal laws and policies, which is to say, they treat the decisions as only binding in the district or circuit in which the decisions are issued. In this case, that would mean that the Third Circuit opinion, were it ever given legal effect (which it was not), would apply only to schools in the Third Circuit. But Harvard is in the First Circuit, a fact which the dean of Harvard Law School undoubtedly knew.

Simply put, there was no duty for Dean Kagan to violate the law. She was still bound by the Solomon Amendment, but she used an inapplicable decision as an excuse to push her policy preferences. This use of non-binding law as cover is reminiscent of her Oxford thesis, in which she wrote that it is not "wrong or invalid" for judges to "mold and steer the law" in order to

"promote certain ethical values and achieve certain social ends." But she suggested that judges should give themselves cover in doing so: "No judge should hand down a decision that cannot plausibly be grounded in principles referable to an acceptable source of law. If, on the other hand, a court can justify a ruling in terms of legal principle, then that Court must make every effort to do so."

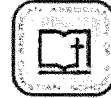
Accordingly, the military recruiting affair appears highly relevant to understanding how it is that Kagan approaches the law. It fits with a pattern dating back at least to her Oxford thesis of attempting to find legal window dressing to justify the imposition of policy preferences.

These issues, as well as her laudatory praise of activist judges like Aharon Barak, raise grave concerns about what kind of justice she would be. Before any Senator votes in favor of Justice Kagan, they need to be as certain as possible that she will be able to uphold her oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich," and not to rule based upon empathy, or personal policy preferences.

I welcome any questions you may have.

American Association of Christian Schools

Education with a Christian Foundation



June 26, 2010

The Honorable Patrick Leahy
Chairman, U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member, U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

The American Association of Christian writes to express strong concerns with President Obama's nominee to the United States Supreme Court, Elena Kagan. She has had minimal experience in a courtroom with only two years of litigation experience prior to becoming the current U.S. Solicitor General. However, the AACS has even greater concerns regarding her record on issues including the sanctity of life as well as her judicial philosophy.

Ms. Kagan's support for federal funding of abortions along with her support for phony compromises on the partial-birth abortion ban and personal endorsements of pro-abortion candidates and organizations raise strong concerns in a nation that is significantly pro-life. She has openly criticized the U.S. Supreme Court decision in *Rust v. Sullivan* that suggests Title X funding should not be permitted to cover family planning pro-choice counseling, and she argues that allowing funds to be allocated to a pro-life agenda and not to an abortion agenda is unconstitutional. Ms. Kagan also urged Justice Marshall to prohibit federal funds to be given to a "religious organization" that offers pregnancy-related care. In writing about organizations that care for the needy, she wrote, "so close to the central concerns of religion, all religious organizations should be off limits" from receiving federal funds. As a national association of Christian schools, we care deeply about the lives of all children, including those children still protected in a mother's womb. We are additionally gravely concerned with Ms. Kagan's clearly secular and anti-religious philosophy.

We have additional strong concerns regarding Ms. Kagan's background and judicial philosophy. Her activity limiting military recruiters at the Harvard Law School shows her contempt not only for the military but also for the Solomon's amendment, a federal law which was upheld by the Supreme Court. In addition, as dean of Harvard Law School Ms. Kagan undertook the effort to update and revise the law school curriculum by adding a required course on international law, while making the course on Constitutional law an elective class. This elevation of foreign law over our own Constitutional law causes strong concern that if confirmed, Ms. Kagan could pose a strong threat to the sovereignty of the Constitution from the highest court in the land. As a Christian educational organization, we believe it is vital that the Justices serving on the Supreme Court have the highest regard for our Constitution and our military in order to ensure that our country continues to enjoy the freedoms that allow us to thrive.

The AACS urges Senate Judiciary Committee members to fully examine the nominee's background and record when she stands before them. We urge them to ask tough questions regarding her blatant pro-abortion record as well as her reluctance to respect our military and the U.S. Constitution over foreign law.

Sincerely,

Dr. Keith Wiebe
President, American Association of Christian Schools

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STATEMENT
OF
KIM J. ASKEW
STANDING COMMITTEE ON THE FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION
concerning the
NOMINATION
of
THE HONORABLE ELENA KAGAN
to be
ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES
before the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JULY 1, 2010

Mr. Chairman and Members of the Committee:

My name is Kim J. Askew of Dallas, Texas, and it is my privilege to chair the American Bar Association's Standing Committee on the Federal Judiciary. I am joined today by William J. Kayatta, Jr. of Maine, our First Circuit representative and the lead evaluator on the Standing Committee's investigation of the Honorable Elena Kagan. We are honored to appear here today to explain the Standing Committee's evaluation of the professional qualifications of Solicitor General Kagan to be Associate Justice of the Supreme Court of the United States.

President Obama announced his nomination of Solicitor General Elena Kagan to be Associate Justice on May 10, 2010. The Standing Committee began its evaluation that very day and continued its work for the next several weeks. The Standing Committee unanimously concluded that General Kagan merits our highest rating and is "Well Qualified" for appointment to the Supreme Court of the United States.

THE STANDING COMMITTEE'S EVALUATION PROCESS

The Standing Committee has conducted its independent and comprehensive evaluations of the professional qualifications of nominees to the federal bench since 1948. The fifteen distinguished lawyers who make up our Committee come from every federal circuit in the United States. These lawyers each spend between 500 and 1,000 hours per year without compensation conducting the nonpartisan peer reviews of the professional qualifications of all nominees to the Supreme Court of the United States and all federal district and lower appellate courts, as well as the Court of International Trade and the Article IV territorial district courts.

The Standing Committee does not propose, endorse, or recommend nominees. Its sole function is to evaluate a nominee's integrity, professional competence, and judicial temperament, and then rate the nominee either "Well Qualified," "Qualified," or "Not Qualified." In so doing,

the Committee relies heavily on the confidential, frank, and considered assessments of lawyers, academics, judges, and others who have relevant information about the nominee's professional qualifications.

The Standing Committee's investigation of a nominee to the Supreme Court of the United States is based upon the premise that the nominee must possess exceptional professional qualifications. As set forth in the ABA's *Backgrounder*:

To merit the Committee's rating of "Well Qualified," a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence and judicial temperament. The rating of "Well Qualified" is reserved for those found to merit the Committee's strongest affirmative endorsement.¹

The significance, range, complexity, and nation-wide impact of issues that such a nominee will confront on the Supreme Court demands no less. As such, our investigation of a Supreme Court nominee is more extensive than nominations to the lower federal courts, and procedurally different in two principal ways.

First, Standing Committee members conduct investigations into the nominee's professional qualifications in every federal circuit in the United States, not only in the resident circuit of the nominee. In accord with our procedures, each Standing Committee member prepared a confidential circuit report, which is included in the comprehensive confidential final report on which the Standing Committee bases its rating.

Second, the Standing Committee commissioned three Reading Groups of scholars and practitioners to review the nominee's legal writings and supplement the Standing Committee's own review of the nominee's writings. Georgetown University Law Center and Washington University in St. Louis School of Law each formed Reading Groups composed of a total of

¹ American Bar Association, *Standing Committee on the Federal Judiciary What it is and How it Works* ("Backgrounder") at p. 10.

twenty-nine professors who are recognized experts in the substantive areas of law they reviewed. Collectively, these professors have decades of experience not only in teaching and scholarship, but also in law firms, non profit organizations, and state and federal government.

The Practitioners' Group is composed of nationally recognized lawyers with substantial trial and appellate practices. All of the readers are knowledgeable of Supreme Court practice, and most have briefed and argued cases in the Supreme Court or in the highest state appellate courts or are former law clerks to Justices on the Supreme Court. The Reading Groups are guided by the same standards that are applied by the Standing Committee and independently evaluate the nominee's analytical ability, clarity, knowledge of the law, application of the facts to the law, and ability to communicate effectively. Each member of each group reduces his or her evaluation to writing, with cited examples, and those written evaluations are then provided to each member of the Standing Committee.

In undertaking its extensive investigation of the professional qualifications of General Kagan, the Standing Committee wrote to invite input relevant to our investigation from 2,453 persons, including all federal district and appellate judges, as well as magistrate judges, Justices of the Supreme Court of the United States, many state judges, lawyers, and community and bar representatives. The Standing Committee solicited input from the lawyers, judges, and additional individuals identified by General Kagan in her Personal Data Questionnaire submitted to this Committee as possibly having knowledge of her professional qualifications. The Standing Committee identified other persons with such knowledge through interviews with lawyers and judges and a review of General Kagan's writings. We interviewed many who had worked with and against General Kagan in her capacity as Solicitor General, and others who had personally witnessed her oral arguments or read transcripts of those arguments. We interviewed law school

deans and law professors at Harvard, the University of Chicago, and elsewhere, who were familiar with General Kagan's scholarship, her work as a law professor, and her service as Dean of the Harvard Law School. We also interviewed Article III judges at each level of the federal judiciary, and lawyers who had worked with her in private practice and at the White House.

We also gathered and reviewed General Kagan's major writings. To facilitate the Standing Committee's review of her writings, an intranet site was established containing all of the nominee's writings that were publicly available, including her law review articles, speeches, briefs filed in cases she handled as an associate, written materials such as letters and emails generated while Dean of Harvard Law School, transcripts of her oral arguments as Solicitor General, and briefs filed by the Office of the Solicitor General under her leadership. Certain materials released by the Clinton Administration were reviewed. The Standing Committee also considered its confidential evaluation conducted in 1999 when General Kagan was nominated to the United States Court of Appeals for the District of Columbia.²

The Standing Committee followed General Kagan's career at the University of Chicago and Harvard Law School, and in Washington, interviewing lawyers, professors, staff, and colleagues, in each case specifically searching for all views, negative or positive, regarding her professional qualifications for service on the Supreme Court.

The Standing Committee based its evaluation on these interviews with judges, lawyers, law professors and community representatives from across the United States; on its own reading of the nominee's major writings; on reports of the three Reading Groups; and on an in-depth personal interview of the nominee that was conducted by our lead investigator, First Circuit representative William J. Kayatta, Jr., and Chair Askew on June 13, 2010. Each member of the

² In connection with the 1999 evaluation, a substantial majority of the Standing Committee found her "Qualified" for service and a minority rated her "Well Qualified."

Standing Committee reviewed the confidential final report and individually evaluated the nominee's professional qualifications by assessing her integrity, professional competence, and temperament. The Standing Committee unanimously concluded³ that General Kagan was "Well Qualified" to be Associate Justice of the United States.

OUR EVALUATION OF GENERAL KAGAN'S PROFESSIONAL QUALIFICATIONS

The Standing Committee did not base its rating on, or seek to express any view regarding General Kagan's ideology, political views or political affiliation. It also did not solicit information with regard to how General Kagan might vote on specific issues or cases that might come before the Supreme Court of the United States. Rather, the Standing Committee's evaluation of General Kagan is based solely on a comprehensive, nonpartisan, nonideological peer review of the nominee's integrity, professional competence, and judicial temperament.

1. Integrity

In evaluating integrity, the Standing Committee considers the nominee's character and general reputation in the legal community, as well as the nominee's industry and diligence.⁴ The Committee also considers the extent to which there have been any findings of ethical violations or the like by a nominee, of which there have been none relating to General Kagan. She has earned and enjoys an excellent reputation for integrity and outstanding character.

Lawyers and judges uniformly praised the nominee's integrity. We cite a few representative comments as follows:

"He believes her professional demeanor is excellent and that she has the highest reputation for integrity. He would give her the highest possible rating to be on the U.S. Supreme Court."

³ One member of the Standing Committee did not vote because she is a partner at the firm in which the nominee previously worked several years ago.

⁴ *Backgrounder* at 3.

* * *

"Her integrity is of the highest order."

* * *

"He has no qualms about her integrity. 'She is a paragon of virtue.'"

* * *

"There are no integrity issues. She is fair-minded and never played games."

* * *

"He would rate her Well-Qualified Plus!"

* * *

"There is no integrity issue. She is 'straightforward' and terrific."

* * *

"Judge [] knows her well and says that her temperament is excellent. She is revered by her students. He has a law clerk who served in Iraq and Afghanistan who wrote a letter in support of Dean Kagan and her position on the military. He says she is very sensitive to these issues and she treated the military students very well. He gives her integrity an A plus."

* * *

"There are no integrity or character issues. The Government never took positions that weren't addressed with the parties; her statements during the meetings were clear, accurate and truthful. He rates her 'Well Qualified.' She is 'about as good as it gets.'"

* * *

"There are no integrity or character issues. From his personal experience and from what he has heard, she has the highest integrity, forthrightness and honesty."

* * *

"Her integrity is impeccable. There is simply no question of her integrity."

* * *

"Her integrity is 'her strongest quality.' She 'tells it as it is, even when it is unpleasant to do so.' She told [her boss] he could not do certain things he wanted to do because they were not supported by law. She does not flinch in the face of power."

* * *

"Her integrity is top-notch. The Solicitor's General's office has a strong tradition of wanting the Supreme Court to be certain of its accuracy of information and reliability in the law. She has continued that tradition."

* * *

The nominee's handling of military recruiters at Harvard Law School was raised in the media as a possible basis for criticizing the integrity of the nominee for allegedly treating military recruiters and students interested in the military as second class citizens. Harvard Law School had a long-standing policy denying placement office services to any firm or organization that refused to hire students for reasons including known sexual orientation. She enforced the policy. She did so less forcefully with the military than many in the Law School wished, setting up an alternative channel to provide similar services through a veterans group, and then exempting the military from enforcement of the policy when required to do so in response to the threatened loss of all federal funding for the entire university. In other words, she provided military recruiters with a degree of student access that likely would not have been provided to private employers with similar policies. Our interviews and review of these facts disclosed no evidence that then Dean Kagan demonstrated any type of bias that would cause us to question her integrity under our standards.

On the basis of the foregoing comments and our extensive review as described above, the Standing Committee concluded that General Kagan possesses the integrity required to receive a "Well Qualified" rating.

2. Professional Competence

“Professional competence” encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience. A Supreme Court nominee must possess “exceptional professional qualifications,” including an especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence. The nominee must be able to write clearly and persuasively, harmonize a body of law, apply the law to the facts, and give meaningful guidance to the trial and circuit courts and the bar.⁵ General Kagan’s professional competence is exceptional.

In summarizing the basis for this conclusion, we emphasize that the Committee does not simply express its own view. Rather, as a conduit for the views of the nominee’s peers in our profession, it also expresses the nearly unanimous consensus of the judges, lawyers, academics, and government officials whom we interviewed. This point merits repeating: almost all of the experienced, dedicated, and knowledgeable sitting judges, former solicitor generals from both parties, legal scholars from top law schools across the country, and lawyers who have worked with or against the nominee in government or court describe the nominee as outstanding in all respects and cite specific evidence in support of that view.

Many described her professional competence as “exceptional,” “extraordinary,” “very high,” and “as good as it gets.” Specific comments from a wide array of lawyers and judges include:

“Her legal skills are ‘remarkable and brilliant, and her analytical skills are balanced.’ She is a gifted writer.’ Her writing displays a respect for judges and ‘she keeps her points narrow and minimalist, not setting policy, which is the way I think a judge should write.’”

* * *

⁵ *Backgrounder* at 9.

"She is 'extraordinarily bright, not in a theoretical way.' She has the ability to 'deal with issues in a practical and real way.' . . . She had the ability to quickly comprehend many of the issues and to understand the statutory, legal and litigation aspects that would be impacted. Kagan has a broad knowledge of the jurisprudence coupled with a practical knowledge of the law. She has an 'innate knowledge of the litigation process and understands how legal arguments translate from the courtroom.'"

* * *

"Elena is very capable at 'at the highest level.' . . . She organizes her thinking in a 'superior way, super smart and very articulate.'"

* * *

"Her analytical ability was excellent and 'as good as he has ever seen.' She knew what was important and what was not, and she was 'smart and logical.'"

* * *

"Elena is 'exceptionally competent,' 'was one of the brightest and best.' . . . She was rated a '10 out of 10 and a star.' You had total confidence in her work."

* * *

"She is an extremely gifted and an exceptionally bright and thoughtful lawyer. "

* * *

"She was 'a real superstar, an excellent writer, a good thinker and a good strategist.' . . . Her analytical ability was at the 'highest order' and 'beyond her years.'"

Given the breadth, diversity, and strength of this and similar feedback from judges and lawyers of all political persuasions and from so many parts of the profession, the Committee would have been hard pressed to come to any conclusion other than that her demonstrated professional competence is exceptionally outstanding. In this respect, and as is the intention behind our peer review evaluation, the rating communicates much more than the judgment of our fifteen members. With this important thought in mind, we summarize the basis of our conclusion that General Kagan possesses sufficiently outstanding professional competence to be rated "Well Qualified."

A. Review of the Nominee's Writings

The Standing Committee read the nominee's scholarly articles, plus representative samples of her other writings, including the briefs she submitted in the cases she argued as Solicitor General, and hundreds of other writings that came to our attention throughout this evaluation process.

In addition, as noted above, we also commissioned three "Reading Groups" to provide us with detailed feedback regarding the degree of professional competence demonstrated in a wide and representative range of the nominee's writings. The more than 300 pages of close analysis that resulted from the work of these groups were then shared with our entire Committee for its review.

Michael Gottesman, Professor of Law, led the Reading Group of 15 professors at Georgetown. Gregory P. Magarian, Professor of Law, led the 14 professors who participated in the Washington University Reading Group. Thomas Z. Hayward, Jr. and Roberta D. Liebenberg, both former Chairs of this Standing Committee, and Mary A. Wells, a former Standing Committee member, led the Practitioners' Reading Group, which consisted of 16 distinguished lawyers from around the country with substantial trial and appellate practices. The members of the Reading Groups and the substantive areas of their expertise and review are listed in Exhibits A, B, and C appended to this letter.

Our two law school Reading Groups summarized their conclusions as follows:

Washington University:

"The members of the Washington University reading group strongly and unanimously conclude that Elena Kagan's writings reflect an exceptional level of professional competence. She consistently writes with intelligence, clarity, and rhetorical force. She thinks through difficult legal questions at a high level of abstraction and with careful attention to detail. Her academic writings demonstrate substantive mastery and theoretical sophistication, and they have

elevated every intellectual debate she has joined. Kagan's oral arguments before the Supreme Court, and the accompanying briefs in the cases she has argued, combine mastery of the substantive law and rare intellectual agility to produce extremely persuasive legal arguments."

Georgetown University:

"[A] reading of the fifteen reports in the aggregate would support a finding that, in the respects you asked us to focus on -- quality, knowledge of the law, clarity, and analytical ability -- Kagan is well qualified to serve on the Supreme Court. Five say expressly that Kagan is well qualified to be a Supreme Court justice. Two others say expressly that she is well qualified in the respects you asked us to focus on. Six others provide unqualified praise for the materials they reviewed -- either expressly or impliedly declaring those materials consistent with a 'well qualified' finding -- but decline to provide a global assessment (no doubt because they had not read enough of Kagan's work, as some of them say). Another reader declares Kagan "professionally competent for the role of Supreme Court Justice."

One professor, while finding the reviewed writings "well written and analytically strong," criticized the nominee for a "preference for reason over passionate idealism."

Our Practitioners' Reading Group, while recognizing that it had a smaller body of work to review, summarized its conclusions as follows:

[T]he substantial majority of the Practitioners Reading Group found that her substantive writings demonstrated keen intellect, command of the legal issues, thoughtful analysis, and clear, skillful writing.

For example, various group members reported:

"Solicitor Kagan's work reflects a high degree of professional integrity and competence."

* * *

"General Kagan demonstrated a solid command of both the factual record and the governing precedent, and she was well prepared to answer all of the questions asked of her."

* * *

"She writes well and persuasively, and is an effective oral advocate and a gracious public speaker. I saw no lack of professional competence. To the contrary, she performed each task skillfully."

* * *

“Kagan’s law review article is a well-written, sophisticated analysis of complex constitutional law doctrine. Kagan offers an original and creative approach to a set of First Amendment problems. The article showcases her intelligent analysis of the issues, and an ability to think and write both at the broad, abstract level and more specifically about principles applied in particular situations.”

* * *

The sole dissenter opined that General Kagan’s article on regulation of hate speech is built on unproven premises, and that she “oversimplifies complex issues.” The Standing Committee notes that this is the article that capped the nominee’s pre-tenure work at the University of Chicago, earning her tenure as a full professor. It was reviewed by both the hiring and tenure committees at Harvard Law School. The law school still uses the nominee’s first amendment writings in a class discussing the First Amendment.

The Standing Committee thanks the Reading Groups for their thoughtful and insightful work.

B. Her Performance as Solicitor General

General Kagan has served as Solicitor General for the last year and half. We interviewed lawyers in the Office of Solicitor General, lawyers on the opposing side of her office, lawyers who sought to advocate positions to her office, Supreme Court Justices who observed her argue, and former Solicitor Generals who observed or reviewed her performance to date. The clear picture that emerges is of an outstanding lawyer who confidently and diligently learns fast, masters new roles, and has a remarkable ability to understand and fairly assess numerous complex and important issues, all while fulfilling faithfully her assigned role as lawyer for the United States and a steward of the Office’s reputation.

C. Prior Judicial Experience

One issue that we explored was the nominee's lack of judicial experience. With nominees to the trial bench, the Standing Committee historically looks for substantial courtroom and trial experience, either as a trial judge or trial lawyer. For prospective nominees to the courts of appeals, the Standing Committee places somewhat less emphasis on trial experience. Instead, we look more for an especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence.

It is these latter qualities that are especially relevant in considering nominees to the U.S. Supreme Court.⁶ Forty justices of the Supreme Court, including 21 of the 59 who joined the Court since 1900, had no prior judicial experience. While prior service as an appellate judge at the state or federal level can certainly provide a nominee with the opportunity to develop and demonstrate the required competencies, so, too, can serving as a practicing lawyer, or as a legal scholar and a teacher, or as Solicitor General. As set forth in the *Backgrounder*, the Standing Committee has therefore long recognized that other distinguished accomplishments in the field of law other than judging or working as a practitioner – such as teaching law – may be considered in evaluating one's professional competence. In the case of the Supreme Court, the extensive and in depth writing, research, debate and teaching of broad areas of law may well satisfy the Standing Committee's criteria for evaluating professional competence. This is particularly true where, as here, the nominee has demonstrated prowess in teaching, brief writing and oral advocacy at the very highest levels.

On this point, too, we look to the many lawyers and judges to whom we spoke, who almost uniformly agreed that a pre-eminent legal scholar who was tenured at both the University of Chicago and Harvard Law School, and then rose to become the Dean of Harvard Law School,

⁶ *Backgrounder* at p. 9.

has in a sense acquired a peculiarly apt and broad understanding of the law that would well serve the Court. The overwhelming view of these judges, lawyers, and academics was that it was important to have on the Court former judges, and it was also important to have on the Court those who had spent their time before joining the Court engaged with the law otherwise, either as practitioners or academics or government officials.

Typical comments include the following:

“As far as this notion of not having a judge’s experience, that is nonsense. There is no reason one needs to have been a judge to be an excellent Supreme Court Justice.”

* * *

“I do not think the fact that she has not been a judge is a disadvantage for being on the Court. You would not want everyone on the Court to have not been a judge and there should be some lawyers who are familiar with trials, but there should also be some who come at it from a different perspective, particularly if you can get someone as smart as she is.”

* * *

“I think it is a plus to have some people on the Supreme Court who were not prior judges simply so they bring to bear another perspective on how the law works, how people think about the law and how the law affects people.”

* * *

“I also do not think that prior service on a court is in any way a requirement for being well qualified to serve on the U.S. Supreme Court.”

* * *

“Generally speaking, I think it’s very good to have members of the Supreme Court who have been experienced judges and to also have members of the Supreme Court who have not been judges, but who have been intimately involved in the law in other capacities. Here, her involvement as a stellar scholar, a dean of a law school, and lawyer within the upper reaches of the government, is in my view, excellent and sufficient to make someone more than well qualified.”

* * *

"[As a federal appellate judge], I can weigh-in on the general notion of whether you need to be a judge to serve on the U.S. Supreme Court. My answer is an emphatic 'no.' I actually think it is a mistake to have a Supreme Court in which everyone had prior substantial judging experience. My ideal court would have five or six people who have experience as judges, then perhaps a politician, and most certainly a practitioner, and a law professor. I think it is deeply unfortunate that we do not have a practitioner on the Court, someone who really knows how the law is applied in practice. For these reasons, I am thrilled that the President has looked beyond sitting judges to make this appointment. In my view, if you look at filling the particular spot on a particular court, the fact that she is not a judge makes her more rather than less qualified because of what she will bring to the Court that the Court does not have."

* * *

"As a sitting judge, I am not at all concerned by the fact that she has not had any experience as a judge. In some ways, judicial experience is less relevant to the Supreme Court than it would be to either our court or a trial court. This is an excellent appointment."

* * *

"Based on [personal prior judicial experience], I can say that I am actually pleased to see the President putting someone on the Supreme Court who does not have judging experience, but who has some other experience that demonstrates a deep commitment to the law and a set of skills that a judge does not necessarily have. Mind you, I think it is important that there be people on the Supreme Court who have judging experience. I just do not think that you end up with the best Supreme Court if all the judges are prior judges."

* * *

"I think the notion that you need prior judging experience to be on the U.S. Supreme Court is nonsense. I have known many superb judges who were neither judges nor litigators before they arrived on the bench, yet they were great from the get-go because of their intellect, their understanding of the law, their temperament, their discipline and their energy."

Overall, the praise for General Kagan's professional competence is supported by the record of her career as a whole. She is a *summa cum laude* graduate of Princeton, *magna cum laude* and law review at Harvard, with a master's in philosophy from Oxford. General Kagan thereafter successfully twice traveled the tenure tract at a top law school, once at the University

of Chicago and a second time at Harvard. Having also served in two different positions for four years in the White House under President William J. Clinton, she has an understanding of government that some judges may never acquire. As a professor, she taught courses in at least four different subject areas. As a Dean, she was required to study the scholarly work of all tenure candidates and new hires to the faculty at Harvard Law School. As a result, she has a breadth of deep knowledge that few practicing lawyers and judges ever reach. As Dean of Harvard Law School, she demonstrated interpersonal skills and an understanding of how large institutions work and how to build coalitions. As Solicitor General, the proverbial “tenth justice,” she knows more than anyone not now on the Court about the Court’s current docket and decisions.

3. Temperament

General Kagan’s temperament is evidenced in part by the fact that she is held in such high regard by so many different people in so many different places. Accomplishing all she did at Harvard Law School required a very difficult and unusual balance of competing views and interests, a strong will, high expectations, listening, sense of humor, and an ability to find common ground. She is uniformly described as compassionate and interested in her students and was accessible to students and faculty. She sets high expectations for herself and others who work with her. She concedes to rare moments of testiness, yet those who work most closely with her are her strongest advocates.

Representative comments we received ran as follows:

“Over time, I noticed that whenever an issue came up that was such that many people, particularly in academia, might take somewhat of a doctrinaire or ideological approach, she seemed to be open-minded and arrive at a very thoughtful and considered judgment that actually fit the facts. She didn’t seem to be the sort of person who quickly labeled a matter and then pre-judged it according to the label.”

* * *

"The way I would best describe Elena in this context is to describe her as more of a judge than often many judges themselves are. She has an open mind that actively solicits all points of view. If she has any firm decisions or values on the big issues that are now before the court, I do not know what they are and I know her well. I think what that means is that on these very tough issues she simply does not have a categorical position that would be obvious to one who knows her well. She is analytically very smart. I have seen on occasions her change her mind on things after hearing new evidence and arguments. She listens so well that she often has an excellent memory of what people say, so much so that it's better than what the people themselves have of what they said. She's a very balanced person generally."

* * *

"Her temperament is splendid. She is a fair listener and she respects the opinions of others even if she disagrees with them."

* * *

"Elena Kagan was enormously successful as our Dean. I've been teaching at the Law School for roughly [] years, so I have a pretty good historical overview and pretty good sense of the difficulties involved in running such a demanding institution with so many very demanding people. Elena simply could not have pulled this off were she not quite remarkably talented in terms of her competence, integrity and temperament. Early on as a faculty member she developed a reputation for listening to people and for finding a way to cut to the heart of matters, a place where there was often more agreement than people had anticipated."

* * *

"Elena could not have been more successful as Dean. Harvard Law School is an incredibly complex operation, with 2,000 students or so, over 100 fulltime faculty, and a very large budget. Dealing with the faculty alone would overtax the abilities and capabilities of almost anyone. Elena's performance across-the-board was really extraordinary. Were there occasions when she made people unhappy or barked at someone? Yes. I had one incident myself where I got out in front of Elena on a very important matter regarding communicating with students about a particular exam. When she found out what I did, she let me have it, to the point of yelling at me. Frankly, I thought she was right and I was wrong and I do not have particularly thin skin. We have a very good relationship from working together on the appointments committee. We will often have some strong disagreements but communicate them clearly."

* * *

"I found her always open, easy to deal with, and obviously very intelligent."

* * *

"She is a person who came to be known on the committee as having strong views that she would present when she held them as such, but she would listen and, on occasion, but not always, yield to either conflicting evidence or contrary views. When I say 'strong,' I simply mean someone who clearly expressed their views and convictions in an effective manner, but was not overbearing. She readily achieved the confidence of the entire committee and all of us looked forward to our deliberations under her leadership. I guess I would say that she had a brilliant and strong mind and also a mind that was open to changing views in the face of new evidence or contrary arguments that convinced her otherwise."

* * *

"As far as my view of her overall attitude towards hiring, I think it fair to say that she paid little attention to ideology or methodology. By methodology, I mean she was open to political scientists, law and humanity types, doctrine people like myself, or economists, all of whom approach the teaching of the law in a slightly different way. When people say that she may have tended to hire more conservative people, I don't know if they're saying that as a compliment or criticism."

* * *

"She was cautious in forming views and was frank in conceding when questions were close calls. At the same time, when she formed her views, they were strongly held and effectively communicated. This was a committee of very strong willed and articulate people. She held her ground well, yet also could see opportunities for developing common ground. She did place a high priority on consensus. Looking at her performance as Dean overall, the observation I would make is that she was right down the middle of the pike on the theoretical/practical spectrum. Some people view legal scholarship as essentially a theoretical or academic exercise. Others stress the fact that we are training lawyers and we need to keep our feet on the ground, being very practical minded. Elena managed to stay in the middle ground between these two extremes and it is that tendency that I would point to as probably the best indicator of how she would be on the Court."

* * *

Those who have worked with her in the Office of Solicitor General also find her temperament to be on a par with her abilities. Her temperament in this position over the past year

and one half is described as “calm and even” and she respects and invites different and opposing views. She questions thoroughly because she wants to understand the positions of all parties. She is held in high esteem by her colleagues, is respectful of others, and is said to treat “everyone with dignity and respect.” Setting high expectations of herself and others in meeting the responsibilities of her office, she is described as a careful listener who does not impose “pre-formed views.”

In sum, the consensus is that the nominee is demanding, open-minded, and works well with others in a collaborative setting to decide important issues of law involving considerable complexity. We find her temperament to be well-suited to the job at hand and deserving of the “Well Qualified” rating.

CONCLUSION

Mr. Chairman, let me say once again what we noted when we last testified before this Committee: the goal of the ABA Standing Committee has always been – and remains – in concert with a goal of your Committee: to assure a qualified and independent judiciary for the American people.

Thank you for the opportunity to present this statement concerning the professional qualifications of General Kagan.

EXHIBIT A

ACADEMIC READING GROUP

GEORGETOWN UNIVERSITY LAW CENTERChair

Michael Gottesman, Professor of Law

(Equal Protection, Substantive Due Process, Second Amendment, Twenty-First Amendment, Separation of Powers, Employment Discrimination, Voting Rights, Other Civil Rights, Labor and Employment)

Members

Hope Babcock, Professor of Law

(Administrative Procedure, Environmental Law, Freedom of Information Act, Indian Law, Justiceability, Regulated Industries, Statutory Interpretation)

Sonya Bonneau, Associate Professor of Legal Research and Writing

(Legal Research and Writing)

Michal J. Cedrone, Associate Professor of Legal Research and Writing

(Death Penalty and Habeas Corpus, Federal Sentencing, Other Criminal Law & Procedure, First Amendment – Religion, Prisoner Civil Claims/Eighth Amendment, Health Law and Insurance Programs)

Sherman L. Cohn, Professor of Law

(Civil Procedure, Appellate Procedure, Jurisdictional and Choice of Law, Professional Responsibility, International Law)

John Copacino, Professor Law

(Director of the Criminal Justice Clinic and the E. Barrett Prettyman Graduate Fellowship in Criminal Trial Advocacy)

Michael R. Diamond, Director of the Harrison Institute for Housing and Community Development, Georgetown Law; Professor of Law

(Corporate Law)

Laura Donohue, Associate Professor of Law

(National Security Law)

Steven Goldblatt, Director, Appellate Litigation Clinic; Co-Director, Supreme Court Institute; Professor of Law

(Appellate Practice, Criminal Law, Civil Rights, Constitutional Law)

Michael Golden, Associate Professor of Legal Research and Writing
(Legal Research and Writing)

Melissa Henke, Associate Professor of Legal Research and Writing
(Legal Research and Writing)

Greg Klass, Associate Professor of Law
(Contracts, Jurisprudence)

Julia L. Ross, Professor of Legal Research and Writing
(Legal Research and Writing)

Rima Siorta, Associate Professor of Legal Research and Writing
(Legal Research and Writing)

Abbe Smith, Co-Director, Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program;
Professor of Law
(Criminal Law, Criminal Procedure, Trial Advocacy, Legal Ethics)

EXHIBIT B

ACADEMIC READING GROUP

WASHINGTON UNIVERSITY IN ST. LOUIS SCHOOL OF LAW

Chair

Gregory P. Magarian, Professor of Law
(Constitutional Law, Legislation, Political Speech)

Members

Scott A. Baker – Professor of Law
(Commercial Law, Intellectual Property)

Kathleen F. Brickey – James Carr Professor of Criminal Jurisprudence
(Criminal Law)

Marion Crain – Wiley B. Rutledge Professor of Law and Director of the Center for the
Interdisciplinary Study of Work and Social Capital
(Labor Law, Employment Law)

John N. Drobak – Professor of Law
(Civil Procedure, Property, Antitrust)

Douglas Bruce LaPierre – Professor of Law
(Appellate Procedure, Constitutional Law)

Stephen H. Legomsky – John S. Lehmann University Professor
(Immigration and Refugee Law, International Human Rights)

Ronald M. Levin – Henry Hitchcock Professor of Law
(Administrative Law)

Mae C. Quinn – Professor of Law and Co-Director of the Civil Justice Clinic
(Criminal Procedure)

Neil M. Richards – Professor of Law
(Privacy Law, Constitutional Law)

Laura Ann Rosenbury – Professor of Law
(Labor and Employment Law)

Hillary Sale – Walter D. Coles Professor of Law and Professor of Business
(Corporate and Securities Law)

Melissa A. Waters – Professor of Law
(International Law)

Peter J. Wiedenbeck – Joseph M. Zumbach Professor of Law
(Federal Income Taxation, ERISA & Employee Benefits)

EXHIBIT C

PRACTITIONERS' READING GROUP

Chairs

Thomas Z. Hayward, Jr.,
K&L Gates LLP, Chicago, IL

Roberta D. Liebenberg
Fine, Kaplan & Black, Philadelphia, PA

Mary A. Wells
Wells, Anderson & Race, LLC, Denver, CO

Members

Judge Phyllis W. Beck (ret.), Philadelphia, PA

Landis C. Best
Cahill Gordon & Reindel LLP, New York, NY

John J. Bursch
Warner Norcross & Judd LLP, Grand Rapids, MI

W. Wayne Drinkwater, Jr.
Bradley Arant Boult Cummings LLP, Jackson, MS

David S. Friedman
Senior Counsel, Boston Red Sox, Boston, MA

Richard B. Kapnick
Sidley Austin LLP, Chicago, IL

The Honorable Timothy K. Lewis
Schnader Harrison Segal & Lewis LLP, Washington, DC

Andrew M. Low
Davis Graham & Stubbs LLP, Denver, CO

Wendy Lumish
Carlton Fields, P.A., Miami, FL

Aaron M. Panner,
Kellogg, Huher, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC

Chilton Varner
King & Spalding LLP, Atlanta, GA

Paul Watford
Munger, Tolles & Olson LLP, Los Angeles, CA

Sheryl J. Willert
Williams Kastner, Seattle, WA



June 25, 2010

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

I am writing on behalf of the American Center for Law and Justice (ACLJ) regarding the nomination of Elena Kagan as Associate Justice of the Supreme Court of the United States. As a legal organization dedicated to the preservation and advancement of constitutional liberties and rights, we fully support the Senate's obligation under Article II, Section II of the Constitution to provide the President with thorough Advice and Consent on judicial nominations. We believe this can only take place if the Senate, and specifically the Senate Judiciary Committee, completes a comprehensive analysis of a nominee's background, record and judicial philosophy.

With this in mind, we have produced a legal analysis of Ms. Kagan's record on several key areas. That analysis is attached for your review and can also be accessed at http://www.aclj.org/media/pdf/Kagan-Memo--ACLJ-Kagan-Analysis_20100617.pdf. As you can see from this analysis, there are several areas of concern that must be addressed during the hearing process if the Senate is to fulfill its constitutional duties. It is incumbent on the Senate to insist that Ms. Kagan fully address each of these concerns. Senators should not consent to a lifetime appointment to the highest court in the land unless evidence to alleviate these concerns can be obtained.

Sincerely,

Jay A. Sekulow
Chief Counsel

CC: Members of the Senate Committee on the Judiciary



Elena Kagan:

Nominee for the Supreme Court of the United States

June 17, 2010

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INTRODUCTION

On May 10, 2010, President Obama nominated Elena Kagan to fill the vacancy left by Justice Stevens’s retirement at the end of the Supreme Court’s current term.¹ If confirmed, Kagan will be the

¹ Press Release, The White House, Presidential Nomination Sent to the Senate, 5/10/2010 (May 10, 2010), <http://www.whitehouse.gov/the-press-office/presidential-nomination-sent-senate-5102010>; Press Release, The White House, Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy (April 9, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>.

first Justice in nearly forty years to join the Court without previous judicial experience.² Therefore, it is important to examine her writings, briefs, and public statements carefully to ascertain her views on the role of a judge and the rule of law. In fact, then-Senator Obama, in an October 14, 2005, podcast on Harriet Miers's nomination to the Supreme Court, said:

Some of you have been interested in finding out what's going on with the Harriet Miers nomination. One thing that I do think is important is that the White House recognize that in the absence of any judicial record on her part, in the absence of any significant work that she appears to have done related to constitutional issues—that she's going to need to be more forthcoming and the White House is going to [need to] be more forthcoming than they were during the Roberts nomination. Ms. Miers is completely a blank slate.³

According to *The Plum Line*, Obama also put out this statement on the Miers nomination:

"Harriet Miers has had a distinguished career as a lawyer, but since her experience does not include serving as a judge, we have yet to know her views on many of the critical constitutional issues facing our country today. In the coming weeks, we'll need as much information and forthright testimony from Ms. Miers as possible so that the U.S. Senate can make an educated and informed decision on her nomination to the Supreme Court."⁴

Obama's own nominees should be held to the standard that he has set forth. In the absence of a judicial record, it is critically important that the Senate Judiciary Committee carefully question Kagan to ascertain how she would approach the role of judging and interpreting the Constitution if confirmed.

EDUCATION, PROFESSIONAL AND ACADEMIC BACKGROUND

Elena Kagan was born on April 28, 1960, in New York, New York.⁵ In 1981, she received her bachelor's degree from Princeton University, *summa cum laude*.⁶ She subsequently earned a Master's of Philosophy as Princeton's Daniel M. Sachs Graduating Fellow at Worcester College at Oxford University in 1983.⁷ Kagan then received her J.D. from Harvard Law School, graduating *magna cum laude* in 1986.⁸ While at Harvard, Kagan served as supervising editor of the Harvard Law Review.⁹ During the summer of 1986 she worked as a research assistant for Harvard Law School Professor

² Josh Gerstein & Carol E. Lee, *President Obama to Senate: Act Fast*, POLITICO.COM, May 9, 2010, <http://www.politico.com/news/stories/0510/36989.html>.

³ *Obama Flashback: A Supreme Court Nominee With No Judicial Experience Requires Extreme Scrutiny*, BREITBART.TV, <http://www.breitbart.tv/obama-flashback-a-supreme-court-nominee-with-no-judicial-experience-requires-extreme-scrutiny/> (last visited May 15, 2010).

⁴ Posting of Greg Sargent to *The Plum Line, Flashback: Obama Raised Concerns About Miers' Lack of Judicial Experience*, WASH. POST, http://voices.washingtonpost.com/plum-line/2010/05/flashback_obama_said_harriet_m.html (May 12, 2010, 15:00 ET).

⁵ *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*, 111th Cong. 48 (2009) (Questionnaire for Non-Judicial Nominees: Elena Kagan), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:55828.pdf [hereinafter *Solicitor General Hearing*].

⁶ United States Dept. of Justice, Office of the Solicitor General, <http://www.justice.gov/osg/meet-osg.html> (last visited May 10, 2010).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Laurence Tribe.¹⁰ She then clerked for Judge Abner Mikva at the U.S. Court of Appeals for the D.C. Circuit.¹¹ From 1987 to 1988, she clerked for Supreme Court Justice Thurgood Marshall.¹² From July 1988 to November 1988, she worked as a researcher for Michael Dukakis's presidential campaign.¹³ According to the Senate questionnaire that she filled out for her solicitor general nomination, Kagan primarily worked on "'defense research'—i.e., preparing responses to attacks on Governor Dukakis's record."¹⁴

From 1989 to 1991, Kagan worked for the D.C.-based law firm, Williams & Connolly.¹⁵ In 1991, she became an assistant professor at the University of Chicago Law School, where she became a tenured law professor in 1995.¹⁶ During the summer of 1993, she worked as a special counsel to the Senate Judiciary Committee.¹⁷ She was appointed by then-Senator Joseph Biden to that position and, as special counsel, worked on Justice Ginsburg's nomination to the Supreme Court.¹⁸

In 1995, Kagan was named associate counsel to President Bill Clinton.¹⁹ From 1997 to 1999, she served as deputy assistant to the President for domestic policy and deputy director of the Domestic Policy Council.²⁰ Kagan "played a key role in the Executive Branch's formulation, advocacy, and implementation of law and policy in areas ranging from education to crime to public health."²¹ In 1999, President Clinton nominated Kagan to serve on the U.S. Court of Appeals for the District of Columbia, but her nomination was "never acted upon."²² In 1999, Kagan served as a visiting professor at Harvard Law School where she became professor in 2001.²³ In 2003, Kagan became the first female dean of Harvard Law School.²⁴ In March 2009, Kagan was confirmed as solicitor general of the United States by a vote of 61–31.²⁵

POSSIBLE JUDICIAL PHILOSOPHY

Because Kagan has not served as a judge, it is difficult to ascertain with certainty what approach she would take to judging if confirmed. She has offered some clues, however, in connection with her nomination as solicitor general and in her earlier writings.

¹⁰ *Solicitor General Hearing*, *supra* note 5, at 49 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 78.

¹⁴ *Id.*

¹⁵ *Id.* at 49.

¹⁶ *Id.*; United States Dept. of Justice, Office of the Solicitor General, <http://www.justice.gov/osg/meet-osg.html> (last visited May 10, 2010).

¹⁷ *Solicitor General Hearing*, *supra* note 5, at 49 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

¹⁸ *Id.* at 77, 79.

¹⁹ *Id.* at 49.

²⁰ Elena Kagan, Questionnaire for Nominee for the Supreme Court, United States Senate Committee on the Judiciary, at 2, <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>.

²¹ Harvard Law School Lambda Second Annual Gay and Lesbian Legal Advocacy Conference "Don't Ask, Don't Tell," 14 DUKE J. GENDER L. & POL'Y 1173, 1229 (2007) (introduction of Kagan, who was moderating a panel, by Harvard Law student Alexis Caloza).

²² *Solicitor General Hearing*, *supra* note 5, at 77 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

²³ *Id.* at 49.

²⁴ Lauren A.E. Schuker, *People in the News: Elena Kagan*, THE HARV. CRIMSON, June 5, 2003, <http://www.thecrimson.com/article.aspx?ref=348422>.

²⁵ Josh Gerstein & Carol E. Lee, *President Obama to Senate: Act Fast*, POLITICO.COM, May 9, 2010, <http://www.politico.com/news/stories/0510/36989.html>.

As a college student, Kagan clearly demonstrated liberal political leanings. In an article for *The Daily Princetonian* written shortly after the November 1980 election, Kagan, who had worked on Democrat Liz Holtzman's senatorial campaign, wrote about her feelings after Holtzman's defeat. In the article, she referred to Alfonse M. D'Amato, the Republican who defeated Holtzman, as "an ultra-conservative machine politician . . ."²⁶ In discussing the races in which Democrats lost, she wrote:

Reagan I expected, but Symms, Abdnor, Quayle and Grassley I did not. Even after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents of Senators Church, McGovern, Bayh and Culver, these avengers of "innocent life" and the B-1 Bomber, these beneficiaries of a general turn to the right and a profound disorganization on the left.²⁷

She concluded her article on a somewhat positive note, holding out hope for a liberal comeback, while at the same time expressing skepticism for conservative solutions:

Looking back on last Tuesday, I can see that our gut response—our emotion-packed conclusion that the world had gone mad, that liberalism was dead and that there was no longer any place for the ideals we held or the beliefs we espoused—was a false one. In my more rational moments, I can now argue that the next few years will be marked by American disillusionment with conservative programs and solutions, and that a new, revitalized, perhaps *more* leftist left will once again come to the fore. I can say in these moments that one election year does not the death of liberalism make and that 1980 might even help the liberal camp by forcing it to come to grips with the need for organization and unity. But somehow, one week after the election, these comforting thoughts do not last long. Self-pity still sneaks up, and I wonder how all this could possibly have happened and where on earth I'll be able to get a job next year.²⁸

Kagan's political leanings during her college years are also alluded to in her senior thesis. In the acknowledgement portion of her senior thesis on "Socialism in New York City, 1900-1933," Kagan thanked her brother Marc, noting that his "involvement in radical causes led [her] to explore the history of American radicalism in the hope of clarifying [her] own political ideas."²⁹ While the bulk of the thesis is a historical study of the aforementioned topic, Kagan concluded her paper by pondering why a radical or socialist party has never become a major force in American politics:

In our own times, a coherent socialist movement is nowhere to be found in the United States. Americans are more likely to speak of a golden past than of a golden future, of capitalism's glories than of socialism's greatness. Conformity overrides dissent; the desire to conserve has overwhelmed the urge to alter. Such a state of affairs cries out for explanation. Why, in a society by no means perfect, has a radical party never attained the status of a major political force? Why, in particular, did the socialist movement never become an alternative to the nation's established parties?

²⁶ Elena Kagan, *Fear and Loathing in Brooklyn*, THE DAILY PRINCETONIAN, Nov. 10, 1980, available at <http://www.dailyprincetonian.com/2010/05/03/26082/>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Elena Kagan, *To the Final Conflict: Socialism in New York City, 1900-1933* (April 15, 1981) (unpublished senior thesis, Princeton University) (on file with the Mudd Library, Princeton University).

....

Through its own internal feuding, then, the SP exhausted itself forever and further reduced labor radicalism in New York to the position of marginality and insignificance from which it has never recovered. The story is a sad but also a chastening one for those who, more than half a century after socialism's decline, still wish to change America. Radicals have often succumbed to the devastating bane of sectarianism; it is easier, after all, to fight one's fellows than it is to battle an entrenched and powerful foe. Yet if the history of Local New York shows anything, it is that American radicals cannot afford to become their own worst enemies. In unity lies their only hope.³⁰

The Senate should inquire into the statements quoted above. The Senate Judiciary Committee should ask Kagan if she still hopes for a "more leftist left" and whether she believes that the judicial branch should be used to achieve or support liberalism and liberal policy positions. She should be further questioned about what imperfections in American society she was alluding to in her thesis, and what role she believes the judiciary should play in addressing those imperfections. For example, in response to a written question from Senator Specter following her nomination hearing for solicitor general asking whether she "believe[d] that the Constitution, properly interpreted, confers a right to a minimum level of welfare,"³¹ Kagan responded:

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.³²

While a solicitor general is well-advised to argue consistent with "traditional understandings" of the Constitution, under a more liberal understanding of the role of a Supreme Court Justice in interpreting the Constitution, Kagan would not be as confined and could revisit this "traditional understanding" and decide that the Constitution does confer a right to a minimum level of welfare. Therefore, it is critical that the Senate Judiciary Committee, in reviewing her nomination, question Kagan about her views of the role of a judge and the proper methods of constitutional interpretation.

This line of questioning is even more relevant in light of Kagan's master's thesis at Oxford, entitled, "The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method." In the thesis, Kagan chastised the Warren Court for failing to "develop a single, constitutionally-based rationale for the exclusionary rule,"³³ noting that "[b]ecause the Warren Court

³⁰ *Id.* at 127, 129-30.

³¹ *Solicitor General Hearing*, *supra* note 5, at 168 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

³² *Id.*

³³ Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method* 118 (April 20, 1983) (unpublished master's thesis, Oxford University) (on file with the Bodleian Library, University of Oxford), available at http://www.fed-soc.org/docLib/20100518_OxfordThesis.pdf [hereinafter Oxford Thesis].

did not adequately support the exclusionary rule, the Burger Court has been able slowly to strangle it.”³⁴ Kagan concluded her thesis with the observation that “[t]he history of the exclusionary rule thus suggests that the way in which a court explains a decision matters quite as much as the decision itself.”³⁵ She noted that “the law of the future is likely to be the law that is founded upon cogent, coherent and constitutionally-based argument.”³⁶ While few would argue with that statement, Kagan went on to state that “even the most meticulously crafted and closely analyzed opinion may not endure the test of time: A future court may overturn such an opinion on the ground that new times and circumstances demand a different interpretation of the Constitution.”³⁷ This troubling statement raises the question: What “new times and circumstances” demand, in Kagan’s mind, a “different interpretation of the Constitution”?

Kagan then proceeded to discuss how judges should reach their decisions, and in doing so blurred the line between lawmaker and judge. When creating law, maintaining high ideals and goals is certainly important. Those ends, however, are for the electorate and their representatives to decide:

As men and as participants in American life, judges will have opinions, prejudices, values. Perhaps most important, judges will have goals. *And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid.* The law, after all, is a human instrument—an instrument designed to meet men’s needs. . . . Concern for ethical values thus has an important role to play in the judicial process. For in the last analysis, the law is a very human enterprise with very human goals.

And yet, no court should make or justify its decisions solely by reference to the demands of social justice. *Decisions should be based upon legal principle and reason; they should appeal no less to our intellectual than to our ethical sense.* If a court cannot justify a ruling in terms of legal principle, then that court should stay its hand: *No judge should hand down a decision that cannot plausibly be grounded in principles referable to an accepted source of law.* If, on the other hand, a court can justify a ruling in terms of legal principle, then that Court must make every effort to do so. Judicial decisions must be based, above all else, on law and reason.³⁸

Kagan’s position is troubling for several reasons. First, she does not reject the practice of judges “mold[ing] and steer[ing] the law in order to promote certain ethical values and achieve certain social ends.” As Ed Whelan has noted,

It simply does not follow from the proposition that law is “an instrument designed to meet men’s needs” that judges may properly “try to mold and steer the law” to promote the ethical values and social ends that they favor. One obvious alternative that Kagan passes over is that judges should accept the “instrument” of law as it has been crafted by its enactors.³⁹

³⁴ *Id.* at 119.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* 120-21 (emphasis added).

³⁹ Posting of Ed Whelan to Bench Memos, *Kagan’s Oxford Thesis*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/55818/kagan-s-oxford-thesis/ed-whelan> (May 19, 2010, 142:17).

Second, although Kagan recognized the importance of “ruling in terms of principle,” she believed that this was necessary, in part, because it gave opinions “lasting effect,”⁴⁰ not necessarily because it made them right. As Whelan has noted, reading the paragraphs together, it appears that

Kagan thinks that it’s fine for a judge to pursue his favored ethical values and social ends in interpreting the law so long as he can offer public reasons that are “plausibly . . . grounded” in legal principles. In Kagan’s usage, terms like “justify” and “be based upon” do not mean that the decision must be *right*; they mean only that it must be *plausible*. Given the broad acceptance in the modern legal culture of freewheeling methodologies and the existence of so many wrongheaded precedents, the test of mere plausibility isn’t much of a constraint on judicial willfulness.⁴¹

In fact, Kagan wrote on the next page, “Judicial opinions may well appeal to the ethical sense—but this alone is not enough. In order to achieve some measure of permanence in an ever-fluctuating political and social order, judicial decisions must be plausibly rooted in either the Constitution or another accepted source of law.”⁴² Most Americans, however, hope that judges will root their decisions in a proper reading of the Constitution, not merely a “plausible” one. Senators should question Kagan about the document and how, if at all, her views have evolved.

Nearly thirty years later, Kagan’s writings are more tempered. In written questions following the hearing on her nomination to be Solicitor General of the United States, she was asked by Senator Specter, then the ranking Republican on the Senate Judiciary Committee, as part of a larger question on “[w]hat principles of constitutional interpretation help [her] to begin [her] analysis of whether a particular statute infringes upon some individual right,” if there is “any room in constitutional interpretation for the judge’s own values or beliefs?”⁴³ She replied: “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.”⁴⁴ When asked about “judicial activism” and if she “agree[d] with the view that the courts, rather than the elected branches, should take the lead in creating a more just society,” Kagan responded, “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.”⁴⁵

Despite these statements, the most telling clues about what one might expect as to Kagan’s general approach to judging appear in a book review she wrote outside of her normal scholarly

⁴⁰ Oxford Thesis, *supra* note 33, at 121. Kagan wrote,

The judge must make principled decisions for three reasons. First, only the methods of principle and reason can justify supreme judicial authority in a political democracy. Second, only those methods can guarantee that the public will continue to accept and support the Supreme Court’s role in the American system of government. Third—and most important from our point of view—only those methods can ensure that opinions will have a lasting effect.

Id. (footnotes omitted).

⁴¹ Posting of Ed Whelan to Bench Memos, *Kagan’s Oxford Thesis*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/55818/kagan-s-oxford-thesis/ed-whelan> (May 19, 2010, 14:17) (alteration in the original).

⁴² Oxford Thesis, *supra* note 33, at 121.

⁴³ *Solicitor General Hearing*, *supra* note 5, at 168 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

⁴⁴ *Id.*

⁴⁵ *Id.* at 167.

interests in First Amendment and administrative law. In *Confirmation Messes, Old and New*,⁴⁶ Kagan reviewed a book by Professor Stephen Carter, *The Confirmation Mess*,⁴⁷ in which Carter argued that the Senate, in confirming Supreme Court Justices, ought to limit their questioning to matters of technical competence (objective qualifications such as analytical ability, writing skills, and the like) and moral judgment and avoid questions concerning judicial philosophy and the application of that philosophy to concrete cases.⁴⁸ Kagan, however, argued that “[t]he 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.”⁴⁹ In Kagan’s view, Carter rightly believes that both “the Senate and the President have an independent responsibility to evaluate . . . whether a person ought to serve as a Supreme Court Justice.”⁵⁰ But, “contrary to Carter’s view, the President and Senate themselves have a constitutional obligation to consider how an individual, as a judge, will read the Constitution: that is one part of what it means to preserve and protect the founding instrument.”⁵¹ Kagan concluded with this observation:

The real confirmation mess, in short, is the absence of the mess that Carter describes. . . . [T]he problem is not that senators engage in substantive discussion with Supreme Court nominees; the problem is that they do not. Senators effectively have accepted the limits on inquiry Carter proposes; the challenge now is to overthrow them.⁵²

This conclusion in itself should not be troubling. Indeed, if one takes seriously the Senator’s duty, it is fundamentally correct.⁵³ Along the way to reaching this conclusion, however, Kagan raises several red flags concerning her own understanding of the proper role of the Court and the Justices’ work; that apparent understanding is disconcerting. Kagan notes with approval Carter’s stated view that most cases before the Court require more “than the application of ‘mundane and lawyerly’ skills.”⁵⁴ Rather, these cases require “‘interpretive judgment,’” and in all such cases “‘there comes a crucial moment when the interpreter’s own experience and values become the most important data.’”⁵⁵ Kagan notes, as part of her agreement with Carter on this point, that “many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value.”⁵⁶

⁴⁶ 62 U. CHI. L. REV. 919 (1995).

⁴⁷ STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994).

⁴⁸ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 920-23.

⁴⁹ *Id.* at 935.

⁵⁰ *Id.* at 931.

⁵¹ *Id.* at 938.

⁵² *Id.* at 942.

⁵³ See generally *id.* at 934-35. Senators, like the President, take an oath to defend and uphold the Constitution, and it is difficult to see how Senators are acting consistently with this oath by simply rubber-stamping a President’s Supreme Court nominees without determining how those nominees are likely to treat the Constitution the Senators swore to defend. Justices Souter’s, Breyer’s, and Ginsburg’s careers provide ample evidence of the dangers of failing to conduct a searching substantive review of Supreme Court nominees. Conservative scholar Matthew Franck has endorsed Kagan’s view that Senators should focus confirmation questioning on a nominee’s judicial philosophy, understanding of the Constitution, and the application of that philosophy and understanding to specific situations. Posting of Matthew J. Franck to Bench Memos, *Stephen Carter Recycles*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50176/stephen-carter-recycles/matthew-j-franck> (May 10, 2009, 15:50).

⁵⁴ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 932 (quoting CARTER, *THE CONFIRMATION MESS* 151).

⁵⁵ *Id.* (quoting CARTER, *THE CONFIRMATION MESS* 151).

⁵⁶ *Id.*

Kagan's thoughts seem to echo President Obama's statement explaining his decision to vote against confirming John Roberts to be Chief Justice. As Ed Whelan recounts, quoting another essay that he had written, "In explaining his vote against [Chief Justice] Roberts, Obama opined that deciding the 'truly difficult' cases requires resort to 'one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.'" ⁵⁷ To be fair, Kagan does not specifically mention "empathy" in her exposition of the judge's role. Yet, it is not unfair to suggest that Kagan's agreement with Obama's emphasis on the importance of "empathy" in a judge is at least implicit in her endorsement of Carter's view that a judge's "own experience" is crucial in deciding difficult cases. She cannot be saying that "experience" means simply the judge's experience in textual exegesis and application of law to fact; such a limited understanding of "experience" would be inconsistent with her approval of Carter's view that judging requires more "than the application of 'mundane and lawyerly skills'" (which one would think includes the skills to engage in textual exegesis and to apply law to fact). It is more reasonable to conclude that Kagan means by "experience" the type of real world experiences and associations that allow a judge to develop the empathy that President Obama has stated is so important to the judge's task.

Kagan does differentiate between a judge's moral character (*i.e.*, the moral values he holds personally) and other "values that matter most in the enterprise of judging."⁵⁸ Those more relevant values are the "values embodied in the Constitution and the proper role of judges in giving effect to those values."⁵⁹ From this, one might conclude that Kagan does not really believe that a judge's personal values should have a role in deciding cases; rather the only values the judge should rely on are those the judge finds in the Constitution.

But two things raise doubt about this conclusion: First, as was the case concerning the role of empathy in Kagan's judicial philosophy, to conclude that Kagan eschews all reliance on personal values in judging seems inconsistent with her endorsement of Carter's view that in difficult cases, "interpretive judgment" depends on "the interpreter's *own* experience and values."⁶⁰ Second, given that President Obama has clearly stated his view of the importance of a judge's "deepest values," "core concerns," "empathy,"⁶¹ and, most recently, "a keen understanding of how the law affects the daily lives of the American people,"⁶² to the task of judging, it is difficult to believe he would nominate someone for a lifetime appointment to the Supreme Court who does not to some extent share that view. There is certainly enough in Kagan's published views about the enterprise of judging to at least raise serious concern about whether she could (or even whether she would think it is necessary to) put aside her own personal values in deciding cases (or at least what she terms the difficult cases, which likely include cases involving controversial social issues). Furthermore, in an interview published in the May

⁵⁷ Posting of Ed Whelan to Bench Memos, *Ruth Marcus's Misguided Defense of the Obama Standard*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50192/ruth-marcus-misguided-defense-obama-standard/ed-whelan> (May 6, 2009, 8:16) (alteration in the original) (quoting Edward Whelan, *Obama's Constitution*, THE WEEKLY STANDARD, Mar. 17, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>).

⁵⁸ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 933.

⁵⁹ *Id.* at 933-34.

⁶⁰ *Id.* at 932 (emphasis added).

⁶¹ Posting of Ed Whelan to Bench Memos, *Ruth Marcus's Misguided Defense of the Obama Standard*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50192/ruth-marcus-misguided-defense-obama-standard/ed-whelan> (May 6, 2009, 8:16) (internal punctuation omitted) (quoting Edward Whelan, *Obama's Constitution*, THE WEEKLY STANDARD, Mar. 17, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>).

⁶² Press Release, The White House, Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy (April 9, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>.

2004 issue of *The Metropolitan Corporate Counsel*, Kagan said, in recognizing the “inevitabl[e] . . . political aspect” to confirmation hearings,

Our courts are called upon to decide important matters—matters that often have great public impact. *The attitudes and views that a person brings to the bench make a difference in how they reach those decisions. So the Senate is right to take an interest in who these people are and what they believe.*⁶³

Moreover, even if Kagan believes the only values a judge should rely on are those the judge finds in the Constitution, that in itself is troubling. It has been a hallmark of Supreme Court jurisprudence over the last half-century or so to substitute constitutional “values” for the actual constitutional text.⁶⁴ That approach to constitutional “interpretation” is illicit because it “fails to respect the choices made by those who drafted and ratified the Constitution.”⁶⁵ Drafting a constitution (or any law) requires “determining how and to what extent to implement concretely often-conflicting principles or values,” and typically requires “difficult judgments and compromises.”⁶⁶ Those judgments and compromises are written into the Constitution’s text; to exalt constitutional “values” over the actual text “‘dishonor[s] an essential part of the enactment,’ and thus usurps power that properly belongs to the lawmaker”⁶⁷ Put another way, this constitutional “values” method of interpretation requires the judge to make policy decisions—especially, but not only, the decision of how far to extend a constitutional “value”—that the Constitution leaves to the people and their representatives. If that is Kagan’s approach to deciding constitutional cases, her nomination should cause concern even if she rejects a judge’s reliance on personal values. Of course, it may also be that the point of searching for and abstracting “values” from the Constitution’s text is to have a means of putting constitutional clothing on one’s own values. For instance, it is very likely that the Supreme Court’s discovery and abstraction of the “constitutional” value of “privacy” in *Griswold v. Connecticut*,⁶⁸ was just a means to connect the Justices’ own value judgments to something in the Constitution, no matter how tenuous that connection was. Given the general focus of her scholarship on doctrine and policy rather than constitutional text, it is not a stretch to conclude that may well be her approach. Certainly, there is more than sufficient reason to question her extensively on her judicial philosophy and her view of a judge’s task in interpreting and applying the Constitution.

These concerns about the role of “values” in Kagan’s judicial philosophy raise one other question: What values would Kagan bring to the Supreme Court or find in the Constitution? In her response to written questions following the hearing on her nomination to be solicitor general, Kagan said that she “view[s] 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.”⁶⁹ A

⁶³ Editor Interviews Elena Kagan, Dean of Harvard Law School, *New England and Boston—Law Schools; Harvard Law School: Progress on Many Fronts*, THE METROPOLITAN CORPORATE COUNSEL, May 2004, at 45, 45, available at <http://www.metrocorpcounsel.com/pdf/2004/May/45.pdf> (emphasis added).

⁶⁴ See generally John Tuskey, *Do as We Say and Not (Necessarily) as We Do: The Constitution, Federalism, and the Supreme Court’s Exercise of the Judicial Power*, 34 CAP. U. L. REV. 153, 169-71 (2005).

⁶⁵ *Id.* at 170.

⁶⁶ *Id.*; see also John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 253-54 (1997); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 252 (1991).

⁶⁷ Tuskey, *Do as We Say*, 34 CAP. U. L. REV. at 171 (quoting *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 139 (7th Cir. 1987) (Easterbrook, J., dissenting)).

⁶⁸ 381 U.S. 479 (1965).

⁶⁹ *Solicitor General Hearing*, *supra* note 5, at 172 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter) (her answer was in response to a multi-part question that included “What other ‘moral injustices of the

more general indication of Kagan's "values" is her characterizations of Judge Bork, and Justices Thomas, Souter, Breyer, and Ginsburg. Kagan writes of the "extreme conservatism of Bork's known views,"⁷⁰ and opines, citing David Strauss's argument in his review of Carter's book, that the cause of the confirmation "mess" that Carter decried in Bork's and subsequent cases was "the simple attempt of the Reagan and Bush administrations to impose an ideologically charged vision of the judiciary in an unsympathetic political climate."⁷¹ In contrast, Kagan describes Justices Breyer and Ginsburg—despite Justice Ginsburg's close association with the ACLU, her radical theory that a right to abortion is required to provide equal protection for women, and her suggestion to replace Mother's Day and Father's Day with an androgynous Parent's Day to "minimize traditional sex-based differences in parental roles"⁷²—as "moderates."⁷³ Given the characterizations, it is not unreasonable to think that Kagan would most likely share (or at least sympathize with) Justice Breyer's and Justice Ginsburg's understanding of the Constitution and the role of Supreme Court Justices.

In her written responses following the hearing on her solicitor general nomination, however, Kagan clarified her previous characterization of Justice Ginsburg:

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.⁷⁴

Also of interest is the fact that, at her confirmation hearing, Kagan moved away from her position in the article. Senator Hatch asked about her argument 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" and how she would "square this with the principle that judges must be impartial and with the oath they take to provide justice without respect to persons,"⁷⁵ With regard

first order' do you see in our society?" *Id.* at 171.), see also *supra* pp. 3-5 (noting Kagan's leftist political views while at Princeton).

⁷⁰ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 940.

⁷¹ *Id.* at 929 (emphasis added) (citing David A. Strauss, *Whose Confirmation Mess?*, AM PROSPECT 91, 96 (Summer 1994), reviewing Carter, *The Confirmation Mess*).

⁷² Kagan herself notes Justice Ginsburg's views on the relationship between abortion and sexual equality. See Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 938 (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985)). On Justice Ginsburg's suggestion to abolish Mother's Day and Father's Day, see Posting by Ed Whelan to Bench Memos, *This Day in Liberal Judicial Activism—May 10*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50177/day-liberal-judicial-activism-may-10/ed-whelan> (May 10, 2009, 8:00).

⁷³ See Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 941.

⁷⁴ *Solicitor General Hearing*, *supra* note 5, at 170 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter). The question asked was

Prior to Justice Ginsburg's confirmation to the Supreme Court, she wrote on a number of women's issue[s]. 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? Do you agree with these positions? If not, with which ones do you disagree?

Id. at 169. But see note 72, *supra* (noting how Kagan herself cited Ginsburg's article on abortion and sexual equality in her 1995 *Confirmation Messes* article).

⁷⁵ *Id.* at 118 (Questioning of Sen. Orrin Hatch).

to the first part of the question, Kagan stated, “I am not sure that sitting here today I would agree with that statement.”⁷⁶ She continued with this statement:

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.⁷⁷

Although Kagan moved away from the position stated in her book review during her solicitor general nomination hearing, in an interview published in the May 2004 issue of *The Metropolitan Corporate Counsel*, then-Dean Kagan was asked “Is there a better way of placing appellate judges? Must it be part of a political process?”⁷⁸ Kagan responded,

I think confirmation proceedings inevitably have a political aspect. Our courts are called upon to decide important matters—matters that often have great public impact. The attitudes and views that a person brings to the bench make a difference in how they reach those decisions. *So the Senate is right to take an interest in who these people are and what they believe. The Senate in fact has an important role to play in the confirmation of judges, although there are more and less responsible ways to carry out that function.*⁷⁹

This quote, made recently, but before Kagan faced Senate confirmation, seems to affirm the position taken in her book review. Furthermore, Senator Specter, in his written questions to Kagan following her solicitor general nomination, prefaced his request for her views on constitutional issues with a quote from her book review and her statement to Senator Hatch that the “Senate has to get the information that it needs . . . [from] the nominee, for any particular position—whether it’s judicial or otherwise.”⁸⁰ Kagan responded 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).”⁸¹ In her answer, Kagan seems to leave room for the Senate seeking different information from judicial nominees than they would seek from an executive branch nominee. Given that Kagan has now been nominated to a lifetime judicial position on the nation’s highest court, it would seem that by Kagan’s own reckoning, the Senate has a stronger interest in more forthcoming answers regarding her judicial philosophy and her views on constitutional issues.

Kagan’s tribute to Justice Thurgood Marshall, published in the *Texas Law Review*, might also shed some light on her judicial philosophy and approach to constitutional interpretation, particularly if Kagan adopts Justice Marshall’s approach to constitutional interpretation. On its face, the article only

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Editor Interviews Elena Kagan, Dean of Harvard Law School, *New England and Boston—Law Schools; Harvard Law School: Progress on Many Fronts*, THE METROPOLITAN CORPORATE COUNSEL, May 2004, at 45, 45, available at <http://www.metrocorpcounsel.com/pdf/2004/May/45.pdf>.

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Solicitor General Hearing*, *supra* note 5, at 165 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter) (alteration in the original).

⁸¹ *Id.*

discusses Justice Marshall's approach to the law and provides little of Kagan's own views. She explained that the stories Justice Marshall told to his law clerks,

reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that, behind law there are stories—stories of people's lives as shaped by law, stories of people's lives as might be changed by law. Justice Marshall had little use for law as abstraction, divorced from social reality (he muttered under his breath for days about Judge Bork's remark that he wished to serve on the Court because the experience would be "an intellectual feast"); his stories kept us focused on law as a source of human well-being.⁸²

She explained that Justice Marshall had an "understanding of the pragmatic—of the way in which law worked in practice as well as on the books, of the way in which law acted on people's lives,"⁸³ and that

[i]f a clerk wished for a year of spinning ever more refined (and ever less plausible) law-school hypotheticals, she might wish for a clerkship other than Justice Marshall's. If she thought it more important for a Justice to understand what was truly going on in a case and to respond to those realities, she belonged in Justice Marshall's chambers.⁸⁴

While Kagan noted that "notions of equity" did not always govern Justice Marshall's votes in cases and that he "believed devoutly . . . in the rule of law," "[a]lways, though, Justice Marshall believed that one kind of law—the Constitution—was special, and that the courts must interpret it in a special manner. Here, more than anywhere else, Justice Marshall allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him."⁸⁵ She explained with this statement:

[I]n Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government—to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission.⁸⁶

According to Kagan, the case that she thought Justice Marshall cared the most about during her clerkship was *Kadrmas v. Dickinson Public Schools*, a case raising the question of "whether a school district had violated the Equal Protection Clause by imposing a fee for school bus service and then refusing to waive the fee for an indigent child who lived sixteen miles from the nearest school."⁸⁷ Although Kagan had told him "it would be difficult to find in favor of the child, Sarita Kadrmas, under equal protection law," Kagan further explained,

[t]o Justice Marshall, the notion that government would act so as to deprive poor children of an education—of "an opportunity to improve their status and better their lives"—was

⁸² Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1127 (1993).

⁸³ *Id.* at 1127-28.

⁸⁴ *Id.* at 1128.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1129.

⁸⁷ *Id.*

anathema. And the notion that the Court would allow such action was even more so; to do this would be to abdicate the judiciary's most important responsibility and its most precious function.⁸⁸

Kagan explained that, under "Justice Marshall's vision of the Court and the Constitution," "[t]he nine Justices sat . . . to ensure that Sarita Kadrmas could go to school each morning. . . . And however much some recent Justices have sniped at that vision, it remains a thing of glory."⁸⁹

Justice Marshall's approach to judging and constitutional interpretation sound much like the qualities that President Obama has said that he will look to in selecting judges. The Senate Judiciary Committee should question Kagan about this article and ask whether she, if confirmed, will adopt Justice Marshall's view of the role of the Supreme Court and of the Constitution in deciding cases that come before the Court.

Finally, Kagan's praise for Aharon Barak may shed light on her judicial philosophy. According to an article in the *Harvard Law Record*, Kagan called Aharon Barak, her "judicial hero," stating that "[h]e is the judge who has best advanced democracy, human rights, the rule of law, and justice."⁹⁰ The remarks were made on the occasion of Barak, "the recently retired President of the Supreme Court of Israel," receiving "the Peter Gruber Foundation 2006 Justice Prize . . ."⁹¹

Ed Whelan, writing about Kagan's comments, cited Judge Richard Posner's critique of Barak from Posner's book *How Judges Think*.⁹²

"One of the most prominent of the aggressively interventionist foreign judges is Aharon Barak. . . . [H]is book on judging is Exhibit A for why American judges should be wary about citing foreign judicial decisions. . . . Although Barak is familiar with the American legal system and supposes himself to be in some sort of sync with liberal American judges, he actually inhabits a completely and, to an American, weirdly different juristic universe. . . .

[W]ithout a secure constitutional basis, Barak created a degree of judicial power undreamt of by our most aggressive Supreme Court justices. . . . Among the rules of Israeli law that Barak's judicial opinions have been instrumental in creating are that any citizen can ask a court to block illegal action by a government official even if he is not personally affected by it . . . ; that any government action that is 'unreasonable' is illegal . . . ; that in the name of 'human dignity' a court can order the government to alleviate homelessness and poverty; and that a court can countermand military orders. . . .

Barak bases his conception of judicial authority on abstract principles that in his hands are merely plays on words. . . . For Barak, [the term 'democracy'] has a 'substantive' component, namely a set of rights ('human rights' not limited to political

⁸⁸ *Id.* (footnote omitted).

⁸⁹ *Id.* at 1130.

⁹⁰ Rebecca Agule, *Distinguished Israeli Jurist Receives 2006 Justice Prize*, HARV. LAW REC., Sept. 29, 2006, available at <http://www.hlrecord.org/2.4463/distinguished-israeli-jurist-receives-2006-justice-prize-1.578536>.

⁹¹ *Id.*

⁹² Posting of Ed Whelan to Bench Memos, *Kagan's "Judicial Hero," Aharon Barak*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/55919/kagan-s-judicial-hero-aharon-barak/ed-whelan> (May 21, 2010, 14:16).

rights, such as the right to criticize public officials, that support democracy), enforced by the judiciary, that clips the wings of elected officials. This is not a justification for a hyperactive judiciary, but merely a redefinition of it.

To him [interpretation] is a practice remote from a search from the meaning intended by the authors of legislation. . . .

Armed with such abstractions as 'democracy,' 'interpretation,' . . . and (of course) 'justice' ('I try to be guided by my North Star, which is justice. I try to make law and justice converge, so that the Justice will do justice'), the judiciary is a law unto itself."⁹³

Whelan also notes that Posner "quotes Judge Bork as writing that Barak 'establishes a world record for judicial hubris.'"⁹⁴

The full context of then-Dean Kagan's comments regarding President Aharon Barak can be found by reviewing the video of the award presentation and are even more disturbing. Kagan began by recounting her conversation with President Barak the night before,

We were having dinner last night in the Caspersen Room in the library. And, in the Caspersen Room there are a couple of portraits of famous and great judges whom Harvard is associated with. The portraits there are of Justice Brandeis and of Justice Holmes, and, as we look around this room [Ames Courtroom] there are some more portraits of great Justices whom Harvard Law School is associated with. Here, Justice Brennan, and there, Justice Frankfurter, but as I said to President Barak yesterday, the Harvard Law School association of which I'm most proud is the one we have with President Barak of the Israeli Supreme Court. . . . I told President Barak and I want to repeat in public that he is my judicial hero. He is the judge or justice in my lifetime whom I think best represents and has best advanced the values of democracy and human rights, of the rule of law, and of justice.⁹⁵

Senators should question Kagan about her statements regarding President Barak being her judicial hero. While Barak has a compelling life story and certainly, as Whelan notes, "merits respect," it is "a far different matter for an American lawyer—a Supreme Court nominee, no less—to regard him as one's 'judicial hero.'"⁹⁶

Questions

- In general, what is your understanding of the Court's power of judicial review? Do you believe the rationale given in *Marbury v. Madison* and *Federalist 78* for the exercise of judicial review correctly explain the basis for the power? If so, why? If not, why not?

⁹³ *Id.* (quoting RICHARD POSNER, *HOW JUDGES THINK* 362-68) (alterations in the original).

⁹⁴ *Id.*

⁹⁵ Videotape: September 21, 2006 Introduction of Israeli Supreme Court President Aharon Barak (Harvard Law School Media Services 2006), available at <http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm> (Audio and Video Files, Part I, comment begins at 2:04 mark).

⁹⁶ Posting of Ed Whelan to Bench Memos, *Kagan, Aharon Barak, and the "Litmus Test" of Standing*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/56149/kagan-aharon-barak-and-litmus-test-standing/ed-whelan> (May 28, 2010, 12:15).

- General Kagan, in your senior thesis, *To the Final Conflict: Socialism in New York City, 1900-1933*, you wrote “Why, in a society by no means perfect, has a radical party never attained the status of a major political force?” What imperfections did you see in our society at that time, and what imperfections do you see today?
 - Is it an imperfection that “[t]he Constitution has never been held to confer a right to a minimum level of welfare”?
 - What role do you believe the judiciary should play in addressing imperfections in society?
- In your master’s thesis, you state that it “is not necessarily wrong or invalid” for judges to “try to mold and steer the law in order to promote certain ethical values and achieve certain social ends.” Do you still agree with that statement?
 - You also wrote that “[d]ecisions should be based upon legal principle and reason; they should appeal no less to our intellectual than to our ethical sense. If a court cannot justify a ruling in terms of legal principle, then that court should stay its hand: No judge should hand down a decision that cannot plausibly be grounded in principles referable to an acceptable source of law.” You later wrote, “Judicial opinions may well appeal to the ethical sense—but this alone is not enough. In order to achieve some measure of permanence in an ever-fluctuating political and social order, judicial decisions must be plausibly rooted in either the Constitution or another accepted source of law.” Do you believe it is sufficient for a judicial decision to merely be “based upon legal principle and reason” and be simply “plausibly rooted in either the Constitution or another accepted source of law”? Shouldn’t judges be seeking to firmly ground their decisions in legal principle and reason and seek out the proper interpretation of the Constitution, not merely a plausible one? If two equally plausible interpretations exist, one that would advance the judge’s ethical values and preferred social ends, and the other that would not, is it acceptable for the judge for this reason to choose one interpretation over the equally plausible other interpretation?
 - If it is acceptable, can you square that answer with the rationale for judicial review set out in *Marbury* and *Federalist* 78, which ground the power in the judge’s duty to prefer the Constitution over other sources of law, thus requiring judges to set aside those other sources when they conflict with the Constitution? If two equally plausible interpretations of a relevant constitutional provision exist, and the statute or other government enactment or action at issue is consistent with one of those interpretations, can a judge honestly find a conflict with the Constitution?
- You also wrote in your master’s thesis that “even the most meticulously crafted and closely analyzed opinion may not endure the test of time: A future court may overturn such an opinion on the ground that new times and circumstances demand a different interpretation of the Constitution.” What do you believe are “new times and circumstances” that would “demand a different interpretation of the Constitution?” What “new times and circumstances” could, for example, alter the meaning of the words “nor shall any State deprive any person of life, liberty, or property, without due process of law,” and how could new times and circumstances change that meaning?

- You said in your response to written questions following the hearing on your nomination as solicitor general that you “fully accept” the “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.” Acceptance is different from agreement. Do you agree with the traditional understanding? Would you apply that understanding if confirmed?
- General Kagan, in your review of Professor Carter’s book, you note with approval Carter’s stated view that most cases before the Court require more “than the application of ‘mundane and lawyerly’ skills.” Rather, these cases require “‘interpretive judgment,’” and in all such cases “‘there comes a crucial moment when the interpreter’s own experience and values become the most important data.’” You write, as part of your agreement with Carter on this point, that “many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value.” However, in responding to written questions following the hearing on your nomination as solicitor general you told Senator Specter that “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.” Can you please reconcile these statements?
- In 2006, you called Aharon Barak your “judicial hero” and noted that “[h]e is the judge or justice in my lifetime whom I think best represents and has best advanced the values of democracy and human rights, of the rule of law, and of justice.” Can you please elaborate on what you meant by that statement? If confirmed, would you look to Barak’s judicial method as a model for how to decide cases? On what basis should a judge consider, use, or rely upon foreign precedents?
- In *Griswold v. Connecticut*, the Court held that the Constitution contains a right to privacy and that this right extended to protect a married couple’s right to use contraceptives. The Constitution nowhere mentions either “privacy” or “contraception,” but the *Griswold* majority found a right to privacy in the emanations from penumbras of various constitutional provisions that in the majority’s view had more or less to do with protecting some aspect of personal privacy. Do you approve of the majority’s reasoning in *Griswold*? If so, how is that method consistent with any sound method or theory of interpretation? If not, do you still accept that the Constitution protects some general right to privacy or personal autonomy? If so, how do you derive that right from the Constitution’s text, structure, and history?

MILITARY RECRUITING & “DON’T ASK, DON’T TELL”

In October 2003, Kagan, then-dean at Harvard Law School, sent an e-mail to the law school community explaining that the military was recruiting on campus in violation of the school’s anti-discrimination policy. As she explained,

[t]he Law School’s anti-discrimination policy, adopted in 1979, provides that any employer who recruits at the School and uses the services of OCS [the Office of Career Services] must sign a statement indicating that it does not discriminate on various bases, including sexual orientation. As a result of this policy, the military was barred for many years from using the services of OCS. Last year, the Dean of [the] Law School, in consultation with other officers of the University, reluctantly lifted this ban for the military. The Dean took this action because of a new ruling by the Department of

Defense stating that unless the Law School took this action, the entire University would lose federal funding under a statute known as the Solomon Amendment The Law School does not receive significant federal funding, and our federally sponsored student loan programs would not have been at risk. The University, however, receives about 16% of its operating budget from the federal government The Dean determined, as did all his counterparts at other law schools, that he should make an exception to the School's anti-discrimination policy in the face of this threat to the University's funding. I left this exception in force this year, once again because of the enormous adverse impact a prohibition of military recruitment would have on the research and educational missions of other parts of the University.⁹⁷

Kagan continued on, writing:

This action causes me deep distress *I abhor the military's discriminatory recruitment policy.* The importance of the military to our society—and the extraordinary service that members of the military provide to all the rest of us—makes this discrimination more, not less, repugnant. The military's policy deprives many men and women of courage and character from having the opportunity to serve their country in the greatest way possible. *This is a profound wrong—a moral injustice of the first order.* And it is a wrong that tears at the fabric of our own community, because some of our members cannot, while others can, devote their professional careers to their country.⁹⁸

When the Solomon Amendment was challenged in court on constitutional grounds, fifty-four Harvard Law School faculty members, including Kagan, "filed an amicus brief in that suit [in the U.S. Court of Appeals for the Third Circuit] articulating different, statutory grounds for overturning the [Department of Defense's] policy."⁹⁹ After the Third Circuit held in late 2004 that "FAIR [Forum for Academic and Institutional Rights] ha[d] demonstrated a likelihood of success on the merits of its First Amendment claims and that it [wa]s entitled to preliminary injunctive relief" to enjoin enforcement of the Solomon Amendment,¹⁰⁰ according to the *New York Times*, "Ms. Kagan . . . barred military recruiters from [] campus[.]. In Harvard's case, the recruiters were barred only from the main career office, while Ms. Kagan continued to allow them access to students through the student veterans' group."¹⁰¹ However,

⁹⁷ Email from Elena Kagan, Dean of Harvard Law School, to Harvard Law School Community (Oct. 6, 2003, 8:03), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part22.pdf>.

⁹⁸ *Id.* (emphasis added).

⁹⁹ Email from Elena Kagan, Dean of Harvard Law School, to Harvard Law School Community (Sep. 20, 2005, 17:36), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part22.pdf>; *Solicitor General Hearing*, *supra* note 5, at 80-81 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

¹⁰⁰ *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004). The Third Circuit "reverse[d] and remand[ed] for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment." *Id.* at 246.

¹⁰¹ Katharine Q. Seelye, *Potential Court Pick Faced Dilemma at Harvard*, N.Y. TIMES, May 6, 2010, available at <http://www.nytimes.com/2010/05/07/us/politics/07kagan.html?ref=todayspaper&pagewanted=all>. Nina Totenberg reported that "[w]hen a federal appeals court struck down the provision nearly a year and a half after she became dean, she reinstated Harvard's anti-discrimination policy barring military recruiters from using the school's placement office." Nina Totenberg, *Kagan's Attitude Toward Military Faces Scrutiny*, NPR, June 9, 2010,

<http://www.npr.org/templates/story/story.php?storyId=127579195>. However, Totenberg explains that while her public position as dean was to revert to the anti-discrimination policy, Kagan reached out privately to the Student Veterans Association, asking the members, some of them Iraq War veterans, to once again act as a proxy for the placement office.

the ban lasted only for the spring semester in 2005. The Pentagon told the university over the summer that it would withhold 'all possible funds' if the law school continued to bar recruiters from the main placement office. So, after consulting with other university officials, Ms. Kagan said, she lifted the ban.¹⁰²

When the Third Circuit's decision was appealed to the Supreme Court, Kagan, "in her capacity as a Professor of Law,"¹⁰³ joined thirty-nine other law professors in filing an *amicus* brief in support of FAIR in *Rumsfeld v. FAIR*,¹⁰⁴ a case addressing the Solomon Amendment's constitutionality.¹⁰⁵ Notably, *amici* began their brief by expressing a "deep[] commit[ment]" to their asserted "fundamental moral principle" that a society that discriminates or otherwise tolerates discrimination on the basis of "sexual orientation" is not "just."¹⁰⁶

The Solomon Amendment was a congressional response to law schools' disagreement with the government's prohibitions of homosexuals in the military.¹⁰⁷ The Solomon Amendment,¹⁰⁸ provides that institutions of higher education denying military recruiters equal access to students, at the same level provided to others allowed to recruit on campus, stand to lose their federal funding.¹⁰⁹ The Solomon Amendment's text, with its most recent revision, prohibits funding to flow to an institution of higher education that

has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer¹¹⁰

Recollections of her meeting with the group vary, and of the dozen or so people who were there, many could not speak on the record because of the positions they now hold.

"It was a tough room," said one of those present. "She got more pushback than she was used to."

....

Another officer of the club recalls the meeting as quite a bit less contentious. "I don't remember us turning her down. We agreed to do a half-step less than she wanted."

In the end, the group posted on the Harvard website a somewhat ambiguous announcement declaring that it had decided to accept a "limited interim role to assist fellow classmates" who wanted to meet with recruiters from the military legal offices. While the group declined to serve in a "formal liaison" capacity for the school, it still sent out e-mails to the student body announcing when a military recruiter would be on campus and letting students know how to arrange interview times. Military recruiters thus continued to meet with students on campus and in the same classrooms where other recruiters met with students.

Id.

¹⁰² Katharine Q. Seelye, *Potential Court Pick Faced Dilemma at Harvard*, N.Y. TIMES, May 6, 2010, available at <http://www.nytimes.com/2010/05/07/us/politics/07kagan.html?ref=todayspaper&pagewanted=all>.

¹⁰³ Brief of Professors William Alford, et al. as Amici Curiae Supporting Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (No. 04-1152), at *1 n.2 [hereinafter Brief of Professors].

¹⁰⁴ 547 U.S. 47 (2006).

¹⁰⁵ 10 U.S.C. § 983 (2000 ed. and Supp. IV).

¹⁰⁶ See Brief of Professors, *supra* note 103, at *1.

¹⁰⁷ *Rumsfeld v. FAIR*, 547 U.S. at 51.

¹⁰⁸ 10 U.S.C. § 983 (2000 ed. and Supp. IV).

¹⁰⁹ *Id.*

¹¹⁰ 10 U.S.C. § 983(b), (b)(1) (2000 ed. and Supp. IV).

FAIR and the government agreed that the Solomon Amendment required law schools to “offer military recruiters the same access to [their] campus[es] and students that [they] provide[] to the nonmilitary recruiter receiving the most favorable access.”¹¹¹ In other words, if a school allowed even one nonmilitary recruiter certain access, it had to allow the same access to military recruiters.

The professors’ brief Kagan joined interpreted the Solomon Amendment differently. According to that brief, the Solomon Amendment “rules out policies that target military recruiters for disfavored treatment, but it does not touch evenhanded antidiscrimination rules that incidentally affect the military.”¹¹² In other words, if schools did not allow access to nonmilitary recruiters who discriminated, the Solomon Amendment did not require schools to allow access to military recruiters.¹¹³ The professors framed the issue to characterize their schools’ policies as content and viewpoint neutral:

[T]he question is whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school’s failure to make a special exception might incidentally hinder or preclude military recruiting. The answer is “no.”¹¹⁴

The Supreme Court unanimously rejected the professors’ proposed interpretation.¹¹⁵ According to the Court, the Solomon Amendment’s text focused on the access provided to military recruiters rather than the content of a school’s recruiting policy. Moreover, during the course of the FAIR litigation, Congress had revised the Solomon Amendment to “now prevent[] an institution from receiving certain federal funding if it prohibits military recruiters ‘from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.’”¹¹⁶ Congress had done this in response to the district court’s reading that the original text of the Solomon Amendment required schools to provide only entry to campus but not necessarily equal access to students.¹¹⁷ The Supreme Court held that to accept the professors’ interpretation would negate the revision—a revision enacted to allow military recruiters access to students on campus—by allowing schools to deny access to military recruiters so long as they did so under a generally applicable nondiscrimination policy.¹¹⁸ Following the Court’s decision, Kagan sent an email to the Harvard Law School community in which she said that she was “disappointed” by the Court’s decision.¹¹⁹

Notably, the *amici* professors made an argument in their brief that could threaten the protection of religious liberties should it be accepted by the Supreme Court. In urging the Court to not decide the constitutional issues, the professors stated,

¹¹¹ *FAIR*, 547 U.S. at 55.

¹¹² Brief of Professors, *supra* note 103, at *3.

¹¹³ *FAIR*, 547 U.S. at 55-56.

¹¹⁴ Brief of Professors, *supra* note 103, at *2.

¹¹⁵ *FAIR*, 547 U.S. at 55-58. Justice Alito did not participate in the case.

¹¹⁶ See *id.* at 54 (quoting 10 U.S.C. A. § 983(b) (2000 ed., Supp. IV)) (footnote omitted) (second alteration in the original).

¹¹⁷ *Id.* at 54, 57.

¹¹⁸ *Id.*

¹¹⁹ Email from Elena Kagan, Dean of Harvard Law School, to the Harvard Law School Community (Mar. 7, 2006, 9:16 am), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part22.pdf>.

if the Court of Appeals' stated justifications for concluding that the Solomon Amendment is likely unconstitutional were applied to the Amendment as we read it—an exercise not undertaken below—the consequences could be worrisome. Our concern, first and foremost, is in furthering the eradication of invidious discrimination. Accordingly, we are deeply concerned about an opinion that would accept the assertion that the Solomon Amendment requires nothing more than equal access—but then conclude that the statute is nonetheless unconstitutional because it infringes upon associational rights, compels unwilling speech, or restricts expressive conduct.¹²⁰

As they explained,

Most obviously, such an approach could encourage attempts by discriminatory employers, educational institutions, or other groups to evade compliance with various pieces of federal civil rights legislation—including the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—by asserting that granting equal treatment without regard to race or sex would send a “message” with which they disagree.

An additional complication in our view is the possibility that affirmance of the Court of Appeals' reasoning would *be invoked by discriminators in efforts seeking immunity from the large and growing number of laws and ordinances that outlaw unequal treatment on the basis of sexual orientation*. By one recent count, 23 States, the District of Columbia, and at least 183 cities and counties now prohibit sexual orientation discrimination in areas such as education, employment, housing, and public accommodations.

At this point in our history, there are—*happily*—few institutions or groups willing to seek exemptions from civil rights laws on the ground that discrimination on the basis of race or sex is fundamental to their associational values. *But the same cannot be said of those who seek to treat people unfavorably because they are lesbian, gay, bisexual, or transgender*. And while this Court has recognized the compelling nature of the government's interest in stamping out discrimination against racial minorities and women—an interest that should outweigh even a constitutionally-based objection to enforcement of civil rights laws—it has not yet had the occasion to recognize a similarly compelling interest in the eradication of anti-gay bigotry.¹²¹

The professors' argument could be seen to claim that statutory protections for sexual orientation trump the First Amendment's religious liberty protections—a very dangerous position for those who believe on religious grounds that homosexual activity is morally wrong. Of course, if the

¹²⁰ Brief of Professors, *supra* note 103, at *21–22 (citation and footnote omitted) (by “equal access” the *amici* presumably mean their reading of the statute). The professors did note in a footnote that

If this Court were to accept the position of these amici, the propriety of proceeding to address the constitutional issue when the Court of Appeals had not done so on our understanding of the statute, and when sorting out issues of standing would pose its own difficulties, would seem doubtful. If, instead, the Court were to reject the position of these amici and thus could not avoid reaching the constitutional question, amici express no view of how the constitutional analysis should proceed, nor of the implications of a holding that such a requirement is unconstitutional.

Id. at *22, n.27.

¹²¹ *Id.*, at *22–23 (footnotes and citations omitted) (emphasis added).

anti-discrimination law is neutral and generally applicable, under *Employment Division v. Smith*,¹²² there would be no Free Exercise problem. So, if the law generally forbids discrimination on the basis of sexual orientation, the Free Exercise Clause, as interpreted in *Smith*, offers no exemption for discrimination based on religious reasons. But a legislature could provide such an exemption by statute. Therefore, another question that arises is whether the right to non-discrimination on the basis of sexual orientation trumps any legislatively-created exemption.

Interestingly, as a result of the brief and the Court's decision, one commentator called for a deeper exploration into Kagan's "ability to separate her reading of the law from her own political positions or from the politically correct stances of the legal academy."¹²³ The commentator, Ed Whelan, quoted Peter Berkowitz, a writer for *The Weekly Standard*, who found ironic the professors' inability to craft a plausible argument:

"This dazzling array of eminent law professors proved incapable—even after hiring the best Democratic party legal talent money could buy—of advancing a single legal argument persuasive enough to pick off even a single dissent from the four more progressive justices on the court—Souter, Breyer, Ginsburg, and Stevens—or to provoke even a single concurrence expressing a single demurral on a single point of law from Chief Justice Roberts's opinion."¹²⁴

Whelan's call for a deeper exploration is even more important in light of statements that Kagan made at her confirmation hearing for the position of solicitor general and positions that the Department of Justice has taken since her confirmation. In her opening statement, Kagan made clear that if confirmed her "responsibilities to Congress" would include "most notably, the *vigorous defense* of the statutes of this country against constitutional attack."¹²⁵ She explained that "[t]raditionally, 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 she "pledge[d] to continue this strong presumption that the Solicitor General's Office will defend each and every statute enacted by this body."¹²⁶

In written questions following the hearing, Kagan was asked by Senator Grassley about her ability to "vigorously defend" the Solomon Amendment.¹²⁷ She replied that she would "defend this law as vigorously as any other in the United States statute books," and that she felt "confident in saying" that had she been solicitor general when the Third Circuit ruled in *FAIR v. Rumsfeld*, she "would have sought certiorari in the Supreme Court, exactly as the then-Solicitor General did."¹²⁸ She was also asked by Senator Sessions if she "believe[d] 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

¹²² 494 U.S. 872 (1990).

¹²³ Posting of Ed Whelan to Bench Memos, *Obama's SG Pick Elena Kagan—Part 2*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50543/obamas-sg-pick-elena-kagan-mdash-part-2/ed-whelan> (Jan. 7, 2009, 15:48).

¹²⁴ *Id.* (quoting Peter Berkowitz, *U.S. Military: 8, Elite Law Schools: 0 How did so many professors misunderstand the law?*, *The Weekly Standard*, March 20, 2006, at Vol. 11, Issue 25, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/011/959tzkai.asp>).

¹²⁵ *Solicitor General Hearing*, *supra* note 5, at 47 (Opening Statement of Elena Kagan) (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.* at 153 (Written Questions of Senator Chuck Grassley to Elena Kagan to be Solicitor General, U.S. Department of Justice).

¹²⁸ *Id.*

supplements—10 U.S.C. § 654” and how “would [she] analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?”¹²⁹ She responded:

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. Goldberg*, 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.¹³⁰

In a March 18, 2009, letter to Senator Specter, Kagan expounded on her answer to Senator Sessions, writing:

Under prevailing Equal Protection law, the “don’t ask, don’t tell” policy and 10 U.S.C. § 654 are subject to rational basis scrutiny. . . . [T]he rational basis standard is very easy to satisfy. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568 (1979). Moreover, courts frequently grant Congress even greater deference than usual when military matters are involved. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981). In enacting 10 U.S.C. § 654, Congress made extensive findings explaining the military’s recruiting policy. These findings satisfy the Equal Protection Clause’s rational basis test, and the government accordingly has had broad success in defending the “don’t ask, don’t tell” policy and its associated statute against constitutional challenge. *See, e.g., Able v. United States*, 155 F.3d 628 (2nd Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996).¹³¹

While Kagan has not had a direct opportunity to confront this policy, she has, by implication, undermined it. In May 2008, the U.S. Court of Appeals for the Ninth Circuit held in *Witt v. Department of the Air Force* that “Don’t Ask, Don’t Tell,” “must satisfy an intermediate level scrutiny under substantive due process, an inquiry that requires facts not present on the record before us.”¹³² In

¹²⁹ *Id.* at 160 (Questions for the Record for Elena Kagan Submitted by Senator Jeff Sessions).

¹³⁰ *Id.*

¹³¹ Letter from Elena Kagan, Solicitor General Nominee, to Senator Arlen Specter, Ranking Member of the Senate Judiciary Committee (Mar. 18, 2009), at 11, *available at* http://www.scribd.com/full/31251143?access_key=key-9vfpapao9f5yrl1mpn7 (emphasis added) [hereinafter March 18 Letter].

¹³² *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821-22 (9th Cir. 2008). The court affirmed the dismissal of the equal protection claim, noting that

Philips [v. Perry], 106 F.3d 1420 (9th Cir. 1997)) clearly held that DADT does not violate equal protection under rational basis review, 106 F.3d at 1424-25, and that holding was not disturbed by *Lawrence*, which declined to address equal protection, *see* 539 U.S. at 574-75 (declining to reach the equal protection argument and, instead, addressing “whether *Bowers* itself ha[d] continuing validity”).

Id. at 821. It vacated and remanded “the district court’s judgment with regard to Major Witt’s substantive due process claim and procedural due process claim” *Id.* at 822; Posting of Ed Whelan to Bench Memos, *SG Kagan’s Subversion of “Don’t Ask, Don’t Tell” Law*, NAT’L REV. ONLINE, (May 19, 2009, 12:22) [hereinafter *Don’t Ask, Don’t Tell*].

his dissent from the court's denial of rehearing en banc, Judge O'Scannlain noted that "[t]his is the first case in which a federal appellate court has allowed a member of the armed services to bring a substantive due process challenge to the congressionally enacted 'Don't Ask, Don't Tell' homosexual personnel policy for the military."¹³³ He further noted that the opinion "claim[ed] to rest its decision on the Supreme Court's opinion in *Lawrence v. Texas* Instead, however, *Witt* contravenes Supreme Court precedent, including *Lawrence*, in the area of substantive due process, creates a circuit split, and stretches the judicial power beyond its constitutional mandate."¹³⁴

Given Kagan's stated commitment to vigorously defend the laws of the United States, one would expect her to have filed a petition for a writ of certiorari with the Supreme Court of the United States. Despite twice asking for and receiving one-month extensions to the deadline to file a certiorari petition with the Supreme Court, the Obama administration "let the most recent deadline pass without seeking another extension."¹³⁵ The *Wall Street Journal* reported that "[a] Justice Department spokeswoman said the government would defend the law at the trial over Maj. Witt's dismissal. The decision not to appeal to the Supreme Court 'is a procedural decision made because the case is still working its way through the regular judicial process,' she said."¹³⁶ Attorney General Holder sent a letter to the Senate explaining that "the decision not to seek review of the Ninth Circuit decision 'was made after extensive consultation with the Department of Defense and is based on the longstanding presumption against Supreme Court review of interlocutory decisions as well as practical litigation considerations.'"¹³⁷ However, as Ed Whelan has noted,

Holder's explanation makes little sense. What Holder calls a presumption against review of interlocutory decisions is, at least for federal appellate rulings, only a prudential consideration, and that consideration is of little weight where, as here, (1) the court of appeals has ruled on a pure question of law (not a mixed question of law and fact that might benefit from further factual development); and (2) that ruling subjects a litigant—especially *the military during a time of war*—to litigation burdens that would be eliminated by a reversal. The "practical litigation considerations" that Holder invokes cut in favor of immediate review.¹³⁸

Whelan further pointed out that:

A solicitor general acting "with vigor" to "advance . . . the interests of the United States" would seek an immediate Supreme Court reversal of the Ninth Circuit's rogue ruling, rather than require the military to undergo burdensome litigation in the district court under an amorphous standard—litigation, that in the event of a victory by the military, would leave in place the Ninth Circuit's ruling. The continuing existence of the Ninth Circuit's ruling invites further lawsuits by additional plaintiffs before various judges, the predictable end result of which is chaos and confusion.

¹³³ *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1265 (9th Cir. 2008) (denying rehearing en banc) (O'Scannlain J., dissenting); *Don't Ask, Don't Tell*, *supra* note 132.

¹³⁴ *Witt v. Dep't of the Air Force*, 548 F.3d at 1265 (denying rehearing en banc) (O'Scannlain J., dissenting); *Don't Ask, Don't Tell*, *supra* note 132.

¹³⁵ Jess Bravin & Laura Meckler, *Obama Avoids Test on Gays in Military*, WALL ST. J., May 19, 2009, at A3, available at <http://online.wsj.com/article/SB124268952606832391.html>.

¹³⁶ *Id.*

¹³⁷ *Don't Ask, Don't Tell*, *supra* note 132.

¹³⁸ *Id.*

.....

Kagan's failure to seek immediate review of the Ninth Circuit's ruling is either a remarkably poor judgment call or a betrayal of her promise to set aside her personal opposition to "Don't Ask, Don't Tell" in representing the interests of the United States. Alas, I have too much regard for Kagan's legal ability to consider the first alternative to be plausible.¹³⁹

Questions

- General Kagan, the *amicus* brief that you and thirty-nine other Harvard professors filed with the Supreme Court in *Rumsfeld v. FAIR*, stated that "there are—*happily*—few institutions or groups willing to seek exemptions from civil rights laws on the ground that discrimination on the basis of race or sex is fundamental to their associational values. *But the same cannot be said of those who seek to treat people unfavorably because they are lesbian, gay, bisexual, or transgender.*" The brief went on to state, "[a]nd while this Court has recognized the compelling nature of the government's interest in stamping out discrimination against racial minorities and women—an interest that should outweigh even a constitutionally-based objection to enforcement of civil rights laws—it has not yet had the occasion to recognize a similarly compelling interest in the eradication of anti-gay bigotry." Do you believe that statutory protections for sexual orientation trump the First Amendment's religious liberty protections?
 - Should a legislature be permitted to provide a statutory exemption, such as a religious exemption, to a neutral and generally applicable law that prohibits discrimination based on sexual orientation? For example, does the government have a compelling interest in requiring a landlord to rent an apartment to a homosexual couple despite her sincere religious belief that renting the apartment to the couple would be to enable their lifestyle and thus be morally wrong? Or, would the government have a compelling interest in requiring the Catholic Church to admit homosexuals to seminaries despite the Church's understanding that homosexuals are not fit for the priesthood?
 - Do you believe, under a proper interpretation of the Equal Protection Clause or the Due Process Clause, that Courts should apply a higher level of scrutiny, such as intermediate or strict scrutiny to discrimination based on sexual orientation?
- You made clear at your confirmation hearing for the position of solicitor general that if confirmed your "responsibilities to Congress" would include "most notably, the *vigorous defense* of the statutes of this country against constitutional attack." You were also asked in follow-up questions if you "believe[d] 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" and how "would you analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?" You responded that "courts have upheld this statute against constitutional attack under the rational basis standard" Given these statements, why did the government decline to seek certiorari after the U.S. Court of Appeals for the Ninth Circuit held in *Witt v. Department of the Air Force* that "Don't Ask, Don't Tell," "must satisfy an intermediate level scrutiny under substantive due process" Do you believe the government's

¹³⁹ *Don't Ask, Don't Tell*, *supra* note 132 (first alteration in the original).

failure to seek certiorari was consistent with your promise to vigorously defend the statutes of this country?

SAME-SEX MARRIAGE & THE DEFENSE OF MARRIAGE ACT

In written questions following the hearing on her nomination to be solicitor general, Kagan was asked by Senator Cornyn if she “believe[d] that there is a federal constitutional right to same-sex marriage.”¹⁴⁰ Kagan responded, “There is no federal constitutional right to same-sex marriage.”¹⁴¹ In her March 18, 2009, letter to Senator Specter, however, she expounded on that answer with the statement:

I previously answered this question briefly, but (I had hoped) clearly, saying that “[t]here is no federal constitutional right to same-sex marriage.” I meant for this statement to bear its natural meaning. Constitutional rights are a product of constitutional text as interpreted by courts and understood by the nation’s citizenry and its elected representatives. By this measure, which is the best measure I know for determining whether a constitutional right exists, there is no federal constitutional right to same-sex marriage.¹⁴²

This response, which is far more telling than her first response, leaves open the possibility that, if confirmed as a Justice, Kagan could interpret the Constitution to include a right to same-sex marriage.

Kagan was also asked in written questions whether she would “defend the constitutionality of the Defense of Marriage Act before the Supreme Court?”¹⁴³ She responded:

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).¹⁴⁴

As with “Don’t Ask, Don’t Tell,” Kagan, as solicitor general, has not directly acted on the Defense of Marriage Act (DOMA). However, the Department of Justice’s (DOJ) actions in the case *Smelt v. United States* call into question her commitment to defending the Act. In *Smelt*, the DOJ filed a Motion to Dismiss Petitioner Smelt’s case challenging DOMA.¹⁴⁵ According to a news report, the “wording of the brief” “riled the gay and lesbian community.”¹⁴⁶ Geoff Kors, executive director of

¹⁴⁰ *Solicitor General Hearing*, *supra* note 5, at 148 (Questions from Senator Cornyn).

¹⁴¹ *Id.*

¹⁴² March 18 Letter, *supra* note 131, at 11-12.

¹⁴³ *Solicitor General Hearing*, *supra* note 5, at 175 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

¹⁴⁴ *Id.* at 176.

¹⁴⁵ Defendant United States of America’s Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof, *Smelt v. United States*, NO. SACV09-00286 (C.D. Cal. Aug. 3, 2009), *available at* http://www.scribd.com/full/16355867?access_key=key-1imfup80kg4qowe2io3r.

¹⁴⁶ Carolyn Lochhead, *Gay Activists Not Impressed with Obama’s Move*, SAN FRAN. CHRON., June 18, 2009, at A1, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/18/MNN618910H.DTL>.

Equality California, called it a “‘horrendous brief.’”¹⁴⁷ Congressman Barney Frank “told the Boston Herald . . . that Obama made a ‘big mistake’ with the brief.”¹⁴⁸ Additionally, “[s]everal activists . . . pulled out of a gay Democratic National Committee fundraiser in Washington”¹⁴⁹ In its Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss, however, DOJ made clear that the administration does not support DOMA.¹⁵⁰ The memorandum explained that “[w]ith respect to the merits, this administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal.”¹⁵¹ The government then noted that DOJ “has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, *even if the Department disagrees with a particular statute as a policy matter, as it does here.*”¹⁵² Moreover, DOJ went on to undercut its own argument for DOMA’s constitutionality by rejecting the procreation and childrearing as legitimate government interests served by DOMA:

Unlike the intervenors here, the government does not contend that there are legitimate government interests in “creating a legal structure that promotes the raising of children by both of their biological parents” or that the government’s interest in “responsible procreation” justifies Congress’s decision to define marriage as a union between one man and one woman. Since DOMA was enacted, the American Academy of Pediatrics, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, and the Child Welfare League of America have issued policies opposing restrictions on lesbian and gay parenting because they concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. Furthermore, in *Lawrence v. Texas*, Justice Scalia acknowledged in his dissent that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the *Lawrence* majority opinion—which, of course, is the prevailing law—because “the sterile and the elderly are allowed to marry.” For these reasons, the United States does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA’s constitutionality.¹⁵³

Dale Carpenter called the government’s new position on this issue

a gift to the gay-marriage movement, since it was not necessary to support the government’s position. It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. Indeed, some state court decisions have relied very heavily on procreation and child-rearing rationales to reject [same-sex marriage] claims. The DOJ is helping knock out a leg from under the opposition to gay marriage.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss at 2, *Smelt v. United States*, NO. SACV09-00286 (C.D. Cal. Aug. 24, 2009), available at http://www.scribd.com/full/18692933?access_key=key-2ar509ov1dce9282hiu [hereinafter Reply].

¹⁵¹ *Id.*

¹⁵² *Id.* (emphasis added).

¹⁵³ *Id.* at 6–7 (footnote omitted) (citations omitted).

....

The idea that same-sex parents are inadequate or at least sub-optimal has been a major point in the public-policy opposition to [same-sex marriage], and was used to support passage of DOMA. The DOJ now implies that DOMA is anachronistic, a holdover from a benighted time when we didn't know so much about the quality of gay parenting. The parenting concern has also been a reason for deference by state courts: as long as there was still a legitimate debate over the quality of same-sex parenting, courts ought to defer to states' judgments that traditional families are best. While the DOJ hasn't exactly endorsed the view that the parenting debate is over, this passage certainly points us in that direction.¹⁵⁴

This brief, issued by the Civil Division of the Department of Justice, did not bear Kagan's signature. This fact, however, does not signify that Kagan did not support or authorize the brief. Ed Whelan, writing for *National Review Online*, noted: "Consistent with convention, SG Kagan's name does not appear on the district-court brief. But two former senior DOJ officials have confirmed that, under usual practices, she surely must have been aware of, and approved, the positions taken in it."¹⁵⁵ The Senate Judiciary Committee should question Kagan about her involvement in the brief and why DOJ abandoned a key argument in support of DOMA's constitutionality.

Questions

- Do you believe that the Constitution, properly interpreted, contains a right to same-sex marriage? If so, please explain how you derive that right from the Constitution's text, structure, original understanding, and the logical implications that flow from those sources.
- Did you play any role in approving or reviewing the Reply Memorandum in Support of Defendant United States of America's Motion to Dismiss in the case *Smelt v. United States*? If so, could you please explain why DOJ abandoned the argument that traditional marriage rationally served the legitimate interest of promoting the raising of children by both parents, which Congress could reasonably conclude is the optimal environment for raising children?
- Do you believe that it was necessary to the court's determination of the issues in *Smelt* to note in the Reply Memorandum that the "administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal." Do you believe that such language is consistent with your promise to vigorously defend the statutes of this country?

¹⁵⁴ Posting of Dale Carpenter to The Volokh Conspiracy, *DOJ Boosts Cause of SSM, THE VOLOKH CONSPIRACY*, <http://volokh.com/2009/08/17/doj-boosts-the-cause-of-ssm/> (Aug. 17, 2009, 16:44).

¹⁵⁵ Posting of Ed Whelan to Bench Memos, *SG Kagan Breaks Her Vows?*, NAT'L REV. ONLINE, <http://bench.nationalreview.com/post/?q=ZW15NDVmOTlwNDhiMzMxNDlmYzA1MWY2NjZjNmU2MzY=> (Aug. 18, 2009, 12:43).

FIRST AMENDMENT**Academic**

In a lengthy article entitled, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Law*,¹⁵⁶ Kagan set forth her general understanding of current First Amendment doctrine. Briefly put, Kagan understands First Amendment doctrine to be concerned primarily (though not entirely) with the government's motive or purpose for regulating speech (or, more broadly put, expression). In her view, the complex system of rules and categories that characterizes present First Amendment doctrine is best explained as an attempt (whether conscious or unconscious) by the courts to ferret out speech restrictions that result from "improper" government motive.

The improper motive of which Kagan writes is "mere disapproval [of that speech], no matter whose or how widely shared."¹⁵⁷ In other words, in Kagan's view, at the heart of current First Amendment doctrine is the principle that government may not regulate speech because the government or other citizens are hostile to or deem the speech offensive.¹⁵⁸ Kagan contrasts what she deems these "ideological" reasons for restricting speech ("ideological" because they relate to the ideas the speech expresses) from what she calls "harm-based" reasons.¹⁵⁹ In theory, at least, government may restrict speech to prevent harm the speech causes, apart from the "harm" caused by exposing people to a disapproved idea.¹⁶⁰

Kagan recognizes problems with premising First Amendment doctrine on examining the motive for speech restriction. First, Kagan notes problems of proof: How does one go about determining what really motivated a legislator to vote to enact a law, much less what motivated a body of legislators?¹⁶¹ Moreover, while a speech restriction may ostensibly be addressed at some kind of harm caused by the speech (apart from the "harm" of merely disseminating an idea), a legislator's judgment concerning the magnitude of the harm or the need to address it may well be influenced by hostility or sympathy toward the speech at issue.¹⁶² Indeed, "[h]ostility toward ideas may . . . even impel the judgment of harm."¹⁶³

Given these practical problems, Kagan notes that the courts have for the most part eschewed efforts to inquire directly into what motivated a particular restriction on speech. How, then, does the First Amendment doctrine take account of—indeed, make central—motivation in determining constitutionality? According to Kagan, First Amendment doctrine accounts for motive by constructing a set of rules based on objective criteria—for example, "what a law includes and excludes," the classifications the law uses, and "how it is written"—that allows judges to sort out laws motivated by ideological concerns from those that are not.¹⁶⁴ Kagan notes that the sorting accomplished by these

¹⁵⁶ 63 U. CHI. L. REV. 413 (1996).

¹⁵⁷ *Id.* at 430.

¹⁵⁸ *Id.* at 429.

¹⁵⁹ *Id.* at 430.

¹⁶⁰ *See id.* at 436 (stating that her "conception of motive countenances (to use but a few examples) reasons relating to the capacity of speech to cause psychic trauma, trigger a hostile audience response, or persuade an audience to violate a law . . .").

¹⁶¹ *See id.* at 438-40.

¹⁶² *Id.* at 434.

¹⁶³ *Id.* at 435.

¹⁶⁴ *Id.* at 441.

rules will not be perfect—“simultaneously under- and overinclusive”—but that given the difficulty of determining motive directly, will achieve better results than directly inquiring into motive.¹⁶⁵

What would these rules look like? Kagan answers:

The first rule would draw a sharp divide between content-based and content-neutral restrictions, with a fuzzier line bisecting the world of content-based restrictions into those based on viewpoint and those on subject matter. The second and third rules would specify exceptions to the first: instances in which a restriction, though content-neutral, demands heightened scrutiny because of suspect origin; instances in which a restriction, though content-based, could receive relaxed scrutiny because apparently safe. And the fourth rule would draw another sharp distinction, this time between actions directly addressed to speech and those affecting speech only incidentally.¹⁶⁶

Kagan devotes the bulk of her article to demonstrating that “[t]hese rules . . . in fact constitute the foundation stones of First Amendment doctrine”¹⁶⁷ and showing how these rules work in practice. Rather than looking at all the rules Kagan notes, examining the distinction between content-based and content-neutral distinctions should give a sufficient understanding of her thesis.

The distinction between content-based and content-neutral speech restrictions is a basic distinction in First Amendment doctrine. Kagan explains the distinction by positing that content-based—and, especially, viewpoint-based—restrictions are far more likely to be motivated by ideological motives than content-neutral distinctions.¹⁶⁸ Therefore, content-based distinctions are presumptively suspect. But it is possible, however unlikely, that a content-based restriction could be free of impermissible motive. Thus, the idea that content-based distinctions are based on impermissible motive is only a presumption, albeit a strong presumption. Because it is only a presumption, courts must consider evidence that the restriction was not based on impermissible motive.¹⁶⁹ But because it is a strong presumption, the evidentiary requirement for overcoming it must be stringent. Hence, the strict scrutiny standard. As Kagan explains, that standard is “best understood as an evidentiary device that allows the government to disprove the implication of improper motive arising from the content-based terms of the law.”¹⁷⁰ But like the distinction between content-based and content-neutral distinctions, strict scrutiny examines motive indirectly rather than directly. The stronger a government’s asserted interest is, the more likely it is the government would act to advance that interest absent any improper motive; likewise, if the government restricts more speech than is necessary to achieve its interest, the more likely it is the government was really acting to quash ideas than to advance its asserted interest.¹⁷¹ A content-based law that passes strict scrutiny—a law that is necessary to advance a compelling interest—is thus likely to be one not based on improper motive.

On the other hand, a content-neutral restriction could conceivably result from an improper motive. Therefore, the presumption that content-neutral laws were not enacted for improper reasons can be rebutted. But because the likelihood of improper motive is less than that raised by content-based restrictions, the standard of review is looser. “[F]lunking this looser standard demonstrates that a

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 443.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 451-52.

¹⁶⁹ *Id.* at 453.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

content-neutral law has an illegitimate basis, thus rebutting the opposite presumption. . . . At a certain point—when the asserted interest is insubstantial or when it does not fit the scope of the challenged regulation—the usual presumption of proper purpose topples”¹⁷²

The above should suffice to explain Kagan’s underlying analysis of current First Amendment doctrine. Kagan also applies her thesis—that all First Amendment doctrine involves the use of evidentiary rules to search for improper motive—to content-neutral laws that raise a heightened likelihood of impermissible motive,¹⁷³ to content-based laws that raise a lesser likelihood of improper motive,¹⁷⁴ and to incidental (non-direct) restrictions on speech.¹⁷⁵

Before moving on to that discussion, there are some general observations to make. First, *Private Speech, Public Purpose* is well-written and demonstrates excellent analytical ability. Kagan does a very good job of tying together into a coherent whole the myriad rules and classifications that comprise present Supreme Court First Amendment doctrine. She makes a more than plausible defense of her thesis that the Court’s speech doctrine really is concerned primarily with discovering improper government motives for restricting speech. Moreover, her explanation of the different levels of scrutiny for content-based and content-neutral restrictions as evidentiary devices to discern improper motive powerfully (though implicitly) challenges a common understanding of the levels of scrutiny merely as devices to “balance” the value of speech against the perceived importance of and need for its restriction.

That said, in a 100-page article concerning First Amendment law, Kagan does not once mention the First Amendment’s text or the original understanding of that text. Underlying Kagan’s analysis is the unstated premise that the freedoms of speech and press guaranteed by the First Amendment are freedoms from government restrictions based on hostility towards the ideas expressed (though government may restrict speech to alleviate the harms—apart from the harm of exposing people to ideas—the speech may cause). That may be an accurate understanding of the First Amendment (or it may not), but nowhere does Kagan attempt to reconcile that understanding with the Amendment’s text. This focus on judicial doctrine, and not text, seems to be a common thread in Kagan’s scholarship. Moreover, while Kagan’s explanation of the levels of scrutiny in current First Amendment doctrine challenges the view that those levels are *merely* devices for *ad hoc* balancing of interests, the fact remains that First Amendment doctrine, even as Kagan explains it, requires courts to balance the government’s interest in regulating speech against the value of that speech and, in the process, requires judges to assess the relative importance or strength of the government’s interest. But that inquiry is unguided by any specific constitutional text, and that Kagan appears to accept that doctrine means that she may well think a judge’s decision in constitutional cases can be properly guided by factors outside of the Constitution itself.

In a 1992 article, Kagan identified and analyzed what she said is a recurring though unappreciated issue in First Amendment jurisprudence, an issue she termed “content-based

¹⁷² *Id.* at 454-55.

¹⁷³ *See id.* at 456-72. Specifically, Kagan addresses “(1) laws conferring standardless discretion on administrative officials; (2) laws turning on the communicative effect of speech; and (3) laws attempting to ‘equalize’ the speech market.” *Id.* at 456.

¹⁷⁴ *See id.* at 472-91. Specifically, Kagan addresses content-based restrictions on so-called “low-value” speech (e.g., fighting words, obscenity) and speech restrictions designed to alleviate the secondary effects of speech. *See id.*

¹⁷⁵ *See id.* at 491-505.

underinclusion.”¹⁷⁶ This problem arises, according to Kagan, in cases in which the government may restrict speech entirely but restricts only a subset of that speech based on subject matter or viewpoint. The most noteworthy example of this context-based underinclusion is the Supreme Court’s decision in *R.A.V. v. St. Paul*.¹⁷⁷ In *R.A.V.*, the Supreme Court held unconstitutional a St. Paul, Minnesota ordinance that prohibited fighting words that “‘arouse[] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”¹⁷⁸ Writing for a majority of the Court, Justice Scalia opined that while the First Amendment allows government to proscribe fighting words, it does not allow government to proscribe only those fighting words that address a particular subject or viewpoint.¹⁷⁹ This phenomenon of content-based underinclusion, according to Kagan, exists in varied settings: for example, the imposition of content-neutral time, place, and manner restrictions and selective exclusions of speech in non-public fora.¹⁸⁰

As the title of her article indicates, Kagan also sees the problem of content-based underinclusion in cases in which the government selectively subsidizes speech. Prominent among these cases is *Rust v. Sullivan*.¹⁸¹ *Rust* involved government grants to provide family planning services under Title X of the Public Health Service Act. That Act provided that Title X funds could not go to “‘programs where abortion is a method of family planning.”¹⁸² In implementing Title X, the Secretary of Health and Human Services promulgated regulations that barred recipients of Title X grants from providing abortion counseling or referrals or encouraging or advocating abortion as a family planning method.¹⁸³

A number of Title X grantees and doctors sued, claiming the regulations violated their right to free speech by discriminating in the provision of benefits on the basis of viewpoint and by conditioning benefits on relinquishing free speech rights.¹⁸⁴ The Supreme Court rejected these claims and held that the regulations on their face did not violate the First Amendment. The Court reasoned that the government did not discriminate on the basis of viewpoint by selectively funding activities it found to be in the public interest without funding alternative programs. The Court also reasoned that the regulations did not force Title X grantees to give up abortion-related speech but merely required the grantees to keep that speech separate from their Title X activities.¹⁸⁵ As the *Rust* majority saw things, the government, in promulgating the regulations, was implementing the statutory command that Title X funds not be spent on programs that use abortion as a means of family planning and ensuring that Title X recipients not use funds to provide services outside Title X’s scope.¹⁸⁶

In Kagan’s view, *Rust* presented precisely the same First Amendment issue as *R.A.V.*—the issue of content-based underinclusion—and the Court should have applied the same analysis in deciding the two cases.¹⁸⁷ Kagan believes generally that content-based underinclusion based on subject matter (for instance, a law banning all obscenity except that dealing with government affairs) is

¹⁷⁶ Elena Kagan, *The Changing Face of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 S. CT. REV. 29.
¹⁷⁷ 505 U.S. 377 (1992).

¹⁷⁸ *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)).

¹⁷⁹ *Id.*; see Kagan, *First Amendment Neutrality*, *supra* note 176, at 34-35.

¹⁸⁰ See Kagan, *First Amendment Neutrality*, *supra* note 176, at 41-43.

¹⁸¹ 500 U.S. 177 (1991).

¹⁸² *Id.* at 178 (quoting 42 U. S. C. § 300a-6).

¹⁸³ *Id.* at 179-80.

¹⁸⁴ *Id.* at 192, 196.

¹⁸⁵ *Id.* at 193, 196.

¹⁸⁶ *Id.* at 193-94.

¹⁸⁷ See Kagan, *First Amendment Neutrality*, *supra* note 176, at 58.

presumptively constitutional, while such underinclusion that is based on viewpoint (for instance, a law banning only obscenity that is critical of the government) is presumptively unconstitutional and subject to strict scrutiny.¹⁸⁸

Thus, Kagan would have applied strict scrutiny to determine the validity of the regulation in *Rust* because in her view there was “little serious argument” that the regulation in *Rust* discriminated on the basis of viewpoint.¹⁸⁹ “Once the determination of viewpoint discrimination is made in this manner, a strong presumption of unconstitutionality would attach, rebuttable only upon a showing of great need and near-perfect fit.”¹⁹⁰

While Kagan does not say expressly that *Rust* was wrongly decided (as opposed to improperly analyzed),¹⁹¹ it is at least highly probable that she believes the government could not make the required showing of “great need and near-perfect fit” strict scrutiny would require and, therefore, that *Rust* was wrongly decided:

The regulations at issue in *Rust* can hardly be understood except as stemming from government hostility toward some ideas (and their consequences) and government approval of others Further, the regulations, in treating differently opposing points of view on a single public debate, benefitted some ideas at the direct expense of others and thereby tilted the debate to one side. For both these reasons, a refusal to fund any speech relating to abortion would have been constitutionally preferable to the funding scheme that the regulations established.¹⁹²

That *Rust* involved subsidies to speech rather than outright restriction of opposing speech does not matter to Kagan. In Kagan’s view, any distinction between subsidy and penalty in the context of content-based underinclusion is meaningless. When the government can proscribe all of a particular category of speech (such as fighting words or obscenity), to allow some but not all speech of that category can be viewed either as a penalty to those whose speech is proscribed or a benefit (subsidy) to those whose speech is not proscribed.¹⁹³ Moreover, according to Kagan, when government may proscribe (or penalize) all of a category of speech, the unconstitutionality of selectively proscribing certain speech within that category must be a function of the selection rather than the penalty (which, as Kagan notes, “is, in and of itself, perfectly permissible”).¹⁹⁴

Kagan also rejects any notion that *Rust* is distinguishable from cases like *R.A.V.* because *Rust* involved government speech (that is, that the government in funding Title X programs was, in effect,

¹⁸⁸ See generally *id.* at 63-68. Kagan does posit that some underinclusion that is based (at least on the face of that statute) only on subject matter should still be subject to strict scrutiny where the subject matter excluded—the type of speech restricted—will realistically only be used by one side in a debate. For instance, one could argue that banning only race-based fighting words distinguishes on the basis of subject matter, not viewpoint, and therefore should not be subject to strict scrutiny. But Kagan would still apply strict scrutiny because realistically, only racists use race-based fighting words, so the law (as legislators must have known when they enacted it) would handicap only one side of a debate. *Id.* at 70-72. Kagan also posits that it is possible that some viewpoint-based underinclusive laws would not be subject to strict scrutiny. *Id.* at 74-75. We will discuss this in the text.

¹⁸⁹ *Id.* at 67.

¹⁹⁰ *Id.*

¹⁹¹ For instance, Kagan stated that “I do not . . . assert that if *R.A.V.* is right, the *Rust* must be wrong I claim only that these cases . . . should be subjected to the same constitutional standards.” *Id.* at 58.

¹⁹² *Id.* at 67-68.

¹⁹³ See generally *id.* at 46-52.

¹⁹⁴ *Id.* at 53.

paying private parties to speak for it). Kagan rejects this government speech rationale for two reasons. First, when the government hires private parties to speak for it, the public may not realize that it is really the government speaking, and therefore lacks a bit of information that may be necessary to evaluate the speech.¹⁹⁵ Second, government subsidy could “operate to distort or influence the realm of private expression in a manner that systematically advantages public power. . . . When the government speaks through subsidy schemes, it may change and reshape the underlying dialogue” by providing incentive to private speakers to adopt the government’s message.¹⁹⁶

Kagan’s argument that in content-based underinclusion cases subsidizing speech is not materially distinguishable from proscribing opposing speech has a certain logical appeal. But as noted when discussing Kagan’s general understanding of First Amendment doctrine, Kagan does not attempt to square her argument with the First Amendment text. Instead, she focuses entirely on the policy or the values undergirding the right to free speech. The First Amendment, however, does not say that “Congress shall make no law skewing public debate;” the amendment says “Congress shall make no law . . . abridging the freedom of speech.” This language seems directed at protecting directly the ability of speakers to speak (and thereby to advance whatever policies and values a regime of free speech serves). And in cases like *Rust*, those whose speech is not subsidized are still entirely free to speak.

Moreover, to treat all viewpoint-based government subsidies of speech as presumptively unconstitutional and therefore subject to strict scrutiny could lead to some disturbing results. Is it, or should it be, presumptively unconstitutional for the government to fund a symposium on the dangers of art as propaganda featuring Leni Riefenstahl’s *Triumph of the Will* while refusing to fund a showing of the same film by a neo-Nazi group? If the government funds speech discouraging drunk driving, must it fund speech encouraging, or minimizing the dangers of, drinking while driving?

Kagan does leave some possible room for viewpoint-based speech subsidies. She notes that “strict scrutiny need not invalidate a viewpoint-based underinclusive action” if the government can show that the action is “both necessary and narrowly tailored to serve a compelling interest.”¹⁹⁷ Thus, “[i]f the government can show . . . that it has a compelling interest, that it must regulate speech to achieve that interest, and that it has regulated all (but only) such speech as is necessary to achieve the interest, then the government action should pass strict scrutiny.”¹⁹⁸ Kagan posits a law restricting speech “extolling cigarettes in the immediate vicinity of a school” (assuming the government has a compelling interest in preventing children from smoking, and that pro-cigarette speech near schools causes children to smoke) as a restriction that could pass strict scrutiny.¹⁹⁹

Kagan also “tentatively” suggests that not all viewpoint-based underinclusive actions should be subject to strict scrutiny. She notes that the smoking example suggests that “not all viewpoints are alike although it is difficult to fashion a principled reason why”²⁰⁰ and suggests that

[i]f our intuitions rebel against the idea that the government cannot fund speech discouraging smoking without also funding its opposite, they do so for some combination of three reasons, each of which exists in tension with common First Amendment

¹⁹⁵ *Id.* at 55.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 74.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

principles. First, *the debate in this case, by its nature, offers the hope of right and wrong answers—answers subject to verification and proof.* Second, *society has reached a shared consensus on the issue;* the answers, in addition to being verifiable, are widely believed. And *third—and most important—one side of the debate appears to do great harm.* When these factors join, a viewpoint regulation may appear justifiable whenever a more general regulation could exist. Then, *government disapproval of a message may seem no longer illegitimate, because the disapproval emerges from demonstrable and acknowledged harms;* then too, the distortion of debate resulting from the government action may appear not vice, but virtue.²⁰¹

Kagan does not wholeheartedly endorse this reasoning, in large part because “[a]lmost all viewpoint-based regulations can be viewed as ‘harm-based’ regulations”²⁰² Kagan believes that the law should take account of harm that can be caused by a particular viewpoint (for example, the viewpoint that one should smoke cigarettes) in determining whether a viewpoint-based underinclusive regulation survives strict scrutiny.²⁰³ But whether the law should take “profound and indisputable” harms into account for the purpose of identifying viewpoint-based regulations that should not be subject to strict scrutiny is still an “open” question for her.²⁰⁴

While the general question is still open for her, it is apparent that one case *Kagan* would not include in the subset of viewpoint-based actions not subject to strict scrutiny is *Rust*. In fact, Kagan uses *Rust* to illustrate her point that “[a]lmost all viewpoint-based regulations can be viewed as ‘harm-based’ regulations,”²⁰⁵ a point she made to critique her own suggestion that some viewpoint-based underinclusion may not be subject to strict scrutiny. Nor is it likely, as noted, that Kagan would find the selective funding in *Rust* to survive strict scrutiny. But why must this be so? The prohibition on abortion counseling in *Rust* served at least three interrelated interests: first, to ensure that funds were not used contrary to the statutory mandate that Title X funds not go to programs that used abortion as a means of family planning; second, to insure that taxpayers would not have to be involved in the business of abortions, even if just by providing funds for advocacy or referrals; and third, to favor live birth over abortion, an act that kills the living offspring of human parents. If one accepts the reasonable premise that the unborn are human beings, it is easy to view the harm caused by abortion and abortion advocacy and referral as great (the destruction of innocent life) and characterize the government’s interest in not subsidizing abortion advocacy and referrals as compelling. Moreover, the regulations in *Rust* only did what was necessary to effectuate these interests (or at least the interest concerning taxpayer involvement in abortion). In *Rust*, the government merely refused to pay for abortion referrals and counseling. Title X recipients were still free, outside their Title X programs, to advocate abortion, and refer women for abortions. The recipients only had to make sure no Title X money was used for these activities.

One could reasonably say that the government’s interests in *Rust* are every bit as compelling, and the fit between the government’s regulation and those interests is every bit as close, as the interests and fit would be in Kagan’s hypothetical prohibiting pro-smoking speech, a hypothetical Kagan uses to illustrate the notion that not all viewpoint-based underinclusive regulations would fail strict scrutiny. So, what could explain Kagan’s antipathy toward *Rust*? One could speculate (reasonably, we think),

²⁰¹ *Id.* at 74-75 (emphasis added).

²⁰² *Id.* at 75.

²⁰³ *Id.*

²⁰⁴ *Id.* at 76.

²⁰⁵ See *id.* at 75. “So, for example, in *Rust*, supporters of the regulations might argue that the selective funding corresponds not to viewpoints, but to demonstrable injuries” *Id.* at 76.

that Kagan simply does not view the government's interests in preventing abortions or at least keeping taxpayers from funding any aspect of abortion practice as sufficiently compelling. (This assumes that Kagan accepts the Court's decisions in *Roe* and *Casey* that hold a woman has a constitutional right to choose to have an abortion, a reasonable assumption given President Obama's statements that he would appoint only pro-*Roe* Justices.) If so, Kagan's treatment of *Rust* provides reason not only for concern about her view that viewpoint-based speech subsidies are presumptively unconstitutional, but also for her views concerning abortion and related issues and the Court's jurisprudence in those areas.

In a 1993 essay, Kagan specifically addressed the issue of how government might go about regulating hate speech and pornography in a way that would pass constitutional muster in light of the Supreme Court's decision in *R.A.V.*²⁰⁶ Kagan began the essay by stating:

I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation. I do not take it as a given that all governmental efforts to regulate such speech thus accord with the Constitution.²⁰⁷

Kagan's goal in the essay is to explore tentatively how government might regulate hate speech and pornography in ways that do "accord with the Constitution" (or at least the Supreme Court's understanding of constitutional requirements).

Kagan begins by noting how the majority in *R.A.V.* held unconstitutional the St. Paul hate speech ordinance—an ordinance that, as construed by the Court, prohibited only fighting words based on race, color, creed, religion, or gender—because the statute in practice discriminated on the basis of viewpoint.²⁰⁸ Kagan notes that *R.A.V.*'s reasoning resembles closely that in *American Booksellers v. Hudnut*,²⁰⁹ a case in which the Seventh Circuit held unconstitutional an Indianapolis anti-pornography ordinance.²¹⁰ The Indianapolis ordinance defined pornography as "'the graphic sexually explicit subordination of women, whether in pictures or in words,' that depicted women in specified sexually subservient postures."²¹¹ The Seventh Circuit held that because "the legality of expression [was] 'depend[ent] on the perspective the author adopts'" and thus "'establishe[d] an 'approved' view' of women and of sexual relations," the ordinance discriminated on the basis of viewpoint and violated the First Amendment.²¹²

As one should expect given the other writings we have discussed, Kagan generally approves of the Supreme Court's viewpoint neutrality doctrine. Indeed, she states that "the principle of viewpoint neutrality . . . has at its core much good sense and reason. . . . [E]fforts to regulate pornography and hate speech not only will fail, but also should fail to the extent they trivialize or subvert this principle."²¹³

²⁰⁶ Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993). See *supra* pp. 31-32 for a discussion of *R.A.V.*

²⁰⁷ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 873.

²⁰⁸ See *id.* at 874.

²⁰⁹ 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

²¹⁰ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 875.

²¹¹ *Id.* (quoting *American Booksellers*, 771 F.2d at 324).

²¹² See *id.* (quoting *American Booksellers*, 771 F.2d at 324) (second and third alteration in the original).

²¹³ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 878.

So, Kagan's goal in the remainder of her essay is to propose and explain means to regulate hate speech and pornography effectively without running afoul of *R.A.V.* She proposes several different ideas. These ideas include regulating non-expressive conduct (for example, by laws enhancing criminal penalties for crimes such as assault based on racist or other motives for targeting the victim²¹⁴ and civil remedies for victims of hate-motivated crimes);²¹⁵ viewpoint-neutral restrictions (for instance, prohibiting all fighting words rather than just those based on race, sex, etc.);²¹⁶ using (which, in Kagan's view, would involve recasting) obscenity laws to regulate pornography;²¹⁷ and, finally (and tentatively) treating hate speech and pornography (narrowly defined) as "low-value" speech subject to lesser First Amendment protection (akin to the treatment of obscenity or fighting words).²¹⁸

The chief concern that arises regarding the regulation of "hate speech" is the specter of Canadian-style regulation of speech that offends certain groups not because the speech is meant to offend and hurt merely for the sake of offending or hurting but rather because the listener does not like the speaker's message. Contrast, for example, shouting offensively in the face of a homosexual, and writing a newspaper column explaining why homosexual acts are wrong or same-sex "marriage" is an oxymoron. One can reasonably argue that even a society committed to a robust understanding of free speech could (or even should) legitimately regulate the former but not the latter.

Kagan's understanding of hate speech would seem not to lead her to uphold regulating speech merely because the ideas expressed offend people. When discussing whether to treat hate speech and pornography as "low-value" forms of speech that could be prohibited entirely without raising any First Amendment concern (just as obscenity and fighting words are treated), Kagan insists that any such law prohibiting "hate speech" "should be limited to racist epithets and other harassment: speech that may not count as 'speech' because it does not contribute to deliberation and discussion."²¹⁹ Assuming the idea of "harassment" is properly limited,²²⁰ Kagan's understanding of hate speech appears to be consistent with the distinction noted above: her understanding would include as hate speech the offensive shouting in someone's face but would seem to exclude serious discussion (or even just discussion) of moral issues, even if some find one side of the discussion to be offensive.

Still, some of the ideas Kagan expresses in discussing how to effectively regulate hate speech and pornography merit concern. For instance, Kagan discusses the possibility that the Constitution "may well permit direct [viewpoint-neutral] regulation of speech . . . when the regulation responds to a non-speech related interest in controlling conduct involved in the materials' manufacture."²²¹ As an example, she discusses the decision in *New York v. Ferber*,²²² in which the Supreme Court held constitutional a New York law prohibiting the distribution of child pornography, primarily because the government had a strong interest in preventing pornographers from exploiting the children who appear in the pornographic material.²²³ She posits that the same principle should allow government to prohibit

²¹⁴ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), in which the Supreme Court upheld a Wisconsin criminal penalty enhancement.

²¹⁵ See Kagan, *Regulation After R.A.V.*, *supra* note 206, at 883-88.

²¹⁶ See *id.* at 888-92.

²¹⁷ See *id.* at 892-97. See *infra* pp. 38-39 for a discussion of how Kagan would recast obscenity law.

²¹⁸ See *id.* at 897-901.

²¹⁹ *Id.* at 900.

²²⁰ *The American Heritage Dictionary* (2d College ed. 1991) defines "harass" as "to irritate or torment persistently." The entry for "harass" goes on to note that "[h]arass implies systematic persecution by besetting with annoyance, threats, or demands."

²²¹ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 891.

²²² 458 U.S. 747 (1982).

²²³ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 891.

distributing material that involved coercion of or violence against participants in its manufacture.²²⁴ She also notes that courts have applied this principle to enjoin publishing stolen trade secrets and to award damages for unapproved publishing of copyrighted material.²²⁵

None of the above raises any real concern. But Kagan goes on to note that “there are almost surely limits on the principle that the government may engage in viewpoint-neutral regulation of speech whenever it has an interest in deterring conduct involved in producing the expression.”²²⁶ She posits two examples that “suggest the need for a boundary line.”²²⁷ First, she posits that prohibiting all speech whose manufacture required violating the Fair Labor Standards Act would “surely” be unconstitutional.²²⁸ Second, she posits that prohibiting the distribution of national security information stolen from the government would be unconstitutional.²²⁹

But the question arises: Why can the government regulate child pornography, or enjoin the publication of stolen trade secrets or copyrighted material to deter the conduct involved in producing those materials, but not prohibit speech whose manufacture involved violating the FLSA or the publication of stolen national security information? The answer is not found in the First Amendment’s text (which, as noted, Kagan has never analyzed in all her writing on First Amendment law). Rather, Kagan sees the question as one of degree that requires judges to balance factors such as “the value of the speech at issue, the magnitude of the harm involved in producing the speech, the extent to which prohibiting the speech is necessary to prevent the harm from occurring, and the extent to which the expression itself reinforces or deepens the initial injury.”²³⁰ The problems here, as with all judicial balancing, are that there is nothing in the Constitution to guide judges in determining what factors to balance or how much weight to give various factors, and there is no good reason to believe that any balance courts strike will necessarily be better than the balance struck by legislatures.

This penchant for balancing of interest also appears in Kagan’s understanding of how the Supreme Court establishes “low-value” speech categories: the Court “determines that the harms caused by the covered speech so outweigh its (miniscule) value that regulation of the speech, even if viewpoint discriminatory, will be permitted.”²³¹ In other words, the content of the First Amendment—that is, what is within the “freedom of speech” protected—is (or at least seems to be), in Kagan’s view, a product of the Court’s determination based on a balancing of factors rather than an analysis focused on the original meaning of the amendment’s text. As explained later, Kagan made this very argument as Solicitor General in urging the Court to uphold a federal prohibition of depictions of animal cruelty. Eight members of the Court soundly rejected this argument.²³²

More potential cause for concern is raised by Kagan’s proposal to use obscenity laws to regulate pornography, not so much by the proposal itself (for much pornography probably is legally obscene), but rather in Kagan’s understanding of obscenity and the relationship of morality to law. At

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* Actually Kagan only asks whether prohibiting publishing the stolen security information would be unconstitutional.

But she responds by noting that to say “yes” would require overruling the *Pentagon Papers* case.” *Id.* (citing *New York Times v. United States*, 403 U.S. 713 (1971)).

²³⁰ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 892.

²³¹ *Id.* at 899.

²³² *See infra* p. 41-42.

the beginning of the discussion, Kagan notes how using obscenity laws to regulate pornography “has come to assume the aspect of heresy in the ranks of anti-pornography feminism.”²³³ That this approach is “heresy” stems from the notion that while obscenity doctrine focuses on morality, offensiveness, and sexual prurience, pornography regulation should focus on power, sexual exploitation, and harm to women.²³⁴ In other words, in the orthodox feminist view that Kagan cites, what makes pornography bad is not merely sexual explicitness and prurience, but rather the exploitation and harm to women pornography involves. Kagan does not think that this feminist account is “flatly wrong.”²³⁵ In fact, she seems to agree with this account; besides positing that using obscenity law to regulate pornography (that is, sexually graphic material that harms women) is a useful way of achieving some of the objectives of anti-pornography feminism, using obscenity law in this way would benefit obscenity doctrine by shifting that doctrine’s focus from sexual prurience and offensiveness to sexual violence and exploitation.²³⁶

In the course of reaching her conclusions, Kagan begins by observing:

To be sure, the Supreme Court [in its earlier obscenity discussions] . . . spoke of the need “to protect the social interest in . . . morality” and, what is perhaps the same thing, of the need “to maintain a decent society. . . .” Here, the Court *appeared to stress a version of morality divorced from tangible social consequences and related to simple sentiments of offense or disgust*. But the Court also spoke of . . . the “correlation between obscene material and crime” and in particular, the correlation between obscene materials and “sex crimes.” This concern too may reflect a notion of morality, but if so it is a morality rooted in material harms. And *although some of the specific harms then perceived might now appear dated—the Court was thinking as much of unlawful acts involving “deviance” as of unlawful acts involving violence*—still the Court understood the obscenity category as emerging not merely from a body of *free-floating values*, but from a set of tangible harms, perhaps including sexual violence.²³⁷

She goes on to state that “one of the great (if paradoxical) achievements of the anti-pornography movement has been to alter views on obscenity—to transform obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women.”²³⁸ She notes approvingly the Canadian Supreme Court’s decision that “made sexual violence rather than sexual offensiveness the keystone of the obscenity category,”²³⁹ and concludes that efforts to similarly transform U.S. obscenity doctrine may benefit that doctrine by “bring[ing] the doctrine into greater accord with the harm-based morality of today, rather than of twenty years ago.”²⁴⁰

Kagan’s discussion of obscenity raises concerns about her understanding of morality and about whether as a Justice she would consider morality (or, at least, what one might call “traditional” morality) to be a legitimate reason for laws restricting personal conduct. Kagan distinguishes between morality she sees as based on “simple sentiments of offense or disgust” of “free-floating values,” and

²³³ *Id.* at 892.

²³⁴ *Id.* at 893.

²³⁵ *Id.*

²³⁶ See generally *id.* at 893-97.

²³⁷ *Id.* at 893-94 (internal quotes and citations omitted) (emphasis added).

²³⁸ *Id.* at 894.

²³⁹ *Id.* at 895 (citing *Regina v. Butler and McCord* [1992] 1 SCR 452, 134 NR 81, 108-18 (Canada)).

²⁴⁰ *Id.* at 897.

morality based on “tangible harms.”²⁴¹ With regard to the latter, she distinguishes between harms that “might now appear dated,” such as sexual deviance, and harms involving violence or exploitation of women.²⁴²

Kagan’s distinctions suggest one of two things concerning the relationship between morality and law. The first possibility is that Kagan believes that morality divorced from what she considers to be bad effects on others, or in her words, “tangible harms,” is based not in reason but in mere “simple sentiments.” This would imply that, in her view, moral principles that condemn behavior that is self-regarding (for example, the notion that masturbation or other private consensual sexual conduct is morally wrong) are irrational or, at best, subrational. The second possibility is that Kagan believes that moral norms regulating self-regarding conduct, while perhaps valuable in informing people how to best live their lives, are outside the law’s purview, a purview that is restricted to addressing harms caused to others.

Both of these views lead to the same practical result: it is not legitimate for government to restrict private personal conduct simply because that conduct is immoral. This view, coupled with accepting the doctrine of substantive due process and a broad autonomy-based understanding of liberty like that expressed in *Planned Parenthood v. Casey* (two positions we assume Kagan holds, and definitely needs to be questioned about) would almost certainly lead a judge to hold that laws restricting personal conduct that do not (in the judge’s view) cause harm to others violate due process. Thus, for example, if what we have noted above about Kagan’s possible understanding of morality and our assumption that Kagan accepts the broad understanding of liberty set forth in *Casey* are correct, it is difficult to imagine that she would not have voted in the majority *Lawrence v. Texas*,²⁴³ and it is reasonable to think she may well be persuaded to find a right to same-sex marriage (if convinced marriage is a private matter that does not cause harm to others).

Another problem with Kagan’s understanding of morality (if we have read it correctly) and the relationship of morality to law concerns the questions, What constitutes sufficient harm? and Who decides what constitutes sufficient harm? First off, nothing in the Constitution guides the inquiry as to what constitutes sufficient harm to allow states to regulate personal conduct, and nothing in the Constitution assigns that inquiry to federal judges or requires that their answers trump those of legislators. Moreover, the question as to what constitutes sufficient harm to justify legislation is often a subtle one, and reasonable minds can disagree over the correct answer. For example, with regard to obscenity, Kagan seems to question whether the concern with preventing deviant sexual behavior (at least where that behavior does not involve violence or exploitation) is a sufficient basis for regulating obscenity.²⁴⁴ But why should leading others into deviant sexuality not count as harm, or why, at least, can a state not conclude that leading others into deviant sexuality counts as harm? The question is especially pertinent given two millennia of Western thought that deviant sexual conduct does harm and degrade the people who engage in it. Moreover, even if the focal point of obscenity regulation should be harm to women, why can a state not reasonably conclude that all obscenity (even when the “actresses” or “models” engaging in the sexual activity depicted are willing participants) degrades women and harms them by feeding male fantasies and distorting men’s perception of women?

²⁴¹ *Id.* at 893-94.

²⁴² *Id.* at 894.

²⁴³ 539 U.S. 558 (2003) (holding unconstitutional a Texas law making private homosexual sodomy a crime).

²⁴⁴ See Kagan, *Regulation After R.A.V.*, *supra* note 206, at 894 (stating that some of the specific harms that animated earlier Supreme Court discussions of obscenity, such as unlawful acts involving deviance, “might now appear dated”).

As nothing in the Constitution's text, structure, or history guides judges in answering the types of questions raised above, those questions are properly consigned to the people and their elected representatives (primarily, state representatives). Kagan's seeming understanding of the relationship between law and morality could well mean that she would be another in the long line of modern Justices who are all too willing to conclude that the Constitution embodies their own views of morality and wise policy and empowers them to enact those views into law in deciding cases.

Solicitor General

Two of the cases that Kagan has handled as solicitor general have raised questions concerning her views on the First Amendment.²⁴⁵ The first case, *United States v. Stevens*,²⁴⁶ involved the constitutionality of 18 U.S.C. § 48, which was enacted "to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty."²⁴⁷ In arguing that the statute was constitutional, the government, in a brief signed by Kagan, stated that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."²⁴⁸ The Supreme Court rejected the government's test. Chief Justice Roberts, writing for the eight-member majority,²⁴⁹ agreed with the government that "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies," but noted that the Court was "unaware of any similar tradition excluding depictions of animal cruelty from 'the freedom of speech' codified in the First Amendment, and the Government points us to none."²⁵⁰ The Court continued,

[t]he Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's "'legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy

²⁴⁵ Jacob Sullum, *The Bounds of Silence, Obama's Supreme Court Pick Looks Wobbly on Freedom of Speech*, REASON.COM, May 12, 2010, <http://reason.com/archives/2010/05/12/the-bounds-of-silence>.

²⁴⁶ 130 S. Ct. 1577 (2010).

²⁴⁷ *Id.* at 1582.

²⁴⁸ Brief for Petitioner/Appellant United States at *8; see also *United States v. Stevens*, 130 S. Ct. at 1585.

²⁴⁹ Justice Alito dissented. He explained at the beginning of his dissent that:

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. The Court of Appeals—incorrectly, in my view—declined to decide whether § 48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision does not endorse the Court of Appeals' reasoning, but it nevertheless strikes down § 48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, a potion that generally should be administered only as "a last resort."

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court's conclusion that § 48 bans a substantial quantity of protected speech.

United States v. Stevens, 130 S. Ct. at 1592-93 (Alito, J., dissenting) (citations and footnote omitted).

²⁵⁰ *Id.* at 1585.

of First Amendment protection,” and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”²⁵¹

Kagan has also been criticized for her argument in *Citizens United v. FEC*.²⁵² The case, which was argued twice before the Supreme Court, concerned a challenge by the group Citizens United to “the provisions of the McCain-Feingold law that had prohibited it from airing a documentary film, *Hillary: The Movie*, through video on demand within 30 days of any 2008 Democratic presidential primary.”²⁵³ Following the reargument in the case, Benjamin Barr, who has served as advisor and counsel to two FEC Chairmen,²⁵⁴ wrote,

[w]hile General Kagan did much to advance the government’s position addressing the many reasons why speech could be criminalized, she obfuscated in one of the case’s most central points: whether campaign finance laws and *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*, at issue in *Citizens United*, allow the government to censor books.

Asked whether the government possessed book banning authority through the Federal Election Campaign Act, the Solicitor General assured the Court books would remain safe. In March, the same government reasoned just the opposite: books could be banned if they contained a call to vote for or against a candidate. . . .

When pressed on the switch, the Solicitor General explained that the FEC has never enforced the law when it came to books. Justice Antonin Scalia rightly retorted, “You are a lawyer advising somebody who is about to come out with a book and you say don’t worry, the FEC has never tried to send somebody to prison for this . . . Is that going to comfort your client? I don’t think so.”

What is even more troubling than a government that decides it can ban books in March, but not in September, is a government that misspeaks or misunderstands the truth about the law. Solicitor General Kagan explained to the Court that it need not worry about book banning because, “what we’re saying is that there has never been an

²⁵¹ *Id.* at 1585 (citations omitted) (emphasis added) (all but first alteration in the original).

²⁵² 130 S. Ct. 876 (2010).

²⁵³ Bradley A. Smith, *Citizens United We Stand*, AMER. SPECTATOR, May 2010, available at <http://spectator.org/archives/2010/05/07/citizens-united-we-stand/print>.

²⁵⁴ Center for Competitive Politics, Benjamin Barr, of Counsel, http://www.campaignfreedom.org/about_us/author/benjamin-barr (last visited May 24, 2010).

enforcement action for books. Nobody has ever suggested—nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem.”

The first problem with this is that Kagan leaves open the possibility that books will be banned in the future, once it is determined that they “pose a corruption problem.” And as other avenues for political speech are cut off through regulation, books will become more prominent tools for political discourse.

Leaving that aside, let’s be clear about this from Kagan’s view—as of now (but not back in March), books will not corrupt the minds of the electorate or be too influential on public officeholders’ judgments, but pamphlets, movies, and bumper stickers prove just too corrupting to trust to an open exchange of ideas.

....

In deciding whether to trust our citizens with the full protection of the First Amendment, the Court should be wary of relying on the representations of counsel that prove unreliable. As Chief Justice John Roberts exclaimed at the oral argument, “We don’t trust our First Amendment rights to FEC bureaucrats.”²⁵⁵

Barr also noted that the FEC had, in fact, investigated a book written by George Soros and its “related publicity.”²⁵⁶ Bradley A. Smith, a former chairman of the Federal Election Commission, wrote of Kagan’s argument:

On reargument last September, Solicitor General Elena Kagan tried to control the damage, arguing that the government never actually had tried to censor books, even as she reaffirmed its claimed authority to do just that. She also stated that “pamphlets,” unlike books, were clearly fair game for government censorship. (Former Federal Election Commissioner Hans von Spakovsky has noted that in fact the FEC has conducted lengthy investigations into whether certain books violated campaign finance laws, though it has not yet held that a book publisher violated the law through publication. And the FEC has attempted to penalize publishers of magazines and financial newsletters, only to be frustrated by the courts.)²⁵⁷

The Court’s opinion in *Citizens United* criticized the government’s argument:

The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. See Part II–E, *supra*; Tr. of Oral Arg. 66 (Sept. 9, 2009); see also *id.*, at 26–31 (Mar. 24, 2009). If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds “that the FEC has never applied this statute to a book,” and if it did, “there would be quite

²⁵⁵ Benjamin Barr, *Will S.G. Correct the Government’s Book Banning Mistake*, CENTER FOR COMPETITIVE POLITICS, Sept. 17, 2009, <http://www.campaignfreedom.org/blog/detail/will-sg-correct-the-governments-book-banning-mistake> (alteration in Justice Scalia’s quote in the original).

²⁵⁶ *Id.*

²⁵⁷ Bradley A. Smith, *Citizens United We Stand*, AMER. SPECTATOR, May 2010, available at <http://spectator.org/archives/2010/05/07/citizens-united-we-stand>.

[a] good as-applied challenge.” Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.²⁵⁸

Kagan’s actions in this case raise questions, and the Senate should question her about her views on the First Amendment.

Questions

- You have stated that the government’s funding of certain speech on a topic, while not funding opposing speech on the same topic, is presumptively unconstitutional and must be evaluated under strict scrutiny. Why is this so, so long as the government does not otherwise prevent those with opposing views from speaking? How does your view square with the First Amendment’s language that “Congress shall make no law *abridging* the freedom of speech”? If opposing speakers are free to speak, can we say government has abridged their right to speak?
- Your view on selective speech subsidy seems to lead to some interesting results. Is it presumptively unconstitutional for government to fund speakers who discourage drunk driving while not funding speakers who encourage drinking while driving or who minimize the dangers of drinking while driving (even if government leaves those people free to speak)?
- Your academic writing on the First Amendment seems to focus exclusively on doctrine, values, and policy. Have you in any of your writings addressed the First Amendment’s text in light of the surrounding historical context? Based on the First Amendment’s text and history, what do you believe it means to “abridge the freedom of speech”?
- Do you believe it is legitimate for courts to determine what is included within the freedom of speech by balancing the “value” of the speech against the harms the speech may cause?
- Is morality a legitimate basis for regulating private personal conduct? If so, what do you think “morality” is?
- You have distinguished in your writing morality “divorced from tangible social consequences and related to simple sentiments of offense or disgust” from morality “rooted in material harms.” You seem to suggest that the former may not be a legitimate (or at least a sound) basis for regulating obscenity. Is that your view? Is morality a legitimate reason for legal regulation only if it is rooted in “material harms”? If so, what counts as harm? And what in the Constitution assigns to judges the task of answering that question, guides judges in answering that question, or gives any basis for determining that the judges’ answers to that question are superior to the legislature’s?

²⁵⁸ *Citizens United*, 130 S. Ct. at 904 (alteration in the original); see also Posting to The Leader Board, *As Solicitor, Elena Kagan’s Office Argued The U.S. Government Could Ban Books Before She Personally Revised The Position To Argue The Ban Would Only Apply To Pamphlets*, SEN. REP. COMM. CENTER (May 17, 2010 at 9:50:43 EDT), http://republican.senate.gov/public/index.cfm?FuseAction=Blogs.View&Blog_Id=efefee75-9be9-4275-843c-986d9df3fb4.

PRESIDENTIAL POWERS

There has been speculation regarding Kagan's views on executive power. Walter Dellinger, noting "the critique of Solicitor General Elena Kagan's views on executive power" and citing Glenn Greenwald's speculation "that Kagan would move the court 'closer to the Bush/Cheney vision of Government and the Thomas/Scalia approach to executive power and law,'" has argued that Kagan's views of presidential power are "fundamentally progressive."²⁵⁹ Kagan has implicitly criticized some of the policies of the Bush Administration. In November 2005, she and three other law school deans sent a letter to Senator Leahy urging the Senate to adopt an amendment that would remove from the Department of Defense authorization bill a "court-stripping" amendment by Senator Graham. The letter expressed their belief that "immunizing the executive branch from review of its treatment of persons held at the U.S. Naval Base at Guantanamo strikes at the heart of the idea of the rule of law and establishes a precedent we would not want other nations to emulate."²⁶⁰ They noted two examples of cases that could be affected by the amendment:

The Supreme Court rejected the Government's claim in *Rasul v. Bush* that federal habeas corpus review did not extend to Guantanamo. The extent of the rights protected by federal habeas law is now before the Federal Court of Appeals for the D.C. Circuit. Another challenge has been filed to the authority of the President, acting without congressional authorization, to convene military commissions at Guantánamo. Just last week the Supreme Court announced that it would review the case, *Hamdan v. Rumsfeld*.

The Graham Amendment would attempt to stop both of these cases from proceeding and would unwisely interrupt judicial processes in midcourse. Respect for the constitutional principle of separation of powers should counsel against such legislative interference in the ongoing work of the Supreme Court and independent judges.

Unfortunately, the Graham Amendment would do much more. With a minor exception, the legislation would prohibit challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment.²⁶¹

The deans concluded with this statement:

We cannot imagine a more inappropriate moment to remove scrutiny of Executive Branch treatment of noncitizen detainees. We are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions, and the abuse of prisoners in Guantanamo, Iraq and Afghanistan. The Graham Amendment will simply reinforce the public perception that Congress approves Executive Branch decisions to act beyond the reach of law. As such, it undermines two core elements of the rule of law:

²⁵⁹ Walter Dellinger, *Elena Kagan Is a Progressive on Executive Power*, SLATE, April 16, 2010, <http://www.slate.com/id/2251138> (quoting Glenn Greenwald, *The Case Against Elena Kagan*, SALON, April 13, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/04/13/kagan).

²⁶⁰ Letter from T. Alexander Aleinikoff, Dean, Georgetown University Law Center, Elena Kagan, Dean and Charles Hamilton Houston Professor of Law, Harvard Law School, Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School, Larry Kramer, Dean and Richard E. Lang Professor of Law, Stanford Law School, to Senator Patrick Leahy (Nov. 14, 2005) (printed in the Congressional Record, 151 Cong. Rec. S12802 (daily ed. Nov. 15, 2005)), available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/12C-4-111405OppositionToGrahamAmendment.pdf>.

²⁶¹ *Id.*

congressionally sanctioned rules that limit and guide the exercise of Executive power and judicial review to ensure that those rules have in fact been honored.²⁶²

One problem with the deans' letter is that in its discussion of the jurisdiction stripping provision it abstracts a structural principle—the separation of powers—from the constitutional text that implements and (in some respect) limits that principle. It is specious to suggest that “separation of powers” bars congressional action without first coming to grips with the power the Constitution actually assigns to the three branches. And, some of those powers are powers to stick their fingers in other branches' business—for example, Congress's power to impeach and the President's power to veto legislation. The deans' suggestion that the jurisdiction stripping provision somehow improperly violates the separation of power by undermining “judicial independence” fails to recognize that Article III implicitly gives Congress the power to regulate lower federal court jurisdiction and expressly gives Congress the power to make exceptions to and regulate the Supreme Court's appellate jurisdiction. If that power extended to the Graham amendment (and *Ex Parte McCordle*²⁶³ and Article III's plain language suggest that it did), there could not be a separation of powers problem because Congress was just doing what the Constitution empowers it to do. In so doing, Congress was acting consistently with another fundamental principle of our constitutional system—the principle of checks and balances.

The deans' letter, with its call for “congressionally sanctioned rules that limit and guide the exercise of Executive power” stands in contrast with the tone of Kagan's scholarly article on presidential power. As an academic, Kagan wrote a lengthy article on the subject of presidential control over administrative agencies. The 2001 law review article²⁶⁴ outlines and evaluates the development and role of “presidential administration,” which she defined in a speech on the article as “the increased control of administrative action by the president.”²⁶⁵ Unlike the letter, this article argued for a strong executive branch and described a way that the executive branch could circumvent, to a degree, a hostile Congress. Her aims in the article were

(1) to trace the development of presidential administration, particularly in the last eight years under President Clinton; (2) to consider the legality of the practices used to effect presidential control, again focusing on the practices developed by Clinton; (3) to consider the desirability of these practices; and (4) finally, to consider the ways in which courts should respond to the emergence of these practices in developing and applying administrative law.²⁶⁶

Kagan disclosed at the outset of the article that as a member of the Clinton White House she “participated in some of the administrative actions discussed in this Article.”²⁶⁷ During Clinton's presidency, “presidential control of administration, in critical respects, expanded dramatically . . . ,

²⁶² *Id.*

²⁶³ 74 U.S. 506 (1868) (holding that Congress could, under its power to make exceptions to the Supreme Court's appellate jurisdiction, strip the Court of jurisdiction even if the Court had to dismiss a case that had been argued and was pending decision).

²⁶⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

²⁶⁵ Elena Kagan, Remarks at the Harvard Law School Faculty Workshop on Presidential Administration Article (Nov. 17, 2000) (notes available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13D-Part75.pdf>) [hereinafter Presidential Administration Speech].

²⁶⁶ *Id.* at 2.

²⁶⁷ Kagan, *Presidential Administration*, 114 HARV. L. REV. at 2246 n.*.

making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda."²⁶⁸ Kagan explained,

[f]aced for most of his time in office with a hostile Congress but eager to show progress on domestic issues, Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals. Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct and/or finally announce administrative actions—regulations, guidance, enforcement strategies, and reports—to showcase and advance presidential policies.²⁶⁹

As Kagan noted later in her article, "Clinton's use of directive authority over the executive branch agencies accelerated dramatically when the Democrats lost control of Congress . . ."²⁷⁰ The directives were often linked to "Clinton's legislative agenda," and, for example,

[t]he many directives on patient protections . . . would have had less purpose if Democrats had maintained a working majority of both houses of Congress throughout Clinton's time in office. These and similar directives functioned as an end run around Congress, and also a goad to Congress, in a context in which presidential inaction could incur a steep price from the press and the public.²⁷¹

Contrasting Clinton's supervision of the administrative state with that of the previous two presidents, Kagan stated,

Where once presidential supervision had worked to dilute or delay regulatory initiatives, it served in the Clinton years as part of a distinctly activist and pro-regulatory governing agenda. Where once presidential supervision had tended to favor politically conservative positions, it generally operated during the Clinton Presidency as *a mechanism to achieve progressive goals*.²⁷²

Kagan noted, however, that "[a] key aspect" of Clinton's "system of administrative control raises serious legal questions."²⁷³ "Clinton's use of what [Kagan] call[s] directive authority—his commands to executive branch officials to take specified actions within their statutorily delegated discretion—ill-comports" with the conventional views about the relationship between Congress, the president, and administrative agencies.²⁷⁴ Kagan explained that the "[a]ccepted constitutional doctrine holds that Congress possesses broad, although not unlimited, power to structure the relationship between the President and the administration . . ."²⁷⁵ Also, she explained,

[t]he conventional view further posits, although no court has ever decided the matter, that by virtue of this power, Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation—and, indeed,

²⁶⁸ *Id.* at 2248.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 2312.

²⁷¹ *Id.* at 2313.

²⁷² *Id.* at 2249 (emphasis added).

²⁷³ *Id.* at 2250.

²⁷⁴ *Id.* at 2250-51.

²⁷⁵ *Id.* at 2250.

that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official.²⁷⁶

While Kagan “acknowledge[d] that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation,”²⁷⁷ she defended Clinton’s actions by looking at the “statutory predicate underlying the conventional view.”²⁷⁸ As Kagan explained in her speech, her “argument . . . to the legality of this practice is that, contrary to the conventional view, a statute delegating power to named officials in the executive branch should not be viewed as foreclosing presidential directive authority.”²⁷⁹ She argued for the necessity of “some kind of default rule or clear statement rule in mind—a rule requiring Congress to state explicitly either that the president shall have this power or that he shall not.”²⁸⁰ She believed that the best type of clear statement rule would be one “requiring Congress to say so clearly if it wishes to foreclose presidential directive authority.”²⁸¹ As she wrote in her article, “most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving the ultimate decisionmaking authority in the hands of the President.”²⁸² Kagan also recognized “potential objections to enhanced presidential control of agency decisions raised, respectively, on behalf of Congress, agency experts, and affected constituencies.”²⁸³ While she “generally conclude[d] that these objections fail,” she did identify “select areas in which the objections reveal a need for limits on the presidential role.”²⁸⁴ In the conclusion of her article, she affirmed the “continuing roles” for Congress, agency experts, and constituency groups in “administrative governance.”²⁸⁵

Kagan’s views on the topic of presidential power can also be seen in her answers following the hearing on her nomination for solicitor general. When asked by Senator Specter if the “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” and if he 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,”²⁸⁶ Kagan responded that “[t]he appropriate analysis in considering any question of this kind derives from Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.”²⁸⁷ She explained,

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

²⁷⁶ *Id.* (footnote omitted).

²⁷⁷ *Id.* at 2320.

²⁷⁸ *Id.*

²⁷⁹ Presidential Administration Speech, *supra* note 265, at 5.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 2320.

²⁸³ *Id.* at 2346.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 2384.

²⁸⁶ *Solicitor General Hearing*, *supra* note 5, at 168 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

²⁸⁷ *Id.* at 169 (citation omitted).

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.²⁸⁸

Kagan’s textbook answer provides little insight into her true views on the topic, especially when compared to her letter and law review article. The Senate should continue to seek clarification on her views regarding executive power.

ABORTION

According to the *Washington Post*, Kagan’s position on abortion may become a “sleepers issue” as both sides try to determine how she would rule if confirmed to the Supreme Court.²⁸⁹ President Obama, however, has made his position on abortion clear. In a July 2007 address before the Planned Parenthood Action Committee, then-Senator Obama stated in a pertinent part:

I have worked on these issues for decades now. I put Roe at the center of my lesson plan on reproductive freedom when I taught Constitutional Law. Not simply as a case about privacy but as part of the broader struggle for women’s equality. Steve and Pam will tell you that we fought together in the Illinois State Senate against restrictive choice legislation—laws just like the federal abortion laws, the federal abortion bans that are cropping up. I’ve stood up for the freedom of choice in the United States Senate and I stand by my votes against the confirmation of Judge Roberts and Samuel Alito.

So, you know where I stand. But this [is more] than just about standing our ground. It must be about more than protecting the gains of the past. We’re at a crossroads right now in America—and we have to move this country forward. This election is not just about playing defense, it’s also about playing offense. It’s not just about defending what is, it’s about creating what might be in this country. And that’s what we’ve got to work together on.

There will always be people, many of goodwill, who do not share my view on the issue of choice. On this fundamental issue, I will not yield and Planned Parenthood will not yield. But that doesn’t mean that we can’t find common ground. Because we know that what’s at stake is more than whether or not a woman can choose an abortion.²⁹⁰

²⁸⁸ *Id.* (alteration in the original).

²⁸⁹ Michael D. Shear, *Abortion Could Be Sleepers Issue in Supreme Court Confirmation Process*, WASH. POST, May 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/11/AR2010051101019.html>.

²⁹⁰ Senator Barack Obama, Address to Planned Parenthood Action Fund (July 17, 2007) (transcript available at <http://sites.google.com/site/lauraetch/barackobamabeforeplannedparenthoodaction>) (applause notation omitted) (second alteration reflects audio rather than transcript). See also Robert P. George, *Obama’s Abortion Extremism*, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD, Oct. 14, 2008, <http://www.thepublicdiscourse.com/2008/10/133>.

Furthermore, in a 2007 debate during his Presidential campaign, Obama was quoted as stating, “I would not appoint somebody who doesn’t believe in the right to privacy.”²⁹¹ Given President Obama’s consistent record in defending the right to abortion,²⁹² there is little reason to doubt that he would nominate an individual who holds his beliefs. His selection of Kagan indicates his belief that she would hold his views concerning a constitutional right to abortion, and therefore raises a rebuttable presumption that Kagan, as a Justice, would support that right and vote not to overrule *Roe v. Wade* and *Planned Parenthood v. Casey*. The question for Senators concerned with this issue, then is whether the hearings produce sufficient evidence to rebut the presumption. The burden of proof on this point rests with Kagan and the Administration. Any Senator who holds the view that *Roe*, *Casey*, and the abortion regime those decisions create are contrary to the Constitution should vote not to confirm Kagan unless she convinces him or her that she does not support those decisions and that regime.

In trying to determine Kagan’s position on abortion, the pro-life group American’s United for Life pointed to contributions by Kagan to the National Partnership for Women and Families (NPWF).²⁹³ In the Senate questionnaire that Kagan filled out regarding her nomination for solicitor general, she stated, “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.”²⁹⁴ NPWF is a pro-abortion organization. According to their website, “We have a deep, unwavering commitment to reproductive health whether it’s expanding your reproductive rights or blocking attempts to reverse hard-won gains. Our goal is to give every woman access to the full range of reproductive health information and services, including . . . abortion services.”²⁹⁵ Kagan’s affiliation with NPWF suggests a sympathetic leaning toward NPWF’s goal of supporting abortion.

A memorandum sent to President Clinton on May 13, 1997, by Kagan and her boss, Bruce Reed, also raises questions about Kagan’s position on abortion. In the memorandum, Kagan recommended that President Clinton send a letter to Congress supporting separate substitute amendments proposed by Senator Daschle and Senator Feinstein regarding the Partial Birth Act (HR 1122).²⁹⁶ Each amendment included a health exception, but Senator Daschle’s amendment was more “stringent” than Senator Feinstein’s amendment.²⁹⁷ The differences in the language of the two

²⁹¹ Robert Barnes and Michael D. Shear, *Abortion Rights Backers Get Reassurances on Nominee*, WASH. POST, May 29, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052803937.html?wprss=rss_nation.

²⁹² For a brief summary of that record, see George, *Obama’s Abortion Extremism*, *supra* note 290.

²⁹³ Press Release, Americans United for Life, *Yost Notes Kagan Is “Stealth Candidate” with a “Fill-in-the-Blank” Approach to Law* (May 10, 2010), <http://www.aul.org/2010/05/yost-notes-kagan-is-stealth-candidate-with-a-fill-in-the-blank-approach-to-law/>.

²⁹⁴ *Solicitor General Hearing*, *supra* note 5, at 52 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

²⁹⁵ National Partnership for Women and Families, *Issues & Campaigns, Reproductive Health*, http://www.nationalpartnership.org/site/PageServer?pagename=issues_repro (last visited June 11, 2010).

²⁹⁶ Memorandum from Bruce Reed and Elena Kagan on Daschle and Feinstein Amendments to the President of the United States 1 (May 13, 1997) (on file at the Clinton Presidential Library), available at <http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Subject%20File%20Series/Box%2097%20Abortion%20Doc%203.pdf> [hereinafter Memorandum on Daschle and Feinstein Amendments].

²⁹⁷ *Id.* According to the memorandum,

Most critically, both amendments contain a health exception, though of different kinds. The Feinstein legislation would exempt an abortion if, “in the medical judgment of the attending physician, the abortion is necessary to . . . avert serious adverse health consequences to the woman.” This language is essentially identical to the language you have used in calling for a health exception to the Partial Birth Act. The

amendments caused pro-abortion groups to oppose Senator Daschle's proposal because they feared it would undermine *Roe*.²⁹⁸

Although the memorandum recommended that President Clinton support both amendments, even though one of the amendments received opposition from pro-abortion organizations, that does not support the conclusion that Kagan advocated for a ban on partial-birth or late-term abortions. The memorandum urged President Clinton to support Senator Daschle's amendment despite pro-choice opposition "in order to sustain your credibility on HR 1122 and prevent Congress from overriding your veto."²⁹⁹ The memorandum went on to state, given Clinton's past statements and the American College of Obstetricians and Gynecologists' support for the amendment, that "declining to support the amendment will weaken your position and increase the chance that Congress will override your veto."³⁰⁰

However, at least one pro-life group rejected the Daschle Amendment as a compromise. National Right to Life Legislative Director Douglas Johnson said at the time, "'The Clinton-Daschle proposal is an empty shell. It is a purely political contrivance. It has one purpose: to provide political cover for lawmakers who want to appear to their constituents to have voted to restrict partial-birth abortions, but without in any way offending the extreme pro-abortion lobby.'"³⁰¹ He further explained that the "'Clinton-Daschle proposal was designed to look good on paper, and to fool unwary journalists, but in no way to impose the slightest actual impediment to the unfettered ability of abortionists to perform the procedures.'"³⁰²

Properly read, the memorandum expressed Kagan's concern about the politics of Clinton's position on the partial birth abortion ban, not the policy. Kagan does not appear to have actually encouraged President Clinton to support a partial-birth or late-term abortion ban. As a *New York Times* article pointed out, "[t]he memo anticipated that the Daschle plan would fail but suggested that it would provide political cover for enough senators to stick by the president when he ultimately vetoed the tougher bill sponsored by Republicans."³⁰³ According to the *New York Times*, Clinton "accepted the recommendation, and the White House signaled support for the Daschle amendment the same day. The amendment was defeated, and the Republican-led Congress sent the tougher ban to Mr. Clinton, who vetoed it. An effort to override the veto fell three votes short in the Senate."³⁰⁴ President Clinton's apparent intention was to veto HR 1122 (assuming that the Daschle Amendment failed), and Kagan's memorandum merely urged his support of Senator Daschle's substitute amendment to prevent an override of his later veto of HR 1122. At best, this evidence seems to show that Kagan encouraged President Clinton's pro-choice agenda, but the evidence certainly does not show she supported a partial-birth or late-term abortion ban.

Daschle language is more stringent. It exempts an abortion when the physician "certifies that continuation of the pregnancy would . . . risk grievous injury to [the mother's] physical health." "Grievous injury" is then defined as "a severely debilitating disease or impairment specifically caused by the pregnancy, or an inability to provide necessary treatment for a life-threatening condition."

Id. (alterations in the original).

²⁹⁸ *Id.* at 2.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Steven Ertelt, *Memo Misread: Elena Kagan Did Not Tell Clinton to Back Partial-Birth Abortion Ban*, LIFE NEWS.COM, May 11, 2010, <http://lifefews.com/nat6323.html>.

³⁰² *Id.*

³⁰³ Peter Baker, *As Clinton Aide, Kagan Recommended Tactical Support for an Abortion Ban*, N.Y. TIMES, May 11, 2010, available at <http://www.nytimes.com/2010/05/12/us/politics/12abort.html>.

³⁰⁴ *Id.*

A June 12, 1998, memorandum written by Kagan's boss, Bruce Reed and Charles Ruff, may also provide insight into Kagan's views on abortion. The memorandum indicated that Kagan supported applying the then-current Hyde Amendment to Medicare and not ruling that "Medicare can cover abortions necessary to protect the health of the woman (in addition to abortions allowed by Hyde)."³⁰⁵ The memorandum noted that this option would "anger womens' groups, which would prefer us to provide Medicare coverage of the widest possible range of abortions, even if doing so would provoke Republicans to enact contrary legislation."³⁰⁶ Although Kagan did recommend that President Clinton adopt the more moderate view, the memorandum makes clear one of the "[p]ros" of the option Kagan endorsed was that "[t]his option is most likely to avoid a legislative showdown on abortion funding that we are unlikely to win."³⁰⁷ Furthermore, the memo noted that the recommended option would "cover more abortions than the current policy allows."³⁰⁸ Once again, Kagan's position does not show that she supports a centrist abortion policy. Instead, this memorandum merely shows her decision was prompted by the politics of the situation.

A piece of evidence that may actually reveal Kagan's personal views on abortion can be found in *The Daily Princetonian* article discussed above in which Kagan wrote,

Reagan I expected, but Symms, Abdnor, Quayle, and Grassley I did not. Even after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents of Senators Church, McGovern, Bayh, and Culver, *these avengers of "innocent life"* and the B-1 Bomber, these beneficiaries of a general turn to the right and a profound disorganization on the left.³⁰⁹

Kagan's view of the pro-life movement seems evident in this essay. Her scare quotes around the words "innocent life" seem to indicate her disbelief that unborn babies are truly part of the human race. The Legislative Director of the National Right to Life Committee, Douglas Johnson, shared the same concern when he stated, "Was Ms. Kagan so dismissive of the belief that unborn children are members of the human family that she felt it necessary to put the term 'innocent life' in quote marks, or does she have another explanation?"³¹⁰ Although the essay expresses Kagan's strong emotions following the election, the essay does not specifically state that Kagan is pro-choice. However, it does give a good glimpse into Kagan's personal views about the pro-life movement.

Finally, as a law clerk to Justice Marshall, Kagan wrote a memo to Justice Marshall on the case *Bowen v. Kendrick*.³¹¹ The case involved a challenge to the Adolescent Family Life Act (AFLA), which, as the Supreme Court described it, "is essentially a scheme for providing grants to public or nonprofit private organizations or agencies 'for services and research in the area of premarital

³⁰⁵ Memorandum from Bruce Reed and Charles F.C. Ruff on Hyde Amendment Application to Medicare and Abortion Coverage Requirements for Catholic Provider Sponsored Organizations to the President of the United States 3 (June 12, 1998) (on file at the Clinton Presidential Library), available at http://www.politico.com/pdf/PPM154_memos5_9_051110.pdf (emphasis omitted) [hereinafter Hyde Amendment Application Memorandum].

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 3; see also *id.* at 4.

³⁰⁸ *Id.* at 3.

³⁰⁹ Elena Kagan, *Fear and Loathing in Brooklyn*, THE DAILY PRINCETONIAN, Nov. 10, 1980, available at <http://www.dailyprincetonian.com/2010/05/03/26082> (emphasis added).

³¹⁰ Press Release, National Right to Life, National Right to Life Comments on the Nomination of Elena Kagan to U.S. Supreme Court (May 10, 2010), http://www.nrlc.org/press_releases_new/Release051010.html.

³¹¹ 487 U.S. 589 (1988).

adolescent sexual relations and pregnancy.”³¹² As the Supreme Court described it, “[c]onsidering the federal statute both ‘on its face’ and ‘as applied,’ the District Court ruled that the statute violated the Establishment Clause of the First Amendment insofar as it provided for the involvement of religious organizations in the federally funded programs.”³¹³ The Supreme Court, however, determined that “the statute is not unconstitutional on its face, and that a determination of whether any of the grants made pursuant to the statute violate the Establishment Clause requires further proceedings in the District Court.”³¹⁴ In Kagan’s memo to Justice Marshall on the case, she wrote:

“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 any 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, all religious organizations should be off limits.”³¹⁵

When asked about the memo at her solicitor general confirmation hearing, Kagan said that, looking back at the memo she thought “That is the dumbest thing I have ever heard.”³¹⁶ In answering written questions from Senator Sessions, she expounded on her answer, stating:

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 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.³¹⁷

³¹² *Id.* at 593 (quoting S. Rep. No. 97-161, at 1 (1981)).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Solicitor General Hearing*, *supra* note 5, at 163 (Questions for the Record for Elena Kagan Submitted by Sen. Jeff Sessions) (alteration in the original, but emphasis in Kagan’s memo).

³¹⁶ *Id.* at 98 (Questioning of Sen. Specter).

³¹⁷ *Solicitor General Hearing*, *supra* note 5, at 163-64 (Questions for the Record for Elena Kagan Submitted by Sen. Jeff Sessions) (alteration in the original).

Questions

- General Kagan, in your November 10, 1980, article in *The Daily Princetonian*, entitled “Fear and Loathing in Brooklyn,” you called Senators Symms, Abdnor, Quayle, and Grassley “avengers of ‘innocent life,’” with the words “innocent life” in what appears to be scare quotes. Why did you put quotes around the words “innocent life?” Did you question these Senators’ commitment to the pro-life cause? Did you disagree with their assertion that unborn babies represent “innocent life?”
 - Do you think that your use of scare quotes could be seen as offensive to individuals who are deeply committed to the pro-life cause? To individuals who, to borrow your words, “abhor” abortion and consider it “a profound wrong” and a “moral injustice of the first order?”
- Do you agree with the Court in *Roe*, that the Constitution protects a right to privacy and that the right to privacy extends to protect the right to abortion?
- Professor John Hart Ely wrote in 1973 that “*Roe* is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.” Do you agree with that statement? If not, why not? In your view, what is *Roe*’s constitutional basis? How does the Constitution’s text support the Court’s decision in *Roe*?
 - If you think *Roe*’s reasoning was deficient, do you think the Court’s decision in *Planned Parenthood v. Casey* remedied the deficiencies?
- Do you agree with *Casey*’s definition of the “heart of liberty” as the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”? If so, what in the Constitution’s text, structure, or history supports that definition? If that is the definition of constitutional liberty, on what principled basis can the courts limit its application? Is there a principled basis? For example, the Supreme Court in *Glucksberg v. Washington* held that the Due Process Clause did not protect a right to assisted suicide. Yet, in *Lawrence v. Texas*, the Court depended on large part on *Casey*’s definition of liberty to hold unconstitutional on due process grounds a law prohibiting same-sex sodomy. What is the principled legal basis for distinguishing assisted suicide from sodomy and abortion such that sodomy and abortion are protected by the Due Process Clause but assisted suicide is not? What in the Constitution’s text, structure, or history supports that distinction?
- With respect to *Casey*’s undue burden standard, where does a judge find guidance to make a legally principled determination whether a law regulates abortion too much? Must the judge resort to balancing interests? What in any legal materials (in particular, the Constitution) guides this balancing? Does the decision really come down to questions of policy? Aren’t policy choices supposed to be left to the political branches or the states?
- Do you agree with the *Casey* joint opinion’s *stare decisis* analysis? If so, why? If not, why not? Do federal courts really have the power to perpetuate decisions that are not supported by the Constitution? If so, how is this consistent with the power of judicial review as explained in *Marbury v. Madison*, which premised the power on the Constitution’s superiority to other sources of law in our system? If *Marbury* is correct, why should judicial decisions inconsistent with the Constitution stand while statutes inconsistent with the Constitution fall?

OTHER ISSUES

Second Amendment

Kagan's views on the Second Amendment are as unclear as her views on many other controversial issues. Since her nomination was announced, news reports have identified previous positions that she took, which might provide insight into her views on the Second Amendment. For example, during Kagan's tenure on President Clinton's staff, she helped to draft an executive order "restricting the importation of certain semiautomatic assault rifles."³¹⁸ However, more evidence is necessary to determine whether Kagan's personal views on the Second Amendment are represented by her work as a member of the Clinton Administration (i.e. whether she advised Clinton to "infringe upon the [Second] Amendment rights of Americans").³¹⁹ Furthermore, in 1987, as a law clerk for Justice Marshall, Kagan, in a memorandum to Justice Marshall on whether to grant certiorari, stated that "she was 'not sympathetic' toward a man who contended that his constitutional rights were violated when he was convicted for carrying an unlicensed pistol."³²⁰ As a news report on the memorandum explained, "The man's 'sole contention [wa]s that the District of Columbia's firearms statutes violate[d] his constitutional right to 'keep and bear arms,'" Kagan wrote. 'I'm not sympathetic.'"³²¹

Perhaps the statements that express more clearly her personal position on the Second Amendment are those made in the March 18 letter that she sent to Senator Specter. When asked by Senator Specter about whether she believed *Heller* was rightly decided, Kagan stated,

Although I have never written about or taught the Second Amendment, I have read a fair bit of the scholarship that has appeared in recent years regarding the original meaning and history of the Second Amendment. I have always found this scholarship singularly difficult to evaluate. Both sides (that is, the individual rights view and the collective rights view) present cogent and sometimes powerful arguments, and I have come away thinking that immersion in the primary sources, which I have never attempted, would be necessary to choose between them with any degree of confidence. My instinctive response to reading the opinions in *Heller* last summer was much the same. This is not to say that the questions at issue are incapable of resolution; to the contrary, I have no doubt that the textual and historical questions with which the opinions wrestle are fundamental to appropriate constitutional analysis. It is only to say that I have not done the work required. I therefore have no reason to believe that the Court's analysis was faulty.³²²

Kagan went on to state that "if confirmed as Solicitor General, I would view *Heller*—and its fundamental understanding that the Second Amendment guarantees an individual right to keep and bear arms—as settled law, and I would fully accept the Court's determination."³²³ Since Kagan may

³¹⁸ Brian Darling, *Kagan Bad on Guns*, HUMAN EVENTS, May 14, 2010, available at <http://www.humanevents.com/article.php?id=36973> (quoting James Oliphant, *She's a White House Veteran*, LOS ANGELES TIMES, May 11, 2010, <http://articles.latimes.com/2010/may/11/nation/la-na-kagan-profile-20100511/2>).

³¹⁹ *Id.*

³²⁰ Greg Stohr & Kristin Jensen, *Kagan Was 'Not Sympathetic' as Law Clerk to Gun-Rights Argument*, BLOOMBERG.COM, May 13, 2010, <http://www.bloomberg.com/apps/news?pid=20601010&sid=aPI35t8uR6Gsh>.

³²¹ *Id.*

³²² March 18 Letter, *supra* note 131, at 6.

³²³ *Id.* at 7.

well soon be one of the Justices determining the scope of the right identified in *Heller*, it is important to understand how she would approach interpreting the Second Amendment.

Questions

- General Kagan, you said in a March 18 letter to Senator Specter that you thought both sides in the Second Amendment debate—“the individual rights view and the collective rights view”—“present cogent and sometimes powerful arguments” Would you characterize the Court’s decision in *Heller* as a close call?
 - What should the Court do in the situation of a “close call”? What should the Court do if analysis of constitutional text, structure, and history do not lead to a definitive answer?
- You told Senator Specter that you had not closely studied the issue, and, therefore, you had “no reason to believe that the Court’s analysis was faulty.” You also said that as Solicitor General you would “view *Heller* . . . as settled law.” If confirmed to the Supreme Court, would you still view *Heller* as settled law?
- You have done research and written on the First Amendment. How would you compare the importance of the right embodied in the Second Amendment with the rights embodied in the First Amendment?

Foreign/International Law

Kagan’s views about the relevance of foreign or international law in interpreting our Constitution and its use in Supreme Court decisions deserve inquiry. Statements she made during her confirmation hearings for solicitor general and during her time as dean of Harvard Law School, and her full-throated support of President Aharon Barak, suggest she would support the use of foreign or international law as a Supreme Court Justice.

In follow-up questions after the hearing on her nomination to be solicitor general, Senator Specter asked Kagan, “[I]s it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution?”³²⁴ Specter then continued to ask Kagan under what circumstances she would “consider foreign law when interpreting the Constitution” in general and the Second and Eighth Amendments in particular.³²⁵ Kagan responded, “At least some members of 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.”³²⁶ Kagan continued to give her opinion about when Justices would most likely take foreign law into consideration by stating, “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.”³²⁷ She explained, “A number of the Justices have considered foreign law in the Eighth Amendment context, where the

³²⁴ *Solicitor General Hearing*, *supra* note 5, at 166.

³²⁵ *Id.*

³²⁶ *Id.* at 166-67.

³²⁷ *Id.* at 167.

Court's inquiry often focuses on 'evolving standards of decency' and then on the level of consensus favoring or disfavoring certain practices."³²⁸ However, she further explained,

none of the Justices relied on other nations' restrictions on gun rights in their opinions in *District of Columbia v. Heller*, 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.³²⁹

Kagan placed a qualification, however, on her answer to Senator Specter's question when she said, "This set of questions appears different when viewed from the perspective of an advocate than when viewed from the perspective of a judge."³³⁰ Therefore, Kagan's answer as a solicitor general nominee offers little insight into how she would use foreign or international law if confirmed as a Justice on the Supreme Court.

Kagan further clarified her position on the use of foreign or international in her March 18 letter to Senator Specter. She explained, "*There are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions.* . . . This is most often the case when the Court has deemed interpretation of a provision to rest in part on current practices and norms regarding some subject."³³¹

Kagan stated the Eighth Amendment is the "classic case" where the Supreme Court "in determining what counts as 'cruel and unusual' punishment, often looks to 'evolving standards of decency that mark the progress of a maturing society' as exemplified by practices both in the United States and around the world."³³² She also stated that she did "not know of any bodies of constitutional doctrine other than that associated with the Cruel and Unusual Punishment Clause of the Eighth Amendment that survey current practices and norms in this way."³³³ Kagan's expanded answer is troubling. Not only does she acknowledge that "[t]here are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions," she appears to accept the notion that "current practices and norms" are relevant to interpreting constitutional provisions. Such a loose standard leaves ample room for judges to insert their own values and policy preferences into constitutional interpretation.

As dean of Harvard Law School, Kagan has made comments about international law. During opening remarks at an International Law Journal Conference at Harvard Law School, Kagan called the topic being discussed, the "relationship between domestic constitutions and international law", "such an important one" that was becoming more important "every year as the different legal systems of the world become more and more interwoven and as that interweaving creates all kinds of complex difficulties and issues."³³⁴

³²⁸ *Id.*

³²⁹ *Id.* (citation omitted).

³³⁰ *Id.* at 166.

³³¹ March 18 Letter, *supra* note 131, at 3 (emphasis added).

³³² *Id.* (citation omitted).

³³³ *Id.* In her answer, Kagan overlooked the majority's citation to foreign law and practices in *Lawrence v. Texas*. See 539 U.S. 558, 572-77 (2003).

³³⁴ Videotape: April 18, 2008 International Law Journal Conference (Harvard Law School Media Services 2008), available at <http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm> (comment begins at 3:16 mark).

Also, during a public conversation with Supreme Court Justice Ginsburg, Kagan asked Justice Ginsburg about a then-recent *New York Times* article that “talk[ed] about foreign courts’ reception of U.S. Supreme Court opinions and sa[id] that foreign courts really no longer cite the U.S. Supreme Court at least to the extent that they used to.”³³⁵ Kagan posed the questions: “Why has that happened? Do you care about it?”³³⁶ Justice Ginsburg started her response with this statement: “I have often said that if we don’t listen, we won’t be listened to.”³³⁷ In her response Ginsburg also noted that there is a “tremendous misunderstanding about references to decisions of tribunals abroad, and that is, they are [in] no sense binding on any United States judge, they are simply informative, they may be highly persuasive.”³³⁸ She said that she does not understand why it is acceptable to note in an opinion that she had considered a law review article, but it is not acceptable to admit that she had consulted a foreign opinion.

Finally, in a short article on revisions to Harvard’s first-year student curriculum, which included a requirement to take a class in international or comparative law,³³⁹ Kagan noted that “[t]he courses in international and comparative law are opening up new questions and possibilities, showing choices made by different societies and challenges that arise from globalization, while also helping every student to locate American law in the larger map of laws, politics, and histories across the world.”³⁴⁰ She also said in remarks to Lex Mundi, “the world’s leading association of independent law firms,”³⁴¹ that

law schools have two interrelated tasks. They have to do a better job of convincing our students of the great relevance and importance of international and comparative law in their legal studies. And they have to do a better job of incorporating and integrating international and comparative law issues into the curriculum.³⁴²

“One important way” to “accomplish these tasks” she said was to “bring to law schools visiting professors and practitioners from abroad.”³⁴³ She explained that “[f]oreign lawyers and law professors often will have the deepest and most detailed knowledge of their legal systems. More broadly, they will help to make American students aware that there are many different ways of solving legal problems and of using law to shape public life.”³⁴⁴ She further stated that,

equally if not more important, law schools must find ways to encourage U.S. trained teachers to retool our courses and our research to better raise and address international and comparative law and practices. I’m not talking here about encouraging more US-trained lawyers to go into the field of international law or comparative law itself,

³³⁵ Videotape: September 20, 2008 Q&A—With Justice Ginsburg, Harvard Law School Alumni “Celebration 55” (Harvard Law School Media Services 2008), available at <http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm> (comment begins at 41:06 mark).

³³⁶ *Id.*

³³⁷ *Id.* at 41:30.

³³⁸ *Id.* at 44:02.

³³⁹ Elena Kagan, *The Harvard Law School Revisited*, 11 GREEN BAG 2D 475, 478 (2008).

³⁴⁰ *Id.*

³⁴¹ Lex Mundi Homepage, <http://www.lexmundi.com> (last visited May 21, 2010).

³⁴² Elena Kagan, Remarks at the Lex Mundi Annual North American Meeting (May 15, 2004) (notes available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13D-Part61.pdf>).

³⁴³ *Id.*

³⁴⁴ *Id.*

although that too is important. I'm talking about all faculty in all courses thinking about the international and comparative dimensions of what they do.³⁴⁵

Senators should carefully question Kagan about how, if confirmed, she would approach the use of foreign or international law in her opinions. Her written answers to Senator Specter certainly raise concerns that, if confirmed, she would join the Justices who believe that it is proper to consider foreign or international law.

Questions

- In your March 18 letter to Senator Specter, you wrote that “[t]here are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions This is most often the case when the Court has deemed interpretation of a provision to rest in part on current practices and norms regarding some subject.” By this answer, can we assume that you believe that it is appropriate for judges to, at times, look to foreign law in interpreting and applying the Constitution?
- Do you think that it is appropriate for the Court to “deem[] interpretation of a [constitutional] provision to rest in part on current practices and norms regarding some subject”? If so, how is the Court to determine what constitutes “current practice and norms”? What principled basis exists for keeping this search from devolving into looking over the heads of guests to pick out your friends?
- Doesn't such a loose test leave room for the judge to substitute her own policy positions for “current practices and norms”?
- You cite the Eighth Amendment as a “classic case.” Do you believe that it is appropriate for the Court, in the Eighth Amendment context, to look to foreign law? Which country's law? What principle guides the judge in determining which country's practices are relevant?
- In *Lawrence v. Texas*, the Court cited to several sources of foreign law and practice (e.g., the 1957 Wolfenden Report on laws punishing homosexual conduct and decision by the European Court of Human Rights) to support its decision to hold the Texas sodomy law unconstitutional. Do you agree with the Court's use of foreign sources in *Lawrence*?
- You held a “public conversation” with Justice Ginsburg as part of an event while you were dean of Harvard Law School. You asked her about a then-recent *New York Times* article addressing “foreign courts’ reception of U.S. Supreme Court opinions and saying that foreign courts really no longer cite the U.S. Supreme Court at least to the extent that they used to.” You asked her, “Why has that happened? Do you care about it?” General Kagan, do you care about it? If so, why?
- In her answer, Justice Ginsburg said: “I have often said that if we don't listen, we won't be listened to.” She also stated that there is a “tremendous misunderstanding about references to decisions of tribunals abroad, and that is, they are in no sense binding on any United States judge, they are simply informative, they may be highly persuasive.” Do you agree with her answer?

³⁴⁵ *Id.*

CONCLUSION

The nomination of Elena Kagan causes several reasons for concern. Although she has generally steered clear of controversial social issues in her scholarly writings, there are enough red flags in her record to cause reasonable concern that if confirmed as a Justice she would be another reliable vote to constitutionalize controversial policy decisions (for example, on same-sex marriage) that the Constitution leaves to the people and their representatives. Therefore, while it would seem that Kagan possesses the technical skills—analytical ability, writing ability, and the ability to make cogent and coherent arguments—to be a Supreme Court Justice, it is important that she address these areas of concern during her confirmation hearing. Although she disavowed (or at least greatly nuanced) her position when facing her own confirmation hearing, Kagan has argued forcefully that Senators should ask searching questions about a potential Justice's judicial philosophy and how that philosophy would affect specific cases, thus practically inviting such questioning in her own hearing. Given the red flags in Kagan's record, Senators who are concerned about limiting the Court to its proper role in our constitutional republic should take her up on that invitation.

**Report of the American Civil Liberties Union
on the Nomination of Elena Kagan to be
Associate Justice of the U.S. Supreme Court**

Dated: June 21, 2010

INTRODUCTION

In accordance with ACLU Policy 519, this report summarizes the civil liberties and civil rights record of Elena Kagan, who was nominated by President Obama on May 10, 2010, to replace Justice John Paul Stevens as an Associate Justice of the U.S. Supreme Court. ACLU Policy 519 provides:

Whenever a Supreme Court nominee is sent to the Senate the ACLU will prepare a report for use by the Senate, the press and the public in evaluating the nominee. The report will examine the nominee's record with respect to civil liberties, and the role of the courts in protecting civil liberties, including the nominee's judicial record (if any), writing, speeches, and activities.

Kagan is currently serving as Solicitor General, the third ranking official in the Justice Department and the federal government's chief advocate before the U.S. Supreme Court. She is the first woman ever to hold that position. She was also the first woman Dean of Harvard Law School, a position she held for six years prior to her appointment as Solicitor General.

Except for a three year stint as an associate at Williams & Connolly in Washington D.C. from 1987-1989, Kagan has spent her entire professional career in government and academia. After graduating from Harvard Law School in 1986, she spent one year clerking for Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit and then clerked on the U.S. Supreme Court for Justice Thurgood Marshall. She taught at the University of Chicago Law School from 1991-1994 and at Harvard Law School from 1999-2009. The years in between were spent in the Clinton administration. Kagan worked in the White House Counsel's office from 1995-1996, and served as

Deputy Director of the Domestic Policy Council from 1997-1999. In addition, she acted as special counsel to the Senate Judiciary Committee during the confirmation hearing of Justice Ruth Bader Ginsburg in the summer of 1993.

Kagan's intellect and knowledge of the law are amply demonstrated by her record of professional achievement, and are acknowledged even by her critics. There has been a great deal of discussion since her nomination about the fact that she has never been a judge and that, if confirmed, she will be the only member of the current Court without prior judicial experience. The current Court is a historical anomaly in that regard, however. Earl Warren was not a judge before he was appointed to the Supreme Court, nor was Felix Frankfurter or William Douglas or Hugo Black or William Rehnquist. Indeed, there was only one former judge on the Supreme Court that decided *Brown v. Board of Education* in 1954. Both Chief Justice Roberts and Justice Thomas, moreover, only served briefly as federal judges before being elevated to the Supreme Court.

Whether this Court would benefit more from the addition of another sitting judge or someone who brings a different set of experiences to the bench is a matter of legitimate debate. But, Kagan's lack of judicial experience does have an undeniable impact on the confirmation process. By comparison to most recent Supreme Court nominees, there is a relatively slim paper record on which to evaluate Kagan's views on a wide range of issues. Her legal scholarship is impressive but it has been focused primarily on two areas: free speech and presidential power. Even where she has written extensively, her conclusions are often framed cautiously. Her articles frequently begin with a disclaimer that they are intended to be descriptive rather than normative, to raise questions rather than to offer solutions.

The briefs she has filed as Solicitor General are more forceful in their advocacy, but they raise a different set of issues. The Solicitor General is the government's lawyer in the Supreme Court and the positions Kagan has taken as Solicitor General on behalf of her client do not necessarily reflect the positions she would take as a Justice on the Supreme Court. Likewise, positions she took in memos she wrote while on the Domestic Policy Council rarely discuss her legal views. They more often reflect pragmatic concerns and favor a centrist approach that was very much in tune with the prevailing political strategy of the Clinton administration.

In part because there is so little else to rely on, we have not ignored these sources entirely in preparing this report but we have tried to cite them carefully and in context. For example, it seems fair to give greater weight to comments Kagan made during her confirmation hearing for Solicitor General than to comments she may have expressed in less formal settings or long ago. In addition, legal positions Kagan has taken as Solicitor General seem most informative when they coincide with positions she took on earlier occasions when speaking on her own behalf.

The simple truth is that there is much that we do not know about Kagan's views on the Constitution and the Court. Most fundamentally, she has said very little so far about her approach to constitutional interpretation. More specifically, the available record offers very few clues about her constitutional views on criminal justice, immigration, voting rights, prisoners' rights, due process, the Establishment Clause, and a host of other recurring Supreme Court topics. This report addresses the views that Kagan has expressed; it does not speculate on views that she has not expressed.

FREE SPEECH

Elena Kagan has written more extensively on free speech than any other subject. Her principal thesis is that modern First Amendment jurisprudence has been primarily designed to identify and invalidate viewpoint discrimination – that is, instances in which the government is acting to suppress particular ideas because those ideas are unpopular, or deemed wrong, or are contrary to the self-interest of those in power. The converse is also true, as she points out: First Amendment law generally bars the government from granting extra legal protection to those ideas it favors.¹

The notion that viewpoint discrimination violates the First Amendment is hardly a novel one and Kagan would not claim otherwise. Oliver Wendell Holmes invoked the metaphor of a marketplace of ideas more than ninety years ago,² and the Supreme Court has spoken frequently about the First Amendment requirement of viewpoint neutrality in recent years.³ Kagan's articles assume the principle of viewpoint neutrality and then make two different points.

First, legislative purpose is central to the Court's First Amendment analysis even though it frequently claims otherwise. In this regard, she argues, we should look at what the Court does rather than what it says. By subjecting content-based laws to strict scrutiny and content-neutral laws to relaxed judicial review, the Court has created a doctrinal framework that allows it to look more closely at laws that are more likely to be

¹ Kagan has developed this theme in several articles. See "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 U. Chi.L.Rev. 413 (1996); "Regulation of Hate Speech and Pornography after *R.A.V.*," 60 U. Chi. L. Rev. 873 (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 The Supreme Court Review 29 (1992).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J. dissenting).

³ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable.")(collecting cases).

motivated by hostility to certain ideas. Put another way, there is less reason for judges to look closely at laws that impose time, place and manner regulations on all speech regardless of content because there is less reason to suspect that such regulations are viewpoint-based. On the other hand, laws that single out certain categories of speech for favorable or unfavorable treatment based on content run a greater risk of crossing the line into unconstitutional censorship. Similarly, the risk of censorship is high when government officials are given standardless discretion to license speech by, for example, granting or withholding parade permits. Thus, those laws too have traditionally been reviewed skeptically by courts. In effect, Kagan says, the Court has decided that content-discrimination and content-neutrality are better ways to determine legislative purpose in a First Amendment context than relying on selective statements by individual legislators in an effort to discern the collective purpose of a legislative body.

Second, in Kagan's view the Court has been inconsistent in applying the doctrine of viewpoint-neutrality. She illustrates her point by distinguishing two Supreme Court decisions. In *R.A.V. v. City of St. Paul*,⁴ the Court struck down a municipal ordinance that made it a crime to engage in certain expressive conduct that aroused "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The decision was unanimous but the Court divided on its rationale. Four members of the Court took the position that the ordinance was unconstitutional because its broad language reached constitutionally protected speech. Justice Scalia took a different view. Writing for five members of the Court, he was willing to assume that the ordinance criminalized only "fighting words," which had long been regarded as unprotected speech

⁴ 505 U.S. 377 (1992).

under the First Amendment. Nevertheless, he wrote, the St. Paul ordinance is unconstitutional because it does not prohibit all “fighting words.” Instead, it prohibits only some “fighting words” based on the ideas they express and that, he concluded is a form of viewpoint discrimination.

One year earlier, in *Rust v. Sullivan*,⁵ both sides of the Court’s ideological spectrum had taken very different positions on what Kagan sees as a related question. The issue in *Rust* was whether family planning clinics that received federal funds could be barred from providing abortion referral or counseling. The dissent characterized that prohibition as viewpoint discrimination and therefore unconstitutional. The conservative majority, on the other hand, ruled that the principle of viewpoint neutrality did not apply because the First Amendment does not guarantee anyone a right to federal funding.

For Kagan, the two decisions are logically irreconcilable. She also believes that the majority got it right in *R.A.V.* and wrong in *Rust*. As she explained, if the government cannot discriminate on the basis of viewpoint when it punishes “fighting words,” even though “fighting words” are unprotected by the First Amendment, then the government cannot discriminate on the basis of viewpoint when it funds private family planning clinics, even though the Constitution does not require the government to fund family planning clinics at all.

It seems reasonable to infer from Kagan’s discussion of these two cases that she views the principle of viewpoint neutrality as a cornerstone of First Amendment law and that she is committed to enforcing that principle in an evenhanded way. For example, Kagan regards hate speech laws as viewpoint-based and thus unconstitutional. Like the

⁵ 500 U.S. 173 (1991).

Supreme Court, however, she distinguishes between laws punishing hate speech and laws punishing hate crimes.⁶ In Kagan's view, the latter do not offend the principle of viewpoint neutrality because she believes that hate crime laws "are best understood as targeting not speech, but acts."⁷ That is the ACLU's position, as well.

More problematically, Kagan has shown sympathy for efforts to regulate what she describes as "low value speech." According to Kagan, "the regulation of speech falling within low-value categories often raises fewer concerns than usual about improper purpose." Applying that principle to pornography, Kagan has suggested that a pornography regulation focused on sexual violence "seems worth consideration" and might be characterized as viewpoint-neutral.⁸ The idea that efforts to regulate graphic sexual violence may be viewpoint neutral presumably reflects Kagan's view that "obscenity causes significant harm to our society, especially to women and children."⁹ But, Kagan's embrace of anti-pornography efforts is both tentative and limited. In the same article, she made clear that efforts to regulate pornography that promotes the subordination of women are viewpoint-based and were properly struck down by the courts.¹⁰

Elaborating on the concept of "low-value" speech, Kagan has said:

Perhaps what sets these categories apart is not that the speech within them is low value, but that regulation of the speech within them is low risk. No matter that a regulation of these categories is

⁶ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

⁷ "Regulation of Hate Speech and Pornography after *R.A.V.*, *supra* n.1, at 884.

⁸ *Id.* at 890.

⁹ See Answers to Written Questions of Senator Chuck Grassley to Elena Kagan, submitted during her confirmation hearing for Solicitor General, Answer 2.

¹⁰ *Supra* n.7, at 875 (discussing *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* mem, 475 U.S. 1001 (1986)).

content based, even viewpoint based; the government need not satisfy the usual standard because the courts do not suspect, to the usual extent, that the government's asserted interest is a pretext.¹¹

If all that Kagan means by this passage is that the government is less likely to be motivated by a desire to suppress ideas when it regulates commercial speech, for instance, than when it regulates political speech, her comment is not particularly troubling. But, to the extent that it suggests a willingness to create a hierarchy of high and low value speech based on whether the government is likely to engage in viewpoint discrimination, it is far more troubling. The concern that it may signal the latter is heightened by the brief that Kagan submitted to the Supreme Court earlier this Term in *United States v. Stevens*.¹²

The Court ruled in *Stevens* that a federal law making it a crime to create, sell, or possess "depictions of animal cruelty" was overbroad and therefore violated the First Amendment. In defense of the statute, the government argued that depictions of animal cruelty should be treated as outside the First Amendment based on the following test: "Whether a given category of speech deserves First Amendment protection depends on a categorical balancing of the value of the speech against its societal costs." By an 8-1 vote, the Court decisively rejected that proposition. As Chief Justice Roberts explained:

As a free-floating test for First Amendment coverage, [the government's proposal] is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh its costs. Our

¹¹ "Private Speech, Public Purpose," *supra* n.1, at 481.

¹² 130 S.Ct. 1577 (2010).

Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.¹³

Kagan's academic approach to campaign finance reform may also shed light on the position she took as Solicitor General in *Citizens United v. FEC*.¹⁴ In her role as an academic, she wrote that government efforts to equalize campaign speech are properly subject to strict scrutiny because of "the absence of any clear criteria for deciding what state of public debate constitutes the ideal and how far current debate diverges from it," as well as "[t]he ease with which improper purpose can taint a law directed at equalizing expression."¹⁵ In her role of Solicitor General, she chose not to defend the prohibition on corporate campaign speech on the ground that such speech had the capacity to overwhelm public debate.¹⁶ Instead, she relied heavily on a shareholder protection rationale that a majority of the Court rejected.

On a related issue that Congress is now considering in light of the decision in *Citizens United* – namely a ban on independent expenditures by U.S. corporations with significant foreign ownership -- Kagan once wrote a memo while in the White House Counsel's Office expressing her view that a "ban on non-citizen contributions is unconstitutional (though a ban on *foreign* contributions) would not be."¹⁷ Interestingly, she expressed a different view in an October 1996 email in which she offered the

¹³ *Id.* at 1585.

¹⁴ 130 S.Ct. 876 (2010).

¹⁵ "Private Speech, Public Purpose," *supra* n.1, at 471.

¹⁶ 130 S.Ct. at 923.

¹⁷ Handwritten note from Elena Kagan to Jack Quinn, undated.

following response to the question of whether a ban on contributions from non-citizens raises constitutional difficulties:¹⁸

It is unfortunately true that almost any meaningful campaign finance reform proposal raises constitutional issues. This is a result of the Supreme Court's view – which I believe to be mistaken in many cases – that money is speech and that attempts to limit the influence of money on our political system therefore raises First Amendment problems. I think that even on this view, the Court could and should approve this because of the compelling governmental interest in preventing corruption. But I also think the Court should reexamine its premise that the freedom of speech guaranteed by the First Amendment entails a right to throw money at the political system.

As is so often the case with Kagan's memos and emails, however, it is not clear in context whether this statement represented her own opinion or what she understood to be the position of the Clinton White House.

PRESIDENTIAL POWER

Kagan's other principal academic interest has been administrative law and, more specifically, the extent to which presidents can and should exercise control over administrative agencies. Based on her experience as Deputy Director of the Domestic Policy Council during the Clinton administration, Kagan is a forceful advocate for what she has called "presidential administration."¹⁹ As a matter of policy, she believes that presidential control of the administrative process increases both accountability and effectiveness. As a matter of law, she argues that laws delegating authority to administrative agencies should be understood as delegating authority to the president as the Chief Executive unless Congress clearly indicates otherwise.

¹⁸ E-mail from Elena Kagan to Paul J. Weinstein, Jr., dated October 31, 1996.

¹⁹ "Presidential Administration," 114 Harv.L.Rev. 2245 (2001).

The caveat is a critical one. It distinguishes Kagan from conservative scholars who have promoted the idea of a “unitary executive,” and Bush administration officials who used that theory to argue in favor of inherent presidential powers supposedly derived from Article II of the Constitution. Kagan does not “espouse the unitarian position.”²⁰ Her view of presidential power is expansive but it ultimately rests on statutory authorization. As she says, “[t]he original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position.”²¹

Rather than rely on Article II, Kagan proposes a rule of statutory construction. If, Congress has not addressed the question of presidential authority, as is usually the case, Kagan would presume that a delegation of authority to an administrative agency includes a delegation of authority to the president over the same subject matter. Unlike the unitarians, however, Kagan recognizes the power of Congress to insulate administrative agencies from presidential control so long as it does so expressly. She also distinguishes between executive branch agencies and independent agencies on the theory that the decision to establish an independent agency represents a “self-conscious[.]” choice by Congress to limit the president’s appointment and removal process and to shield the agency from presidential influence. Finally, and most importantly in the present political climate, she states unequivocally that the president “has no greater warrant than an agency official to exceed the limits of statutory authority.”²²

²⁰ *Id.* at 2326.

²¹ *Id.*

²² *Id.* at 2349

NATIONAL SECURITY

Kagan's article on "presidential administration" was written before 9/11. Today, the debate over presidential power, whether derived from Article II or inferred from the interstices of congressional legislation, is largely focused on issues of national security. Both sides in that debate have found cause for concern in Kagan's approach. On the one hand, John Yoo has criticized Kagan for conceding in his view that Congress could limit the president's national security powers.²³ On the other hand, critics of the Bush administration's approach to terrorism have worried that Kagan's willingness to read statutory ambiguity as an endorsement of presidential power risks the sort of civil liberties violations that occurred during the Bush years. In fairness, Kagan was probably not thinking about national security when she wrote her article. That said, her favorable citation to Justice Jackson's famous opinion in *Youngstown Steel*²⁴ at least gives reason to hope that she does not see a national security exception to the principle that the president must obey the laws that Congress has enacted. But, conversely, there nothing in Kagan's academic writing suggesting that she would grant the president less discretion over national security than routine administrative matters or seek ways to narrow the scope of an ambiguous congressional mandate in the national security context. Clearly, these questions are vitally important and they should be discussed at Kagan's confirmation hearing.

²³ John Yoo, "An Executive Without Much Privilege," *The New York Times*, May 26, 2010.

²⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (holding that President Truman's seizure of privately-owned steel mills during the Korean War was inconsistent with "the will of Congress" and therefore unconstitutional). See also Answers to Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter, submitted during her confirmation hearing for Solicitor General, Answer 6.

During her confirmation hearing for Solicitor General, Kagan was asked a series of questions by Senator Lindsay Graham that also deserve further exploration at her upcoming hearing for the Supreme Court. First, she was asked if we were at war. She said, yes.²⁵ She then had the following exchange with Senator Graham:²⁶

SENATOR GRAHAM: [I]f 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 . . . [T]he Attorney General said, "Yes, I would." Do you agree with that?

MS. KAGAN: I do.

* * * * *

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.

From the colloquy, these statements appear to express Kagan's personal sense of what the law should be, as opposed to a summary of current law as she understands it. The proposition that anyone who finances al Qaeda activity anywhere in the world (or,

²⁵ Hearing before the Committee on the Judiciary, United States Senate, 111th Cong., 1st Sess. (Feb. 10, 2009), at 113.

²⁶ *Id.* at 114.

one assumes, provides other forms of material support) can be classified by the government as an enemy combatant and detained indefinitely in military custody without criminal charges or trial is, in our view, wrong as a matter of U.S. constitutional law and wrong as a matter of international law. It is also critical to deciding the scope of the government's detention authority and its authority to use lethal force. Experience at Guantanamo has shown the importance of providing transparency, due process and judicial review for those who are classified as enemy combatants. But for those who are not properly subject to military detention in the first place, transparency, due process and judicial review are not a substitute for criminal charges and trial.

In addition, Kagan's stated commitment to due process and judicial review for detainees have not been reflected in positions she has taken as Solicitor General on behalf of the Obama administration, with the caveat that it is impossible to know whether her client's positions are also her own. For example, in *Kiyemba v. Obama*, the Solicitor General's Office successfully argued that a federal habeas court lacks authority to order the release of Guantanamo detainees even after the court has found and the government has conceded that the detainees – in this case, Uighurs from China – are not enemy combatants.²⁷ Similarly, in *Al Maqaleh v. Gates*, the Solicitor General's Office successfully argued that detainees in Afghanistan cannot file habeas corpus petitions to challenge the basis for their detention because Afghanistan is a war zone, even if the detainees were brought to Afghanistan after being apprehended elsewhere.²⁸

By contrast, Kagan signed a letter in November 2005, while still at Harvard Law School, urging the Senate to reject a proposed amendment stripping federal courts of

²⁷ See *Kiyemba v. Obama*, ___ F.3d ___, 2010 WL 2134279 (D.C.Cir. 2010).

²⁸ See *Al Maqaleh v. Gates*, ___ F.3d ___, 2010 WL 2010783 (D.C.Cir. 2010).

jurisdiction to hear habeas petitions filed by Guantanamo detainees.²⁹ In blunt language, the letter said:

To put this most pointedly, were the Graham amendment to become law, a person suspected of being a member of Al Qaeda could be arrested, transferred to Guantanamo, detained indefinitely (provided that proper procedures had been followed in deciding that the person is an “enemy combatant”), subjected to inhumane treatment, tried before a military commission and sentenced to death without any express authorization from Congress and without review by any independent federal court. The American form of government was established precisely to prevent this kind of unreviewable exercise of power over the lives of individuals.

And, in January 2007, Kagan signed another letter, this time joined by more than 160 law school deans, strongly objecting to a statement by then-Deputy Assistant Secretary of Defense Charles Stimson urging corporate executives to use their economic leverage to discourage private law firms from representing Guantanamo detainees. “These lawyers,” the deans wrote, “protect not only the rights of detainees, but also our shared constitutional principles.”³⁰ On the other hand, during oral argument in *Holder v. Humanitarian Law Project*, Kagan argued that any lawyer who filed an *amicus* brief in a U.S. court on behalf of a designated terrorist organization would be violating the material support statute and thus risking criminal prosecution.³¹

LGBT RIGHTS

Probably no issue has attracted more public attention since Kagan’s nomination last year for Solicitor General than her opposition to the Solomon Amendment during her

²⁹ 151 CONG. REC. at S12802 (daily ed. Nov. 15, 2005) (joint letter to Sen. Leahy). The letter was also signed by the Deans of Georgetown, Yale, and Stanford law schools.

³⁰ See <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13C-Part2.pdf>.

³¹ OT 2009, No. 08-1498 (argued Feb. 23, 2010), Tr. at 47-48. The Court did not reach that hypothetical question in its decision, which upheld the material support statute as applied to the actual facts before it. *Holder v. Humanitarian Law Project*, 2010 WL 2471055 (June 21, 2010).

tenure at Harvard Law School. Under the Solomon Amendment, universities as a whole are ineligible to receive designated federal funds if any part of the university denies military recruiters the same access to students that it provides to other potential employers. Like many law schools, Harvard has a non-discrimination policy that includes sexual orientation. Pursuant to that policy, employers who wish to recruit through the school's Office of Career Services (OCS) are required to sign a non-discrimination pledge. Because of the military's ban on gay, lesbian or bisexual soldiers, the Law School had barred it for many years from using the services of OCS. In 2002, the Defense Department informed the school that this practice violated the Solomon Amendment and that, unless it was changed, Harvard University would forfeit \$328 million in federal funding. The Law School agreed to waive its non-discrimination policy for the military in response to the threatened loss of funding. Kagan did not make that initial decision but reaffirmed it a year later when she became Dean.

At the same time, Kagan was outspoken in opposing the military's policy of Don't Ask, Don't Tell. In a typical e-mail to the Harvard Law School community in October 2003 – one of several she wrote over the years – Kagan described the decision to permit military recruitment in the following terms:³²

This action causes me deep distress, as I know it does many others. I abhor the military's discriminatory recruitment policy. The importance of the military to our society – and the extraordinary service that members of the military provide to all the rest of us – makes this discrimination more, not less, repugnant. The military's policy deprives many men and women of courage and character from having the opportunity to serve their country in the greatest way possible. This is a profound wrong – a moral injustice of the first order. And it is a wrong that tears at the fabric

³² E-mail from Elena Kagan to the HLS community, dated October 6, 2003.

of our community, because some of our members cannot, while others can, devote their professional careers to their country.

That same year, a group of law professors and law schools (not including Harvard) challenged the Solomon Amendment in court. After the Third Circuit declared the Amendment unconstitutional in November 2004, Kagan reinstituted the Law School's prior ban on military recruitment through the Office of Career Services. Along with other members of the Harvard Law School faculty, she also submitted an amicus brief – first in the Third Circuit and then in the U.S. Supreme Court – supporting the Solomon Amendment challenge. The brief did not address the constitutionality of the Amendment; instead, it argued that the neutral application of a non-discrimination policy did not violate the Solomon Amendment because it treated all employers equally. In a unanimous decision, the Supreme Court rejected that interpretation of the Solomon Amendment and upheld the law as constitutional.³³ Following the Supreme Court decision, Kagan again agreed to waive the non-discrimination policy for the military, and again wrote to the Law School community, stating: “The Law School remains firmly committed to the principle of equal opportunity for all persons, without regard to sexual orientation. And I look forward to the time when all our students can pursue any career path they desire, including the path of devoting their professional lives to the defense of their country.”³⁴

The subject of marriage for same-sex couples arose during Kagan's confirmation hearing for Solicitor General. Specifically, Senator Cornyn asked her whether she

³³ *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). The ACLU also submitted an amicus brief in the Supreme Court urging the Court to strike down the Solomon Amendment as unconstitutional.

³⁴ E-mail from Elena Kagan to the HLS community, dated January 9, 2009.

believed “that there is a federal constitutional right to same-sex marriage.” She responded that “[t]here is no federal constitutional right to same-sex marriage.” In isolation, that answer could be read as a description of existing law or as a statement of what the law should be. In context, it appears that the former is a much more likely explanation because in response to the very next question from Senator Cornyn -- “Have you ever expressed your opinion whether the federal Constitution should be read to confer a right to same-sex marriage?” -- she replied: “I do not recall ever expressing an opinion on this question.”³⁵

REPRODUCTIVE RIGHTS

Kagan was equally circumspect in response to a series of questions about abortion by Senator Grassley during her confirmation hearing for Solicitor General. When asked whether the U.S. Constitution confers a right to abortion, she said:

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*.

She gave similar responses when asked whether the U.S. Constitution compels taxpayer funding of abortion, whether it prohibits “informed-consent and parental-involvement provisions for abortion,” and whether the Supreme Court had ruled properly in upholding the Federal Partial-Birth Abortion Act in 2007.³⁶ It would be a stretch to read anything into this intentionally bland language that even hints one way or another how Kagan

³⁵ See Answers to Written Questions from Senator Cornyn to Elena Kagan, submitted during her confirmation hearing for Solicitor General, Answers 1(a) and 1 (b).

³⁶ See Answers to Written Questions of Senator Chuck Grassley to Elena Kagan, submitted during her confirmation hearing for Solicitor General, Answers 8, 9, 10, 11.

would respond to specific attempts to limit or curtail abortion if confirmed to the Supreme Court.

The same is true for two memos discussing abortion that were written while Kagan worked in the Clinton White House. The first is a 1997 memo to President Clinton from Bruce Reed, who was then Director of the Domestic Policy Council, and Kagan.³⁷ At the time, the Senate was considering a bill (HR 1122) to ban so-called partial birth abortions that would have permitted an exception only if necessary to save the life of the woman. President Clinton had indicated that he would veto the bill. Reed and Kagan urged President Clinton to support a substitute amendment offered by Senator Daschle. The Daschle amendment applied to all post-viability abortions regardless of method but added a narrow health exception to the ban if continuation of the pregnancy would “risk grievous injury to [the woman’s] health.” The Reed/Kagan memo notes that the Justice Department’s Office of Legal Counsel had reviewed the Daschle amendment and believed that, “properly read,” it violated *Roe v. Wade* because it “countenance[d] trade-offs involving women’s health.” A year before, Kagan had taken a similar position when she argued that any regulation of so called partial-birth abortion was unconstitutional if it did not allow use of the procedure whenever other methods of abortion risked serious adverse health consequences to the woman, regardless of whether the abortion itself was medically necessary.³⁸

³⁷ “Daschle and Feinstein Amendments,” Memorandum for the President, from Bruce Reed and Elena Kagan, dated May 13, 1997.

³⁸ Memo from Elena Kagan to Jack Quinn, dated February 15, 1996. In *Carhart v. Gonzales*, 550 U.S. 124 (2005), the Supreme Court upheld the facial validity of the federal Partial-Birth Abortion Ban Act of 2003 despite the absence of a health exception. Five years earlier, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court had struck down a similar Nebraska law as unconstitutional because it lacked a health exception.

The 1997 memo nevertheless recommends that President Clinton “endorse the Daschle amendment in order to sustain your credibility on HR 1122 and prevent Congress from overriding your veto.” The memo also notes that the Daschle amendment had been endorsed by the American College of Obstetricians and Gynecologists. (The ACLU opposed it.) Congress ultimately passed a federal partial-birth abortion ban that did not include a health exception and Kagan supported the President’s decision to veto it. She also helped draft a letter from President Clinton to Archbishop Law of Boston that highlighted the President’s support for a “limited” health exception “that takes effect only when a woman faces real, serious adverse health consequences.”³⁹

The second memo dealt with a discrepancy between the Hyde Amendment and Medicare regulations covering abortion. Based on an earlier version of the Hyde Amendment, the Medicare regulations then in effect permitted federal funding for abortion only when the life of the mother was endangered. The Hyde Amendment, however, had been subsequently amended to permit federal funding of abortion in cases of rape and incest, as well. In response to an inquiry from the Catholic Health Association and Senator Nickles, the White House was considering two questions. First, should Catholic hospitals be permitted to participate in Medicare without providing abortions? Second, should the Medicare regulations be updated in light of the changes in the Hyde amendment? As explained in a memo to the President from Bruce Reed and Charles F.C. Ruff,⁴⁰ the President’s advisors agreed that the answer to the first question

³⁹ See generally, Barnes & Goldstein, “Papers Covering Elena Kagan’s Time As Clinton Adviser Released,” *The Washington Post*, June 5, 2010.

⁴⁰ “Hyde Amendment Application to Medicare and Abortion Coverage/Requirement for Catholic Provider Sponsored Organizations,” Memorandum to the President from Bruce Reed and Charles F.C. Ruff, dated June 12, 1998.

was yes, but disagreed on the second question. The Domestic Policy Council and the Office of Management and Budget thought that the Medicare regulations should be revised to track the new language of the Hyde Amendment. The Department of Health and Human Services wanted to go further and argued that Medicare should be allowed to use non-appropriated funds (that were not covered by Hyde) to fund all medically necessary abortions. The President ultimately accepted the narrower recommendation. Although Kagan did not write the memo, she is listed as one of three people from the Domestic Policy Council that helped formulate its position, and therefore presumably agreed with the memo's conclusion that a more limited expansion of Medicare coverage was more likely to avoid "a high-profile legislative battle."

Earlier in her career, Kagan did offer her views on the constitutional question of whether prison officials are required to fund elective abortions for prisoners. She was clerking for Justice Marshall at the time. In response to a petition for certiorari by prison officials who were seeking Supreme Court review of a preliminary injunction, she prepared a memo for Justice Marshall, which stated: "Since elective abortions are not medically necessary, I cannot see how denial of such abortions is a breach of the Eighth Amendment obligation to provide prisoners with needed medical care. And given that non-prisoners have no rights to funding for abortions, I do not see why prisoners should have such rights." She nevertheless recommended that Justice Marshall vote to deny certiorari because of her concern that "this case is likely to become the vehicle that this Court uses to create some very bad law on abortion and/or prisoner rights."⁴¹

⁴¹ Memo from Elena Kagan to Justice Marshall re Lanza v. Monmouth County Correctional Institute Inmates, No. 08-1431, dated April 26, 1988.

RACIAL JUSTICE

Kagan's academic writings do not address race discrimination, but the issue does arise in two memos that have been released since her nomination. The first was written by Kagan while she was clerking for Justice Marshall in 1987.⁴² It involved a case from Texas that the Court ultimately declined to hear. The issue, as described in Kagan's memo, was "whether a school district may adopt a race-conscious rezoning plan in the absence of a showing of prior de jure or de facto segregation." It is clear from the memo that Kagan thought the school district's actions were lawful and appropriate. Her memo concludes with the following observations:

The plan under attack is amazingly sensible. The [school district] refused to wait and watch while new residential trends effectively resegregated the schools. It noted the residential trends, calculated their long-term consequences, and acted to prevent those consequences from taking place. The decisions of the Texas state courts were based, above all, on a recognition of the good sense and fairmindedness of the rezoning plan. Let's hope this Court takes note of the same.

A decade later, when she was serving on the Domestic Policy Council in the Clinton White House, Kagan received a copy of a memo from the Solicitor General to the Attorney General outlining a proposed *amicus* brief for the government in *Piscataway Bd. of Education v. Taxman*, a high profile case then pending before the United States Supreme Court.⁴³ The case arose after a local school district invoked its affirmative action policy to lay off a white teacher rather than a black teacher with equal seniority. At the time, it was widely anticipated that the case would produce a major affirmative action decision by the Supreme Court. In fact, the case was settled before any Supreme

⁴² Memo from Elena Kagan to Justice Marshall re *Citizens for a Better Education v. Goose County Sch. District*, No. 86-2061, dated Aug. 6, 1987.

⁴³ Memo from Walter Dellinger to the Attorney General, dated July 29, 1997.

Court decision. Prior to settlement, however, the Solicitor General proposed filing a “narrow” brief arguing that the facts in this case failed to support this particular layoff. If the Court followed that approach, the Solicitor General said, “[t]he Court would then not have to reach the broader question whether Title VII *always* precludes non-remedial affirmative action.” The copy of the memo in the files contains a marginal note from Kagan to Bruce Reed, which says: “I think this is exactly the right position – as a legal matter, as a policy matter, and as a political matter.”

In addition, there have been reports that Kagan was skeptical about a Race Commission that President Clinton created during his second term, favored a public message on race that emphasized responsibility as well as opportunity, opposed social promotion in schools, and preferred race-neutral remedies to race-conscious remedies as part of the Clinton initiative to “mend, not end” affirmative action.⁴⁴

Since her Supreme Court nomination, attention has also focused on the paucity of minority hires while Kagan was Dean of Harvard Law School. From 2003-2009, the Law School hired 43 full-time faculty members: 9 were women and 4 were minorities. Only 1 minority – an Asian American woman – was hired for a tenure or tenure track position. Some have suggested that those numbers raise questions about Kagan’s commitment to diversity, but at least three prominent African American professors at Harvard Law School – Charles Ogletree, Randall Kennedy, and Ronald Sullivan -- have spoken out publicly in her defense.⁴⁵ Among other things, they have pointed out that:

⁴⁴ Baker, “As Aide, Kagan Battled Colleague Over Policy,” The New York Times, June 14, 2010.

⁴⁵ See e.g., Seelye, “Nominee Scrutinized for Hiring on Race,” The New York Times, May 13, 2010; Kennedy, “The Media Jabs are Unfair, Kagan Will Fight for Equality on the Court,” available at www.huffingtonpost.com/randall-kennedy/post_603_b_573085.html; Sullivan, “A Black Kagan Recruit Makes the Case for Confirmation,” available at www.thegrio.com/politics/a-black-kagan-recruit-makes-the-case-for-confirmation.php.

the Dean plays a prominent role in hiring but final decisions belong to the faculty; Kagan appointed a faculty committee to identify minority candidates for recruitment; she recruited several minority candidates who chose not to accept Harvard's offer; she supported fellowship programs at Harvard that have been a "launching pad" for minority scholars seeking academic careers; and the number of minority students increased during her deanship. When she became Dean, Kagan also broke with tradition by declining a chaired professorship named after Isaac Royall, an early supporter of Harvard who made his fortune from the slave trade. Instead, she became the Charles Hamilton Houston Professor of Law, an endowed chair named after one of the great civil rights lawyers of the twentieth century, who was Thurgood Marshall's teacher and mentor. Based on this record, Professor Ogletree has said that Kagan "worked diligently to make opportunities available for others," and Professor Kennedy has said that "the criticisms leveled at [Kagan] are unfair."⁴⁶

More generally, Kagan has said: "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."⁴⁷ She has also said that "it is a great deal better for the elected branches to take the lead in creating a more just society."⁴⁸ Of course, that says nothing about how the courts should respond when the actions of the elected branches instead create inequality and injustice.

⁴⁶ *Id.*

⁴⁷ Kagan made this statement in response to a question from Senator Specter asking her to identify "moral injustices of the first order" in our society, which is a phrase she has used to describe Don't Ask, Don't Tell. See *supra* n.21, Answer 14.

⁴⁸ *Id.* Answer 4.

Kagan was less equivocal when asked whether she believes that the Constitution “confers a right to a minimum level of welfare.” She responded by saying:⁴⁹

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 right 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 . . .

Her response can best be described as a conventional one.

CRIMINAL JUSTICE/DEATH PENALTY

Like so many other areas, there is very little in the public record on which to base any assessment of Kagan’s views on criminal justice. Uncharacteristically, however, she did offer a personal opinion about the death penalty during her confirmation hearing for Solicitor General. She was asked by Senator Spector if she supported the death penalty, if she believed it was constitutional as applied in the United States, and if she was prepared to defend its constitutionality before the Supreme Court. When asked similar questions about others subjects, such as abortion and same-sex marriage, she generally recited the law and refrained from offering her personal views. She took a different approach with regard to the death penalty, saying:⁵⁰

I am fully prepared to argue, consistent with Supreme Court precedents, that the death penalty is constitutional . . . Like other nominees to the Solicitor General position, I have refrained from

⁴⁹ *Id.* Answer 5b.

⁵⁰ *Id.* Answer 1.

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.

Two observations seem appropriate in light of these comments. First, they are silent on the question of whether the death sentence has been constitutionally imposed in particular cases that have been decided by the Supreme Court or are likely to come before the Supreme Court. Second, Kagan's comments suggest a very different attitude toward the death penalty than Justice Stevens' observations two years ago in *Baze v. Rees*.⁵¹ Although acknowledging that he was bound by Supreme Court precedents "that remain a part of our law," Justice Stevens reflected on his long Supreme Court tenure and said: "I have relied on my own experience in reaching the conclusion that that the imposition of the death penalty 'represents the pointless and needless extinction of life with only marginal contributions to any discernible social or political purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'"

Kagan also expressed her views on a proposal to reduce the sentencing disparity between crack and powder cocaine from 100:1 to 10:1 while working in the Clinton White House. The sentencing disparity was and is a highly contentious issue, in part because of its racially disparate impact. In 1995, the U.S. Sentencing Commission had recommended eliminating the disparity entirely by increasing the amount of crack cocaine necessary to trigger a mandatory five-year sentence from 5 grams to 500 grams,

⁵¹ *Baze v. Rees*, 553 U.S. 35, 86 (2008)(citation omitted).

the trigger amount for powder cocaine. Congress rejected the change in a bill that President Clinton signed into law. Two years later, the Sentencing Commission submitted a revised proposal to reduce the sentencing disparity without eliminating it. Its report suggested a range of possible fixes. In response, Attorney General Reno and General McCaffrey, who was then the federal drug czar, recommended that the President support raising the threshold level for crack cocaine from 5 grams to 25 grams, and lowering the threshold level for powder cocaine from 500 grams to 250 grams, thus creating a new 10:1 ratio that would at least partially address what they described as a symbol of racial bias in the criminal justice system while enabling the federal government to focus its law enforcement efforts on more serious drug dealers.

Kagan endorsed that recommendation. She acknowledged that the recommendation was a compromise that was likely to be criticized from both sides. As she noted in a memo to President Clinton written in July 1997,⁵² Republicans in Congress wanted to toughen the sentencing laws by lowering the amount of powder cocaine necessary to trigger a five-year minimum sentence while leaving the rules for crack cocaine as they were. On the other hand, she predicted, “the Congressional Black Caucus and others in the African-American Community will attack the Administration for failing to go far enough to remove a racial injustice.”

Here, as elsewhere, Kagan urged the President to take a pragmatic approach:

[P]recisely because it takes a middle position – and because . . . it can be hooked to law enforcement objectives – [our] recommendation offers the best hope of achieving progress on this issue. The CBC approach will go nowhere in Congress, even with our support. The Republican approach stands a scarily high chance of success, unless we counter it with a credible alternative. We are

⁵² Memo from Bruce Reed and Elena Kagan to the President, dated July 3, 1997.

not particularly optimistic that the recommended approach (assuming you accept it) will prevail, but it stands a better [chance] than any alternative approach of leading to a decent outcome.

RELIGION

In *Bowen v. Kendrick*,⁵³ the Supreme Court ruled that the Adolescent Family Life Act did not violate the Establishment Clause on its face, even though nothing in the Act expressly prohibited federal grantees from engaging in religious proselytizing while counseling teens on sexuality and pregnancy. By a 5-4 vote, the Court refused to presume that federal funds would be used for religious proselytizing. Instead, it ruled that any acts of religious proselytizing could be challenged on an as-applied basis. Justice Marshall was one of the dissenters in *Bowen*. Kagan was clerking for him at the time and wrote a memo, which said: "It would be difficult for any religious organization to participate in such projects without injecting some kind of religious teaching . . . [W]hen the government funding is to be used for projects so close to the central concerns of religion, all religious organizations should be off limits."⁵⁴

At her confirmation hearing for Solicitor General, Kagan repudiated the views she had expressed twenty-two years earlier, describing the memo as "the dumbest thing I have ever heard."⁵⁵ She then expanded on her response in written answers to questions from Senator Sessions:

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

⁵³ 487 U.S. 589 (1988).

⁵⁴ See Answers to Questions for the Record for Elena Kagan by Senator Jeff Sessions, submitted during the confirmation hearing for Solicitor General, Answer 6. The ACLU represented the plaintiffs in *Bowen*, who challenged the Adolescent Family Life Act both on its face and as applied.

⁵⁵ *Supra* n.25, at 99.

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 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 the 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 is 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.

Kagan's recantation stands out less for its content than because it is one of the few unequivocal statements she made about her personal views on the law during her confirmation hearing for Solicitor General.⁵⁶

Using language that was almost equally blunt, Kagan sharply criticized a decision by the California Supreme Court in a 1996 memo that she wrote while in the White House Counsel's Office.⁵⁷ The decision by the California Supreme Court was a fractured one; no single opinion commanded a majority. Kagan, however, particularly objected to

⁵⁶ The Wall Street Journal has reported that, while a member of the Clinton administration, Kagan did not support the Justice Department's effort in 1996 to bar pervasively sectarian organizations from participating in "charitable choice" programs that were part of the welfare reform bill then being considered by Congress. The article acknowledges, however, that the brief note from Kagan to Bruce Reed did not explain the basis for her opposition to DOJ's proposed "technical amendment," and it is therefore hard to draw any conclusions from it. See Mecker, "Memo Suggests Kagan Backed Funds for Religious Groups," *Wall Street Journal*, May 14, 2010. Likewise, in an October 1997 email under the subject heading, "Religious service and student loans," Kagan wrote: "It seems to me that we have to give people a very strong signal that we need to find some way of including people who are doing service activities under the auspices of church programs At the very least, we should be able to include participants in programs that aren't 'pervasively sectarian.' But don't suggest this as a solution – it would be nice to find language that stretched the envelope still further." E-mail from Elena Kagan to Bruce Reed, dated October 8, 1997. The context of her comments, however, is not entirely clear from the e-mail.

⁵⁷ Memo from Elena Kagan to Jack Quinn and Kathy Wallman, dated August 4, 1996, discussing *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Ca.Sup.Ct. 1996).

the plurality's conclusion that California's anti-discrimination law did not impose a substantial burden on the religious beliefs of a commercial real estate owner who objected, on religious grounds, to renting apartments to unmarried couples. More specifically, Kagan described the plurality's assertion that the owner of the apartments could earn her living in another way if she felt unable to comply with the state's non-discrimination rules for religious reasons as "quite outrageous," and inconsistent with the intent of Congress when it enacted the Religious Freedom Restoration Act (RFRA). Significantly, however, Kagan did not address the question of whether the state's interest in barring discrimination was sufficiently compelling to justify enforcement of the state's non-discrimination rule despite its impact on the religious beliefs of the real estate owner, who did not reside in any of the buildings at issue (a position that the ACLU supported in a brief submitted to the California Supreme Court). In short, Kagan's objection was to the state court's "reasoning" and not necessarily to its result.

After RFRA was struck down as unconstitutional as applied to the states,⁵⁸ Kagan described herself as the "biggest fan" of congressional efforts to redraft the legislation in response to the Supreme Court's objections, but in an email message cautioned the Vice President to be careful in his comments until a compromise could be worked out between gay rights groups and religious groups about the impact of the proposed bill on civil rights enforcement (an issue of concern to the ACLU, among others).⁵⁹

⁵⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵⁹ E-mail from Elena Kagan to Ron Clain, dated May 20, 1999.

IMMIGRATION

While a lawyer in the White House Counsel's Office, Kagan recommended that the U.S. take no position on whether the Supreme Court should review a lower court decision striking down Arizona's "English-only" law on First Amendment grounds. "From a political standpoint," she wrote, "we don't want to highlight this issue. From a legal standpoint, we don't want to defend the Ninth Circuit's decision."⁶⁰ In another memo written three months later, she agreed that a Tenth Amendment challenge by New York City to a federal law allowing municipal employees to report undocumented immigrants to the Immigration Service was "nearly frivolous." (New York City law order prohibited such reporting.) "Surely," she added, "the federal government has strong institutional interests in defending against such 10th Amendment claims."⁶¹

CONCLUSION

Elena Kagan has spent the past twenty-five years in academic life and government service. Over that time, she has compiled an impressive record of personal accomplishment while revealing very few of her personal views on most of the difficult issues she is likely to face if confirmed to the Supreme Court. This report attempts to describe those views on civil liberties and civil rights to the extent they are known. By omission, it also highlights what is not known. It is our hope that the report will assist the Senate as it performs its constitutional role of advice and consent, and also aid the public in understanding the confirmation process as it unfolds.

⁶⁰ Memo from Elena Kagan to Jack Quinn and Kathy Wallman, dated June 4, 1996. The Supreme Court ultimately granted review but then dismissed the case on standing grounds. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

⁶¹ Memo from Elena Kagan to Jack Quinn and Kathy Wallman, dated October 19, 1996, and handwritten notes.



THE AMERICAN CONSERVATIVE UNION

Dear Senator:

On behalf of the American Conservative Union, I strongly urge you to vote "NO" on the confirmation of Elena Kagan to the U.S. Supreme Court.

Elena Kagan's entire career is more suited to that of a political activist than a legal scholar, as she has been described by President Obama and as she described herself in her testimony. Kagan began public life as a political operative for the U.S. Senate campaign of Elizabeth Holtzman of New York in 1980. The documents produced for the Judiciary Committee show that, as a member of the Clinton Administration's Justice Department, Kagan's primary role was to develop political strategy in dealing with the Congress on legal issues. A good example of this is when the issue of partial birth abortion came before the Senate during the Clinton administration. At this time Kagan proceeded to negotiate changes to a statement by the American Council of Obstetricians and Gynecologists (ACOG) that said there were no serious medical reasons for conducting a partial birth abortion. Kagan's involvement made it more difficult for the Senate to pass a ban on partial birth abortion. This example clearly displays that Kagan is more of a political operative than a legal scholar.

Another serious impediment to Kagan's nomination is her deep involvement as the Obama Administration's Solicitor General on issues that will continue to come before the Supreme Court. This may mean that Kagan will or should have to recuse herself from key decisions of the court. As outlined in a letter from Republican members of the Committee on July 13 to Kagan, there is even a question as to whether recusal will be an issue when the constitutionality of the recently passed health care bill comes before the court.

Kagan has also shown herself willing to ignore the law for political purposes. As Dean of the Harvard Law School, Kagan banned military recruiters on campus in violation of the Solomon Act to satisfy campus activists. Her actions were voided by a unanimous 8-0 decision of the very court on which she has been nominated to serve.

Although through the mid-twentieth century, court appointments of politicians were sometimes made to satisfy political deals, such as the appointment of Earl Warren in the 1950s, in recent years judicial experience and legal background have been at the forefront of nominations. The nomination of Elena Kagan is more akin to President Lyndon Johnson's nomination of political crony Abe Fortas as Chief Justice, which had to be withdrawn.

It was President Obama, as a U.S. Senator, who changed the criteria for judges from minimum qualifications to judicial philosophy and more subjective criteria. The nomination of Elena Kagan is a blatant attempt to place on the court a political operative who will work as an advocate of Administration policies rather than look at rulings from an objective view of constitutionality. Please vote "NO" in the confirmation of Elena Kagan.

Sincerely,

Larry Hart
Director of Government Relations
The American Conservative Union



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Jumana Musa, Rights Working Group

Marc Rotenberg, Electronic Privacy Information Center

Chris Townsend, United Electrical Workers Union

Naomi Wolf, American Freedom Campaign

*Organizational affiliations are for identification purposes only.

June 28, 2010

To members of the Senate Judiciary Committee:

Your constitutional responsibility to ratify and consent to the president's judicial nominees is perhaps among the most significant of the many powers that you hold as a senator. The nomination of any potential justice to the Supreme Court is momentous, but at this particular time in history, Elena Kagan's nomination to replace Justice John Paul Stevens is pivotal to the future of our republic.

We urge you, given your oath to uphold the Constitution, to carefully consider the nominee's views of executive power and individual rights as you decide how to vote on the nomination.

Elena Kagan is unquestionably brilliant, and could bring a great many formidable skills to the bench. The question before the Congress, however, is whether her track record indicates the political independence for which her predecessor grew notorious. Justice Stevens repeatedly checked the excesses of administrations of both parties. In contrast, Solicitor General Kagan's record in public service, as well as her scholarship, indicates a potential deference to executive authorities that could be poorly suited to this era of expanding executive power.

Whether the nominee's views as a justice would reflect the positions she has taken as a solicitor general is admittedly unclear. Indeed, the roles of senior Justice Department officials and Supreme Court justices hold little in common.

However, the few available indications of the nominee's views indicate a predilection to favor the Executive Branch, perhaps recalling her own history of public service within it. Many trends on the Supreme Court have attracted attention, such as demographic trends reflected in the emergence of a Catholic majority, educational trends rendering the Court a product entirely of the most elite law schools and legal pedigrees, political trends favoring corporations, and jurisprudential trends undermining constitutional rights. Given the dramatic expansion of executive power over the past decade, the rising predominance of former executive branch officials on the Court should raise at least equal concerns.

Unfortunately, a variety of issues constrain Congress' ability to check the President, whose institutional authority has ballooned over the past decade—often with Congress' active support, apparent in recent amendments to statutes including the Military Commissions Act and the Foreign Intelligence Surveillance Act. As the "war on terror" continues to fan the flames of public fear and encourage deference to authority, the need for judicial independence stands at a historical zenith.

Regardless of who stands before your committee, we encourage you to vigorously examine any nominee to the Supreme Court, with a particular eye towards

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establishing his or her willingness to check and balance the Executive Branch when necessary to protect constitutional rights.

Areas of constitutional doctrine that have particularly suffered in the past decade include the First Amendment rights to freedom of association and speech, as well as religious free exercise; the Fourth Amendment rights to freedom from unreasonable searches and seizures; the Fifth Amendment right to due process; the Sixth Amendment's assurance of trial by an impartial judge before a jury of one's peers; and the Fourteenth Amendment's commitment to equal protection under the law. Any nominee's views of each of these doctrines should be carefully considered before granting a lifetime seat on the nation's highest court.

You, as a senator of the United States, are among a small number of guardians of judicial independence—and the separation of powers on which our republic has proudly stood for more than two centuries. We urge you to consider that trust, in this time of constitutional tumult, as a primary principle when deciding whether to confirm any nomination to the Supreme Court.

Respectfully submitted,

Alabama

Anonymous, Florence, AL
John Estes, Birmingham, AL
Francine Hasenbein, Cullman, AL
Patricia Hefner, Birmingham, AL
Lennie Lankford, Birmingham, AL
Joshua Logan, Muscle Shoals, AL
Chester Richey Martin, Auburn, AL
Jonathan Mitchell, Florence, AL
Suhail Shafi, Ozark, AL
Jacqueline Siegelman, Birmingham, AL

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George Gilson, Anchorage, AK
Laura Herman, Anchorage, AK
Richard Kapus Jr., Ketchikan, AK
Mollie Thomas, Anchorage, AK

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Patty Diana, Glendale, AZ
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Jeff Guevin, Scottsdale, AZ
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Bobbie Howard, Scottsdale, AZ

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Manuel Lopez, Nogales, AZ
Daniel Maddux, Sedona, AZ
Don Mohlere, Phoenix, AZ
Siraj Mufti, Tucson, AZ
William K. Noble Jr., Glendale, AZ
Molly Noone, Chandler, AZ
Nathaniel Ormonde, Yuma, AZ
Geoffrey Petras, Apache Junction, AZ
Saul Rackauskas, Tucson, AZ
Carlos Romero, Tucson, AZ
Denise Romesburg, Phoenix, AZ
David Russell, Chino Valley, AZ
Robert Schacht, Flagstaff, AZ
Michael Simpson, Tucson, AZ
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Peggy Szymeczek, Sierra Vista, AZ
Russell Whelan, Arlington, AZ

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Helen Lehman, Pochontas, AR
Allen Pfannenstill, North Little Rock, AR
Andra Pfannenstill, North Little Rock, AR
Mark Reback, Los Angeles, AR

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Anonymous, Agoura Hills, CA
Anonymous, Burbank, CA
Anonymous, Encino, CA
Anonymous, Lafayette, CA
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 Jin Emerson Cobb, Memphis, TN
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 Greg Moser, Orem, UT
 Jacqueline Murray, Santa Clara, UT
 Ashlyn Ruga, Salt Lake City, UT
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 Carol Cox, Fredericksburg, VA
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 C. Gail Della-Piana, Norfolk, VA
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 Brendan Ferreri-Hanberry,
 Charlottesville, VA
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 Xyra Harper-Cann, Arlington, VA
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 Shirine Hossaini, Alexandria, VA
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 Sharon Keys, Alexandria, VA
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 Kathleen McLane, Woodbridge, VA
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 William Solomon, Shipman, VA
 Alex Sparrow, Ashland, VA
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 Anonymous, Bellingham, WA
 Anonymous, Bremerton, WA
 Anonymous, Brinnon, WA
 Anonymous, Clarkston, WA
 Anonymous, Gig Harbor, WA
 Anonymous, Mercer Island, WA
 Anonymous, Port Townsend, WA
 Anonymous, Rainier, WA
 Anonymous, Seattle, WA
 Anonymous, Seattle, WA
 Anonymous, Spokane, WA
 Anonymous, Yelm, WA
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 WA
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 Richard Burrows, Bonney Lake, WA
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 Erik Ibsen-Nowak, Tacoma, WA
 Lura Irish, Lakebay, WA
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 Susan Marett, Port Townsend, WA

Mark McCormick, Seattle, WA
 Susan Moorehead, Gig Harbor, WA
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 Dana Walker, Olympia, WA
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 Ardeth L. Weed, Edmonds, WA
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 Sandra Whitmore, Tumwater, WA
 Maciej Wojtulewicz, Issaquah, WA
 Esther B. Wolf, Seattle, WA
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West Virginia

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 Anonymous, Glen Dale, WV
 Jonathan Damron, Fort Gay, WV
 John Doyle, Charleston, WV
 Elwood Groves II, Maxwelton, WV
 Dom Pucci, Jr., Weirton, WV
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 Lonnie Ward, White Sulphur Springs,
 WV

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 Kenneth Appleton, Green Bay, WI
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 Marjorie Bierbrauer, Platteville, WI

Kent Bryngelson, Niagara, WI
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 Odin Johnson, Eau Claire, WI
 Joseph Koeller, Madison, WI
 Ruth Larsen, Marion, WI
 Jason McLean, River Falls, WI
 Dan Murray, Eau Claire, WI
 Russell Novkov, Madison, WI
 Corey E. Olsen, Delafield, WI
 Russell Roberts, Grafton, WI
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 Britton Saunders, Milwaukee, WI
 Robert Scheele, Madison, WI
 Randolph Schoedler, Milwaukee, WI
 J. Kenneth Strom, East Troy, WI
 Kathleen Turner, Green Bay, WI
 Theodore Voth III, Madison, WI
 Ted Voth Jr., Madison, WI
 Harry Waisbren, Milwaukee, WI
 Kristen Zehner, Marshall, WI
 Kevin Zellmer, Milwaukee, WI

Wyoming

Anonymous, Casper, WY
 Kyle Kulseth, Sheridan, WY
 Mike Logan, Riverton, WY

Armed Forces

Brian Tierney, APO, AE

Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
June 28, 2010

Opening Statement by U.S. Senator Benjamin L. Cardin (D-MD)
Confirmation Hearing for Elena Kagan to be
Associate Justice of the Supreme Court of the United States

Thank you, Chairman Leahy. Solicitor General Kagan, welcome back to the Judiciary Committee. Last year, I had the privilege of chairing your confirmation hearing for the position of Solicitor General. While we had a spirited debate at that time, I think we can agree that there was not quite as much media attention to that hearing as there is today.

Why is that? As I prepared for this week's hearings, I have been thinking about the role of the Supreme Court and the Constitution in our lives. Many people may say—to paraphrase our Vice President- "Why is this such a big deal? Why should I care? Does the Supreme Court really impact my life or my family?"

If you have children, if you work for a living, if you are a woman, if you vote, if you care about the air we breathe or the water we drink, you need to pay close attention to this confirmation hearing and the work of the Supreme Court.

The Constitution has a very tangible impact on all our lives. It is the foundation of our rule of law that is supposed to protect us from the abuses of power- ABUSES OF GOVERNMENT, ABUSES OF BIG BUSINESS.

The very words that open our Constitution tell us why we ALL should care so much about who is on the Supreme Court and who will be responsible for upholding our laws.

"We the people of the United States- WE THE PEOPLE- in order to form a more perfect union, ESTABLISH JUSTICE, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America."

The authors of the Constitution understood the timeless idea that Justice was paramount. As we gather this week to consider your nomination, Ms. Kagan, to be just the 112th person-and only the fourth woman—to serve on our highest court, my goal is to ensure that you have a clear understanding of how profound an impact your future decisions may have on the lives of

everyday Americans. Based on our conversations, I trust that you will put the interest of the American people and justice for the American people, first, above popular opinion or politics.

I also will do all I can to ensure that the American people, whether you are watching this hearing at home, at work, or at school, gain a better understanding of how the Supreme Court, which has a duty to uphold the Constitution, really does affect your lives. The principles outlined in the Constitution are not some abstract, historical theory. At its heart, our Constitution and the rule of law is about people -- We the People.

Let's start with families and children. As a personal example, I -- along with millions of American school children -- was denied a full education opportunity in our schools because I was forced to attend segregated public schools. The Supreme Court, in *Brown v. Board of Education*, rejected the notion of separate but equal and helped move our nation forward toward a "more perfect union." It was a young attorney, from Baltimore, who argued that case before the Supreme Court. He later became the first African-American to serve on the Supreme Court. Justice Thurgood Marshall had one of the most distinguished records on the court, aided by energized law clerks including our nominee, Elena Kagan.

If you believe that you have a right to fall in love and get married to whomever you wish, you are mostly correct, but only because the Supreme Court intervened on the side of the American people when it ruled in *Loving vs. Virginia* that inter-racial couples could marry. Indeed prior to that decision, the parents of the current President of the United States and some members of this United States Senate could not have been married in some states of this Nation.

If you believe that what you do in your own home, in your own bedroom, is your business and no one else's -- especially not the government's -- you also are correct, but only because Supreme Court decisions like *Griswold v. Connecticut* and *Lawrence v. Texas* reinforced the individual's right to privacy, keeping government out of the private consensual activities of adults.

The Supreme Court was on the side of the American people when it ruled in *Roe v. Wade* that the constitutional right to privacy exists. The court ruling was not taking sides in a debate on abortion: it was stating that there are certain matters in which government should not interfere in the privacy of families. Likewise, the court has ruled that every person is entitled to their religious beliefs - or lack thereof - but the Constitution makes it clear through the establishment clause that Congress cannot show preference to a religion.

So many of these cases are categorized as "landmarks" because they continued a forward progression of protections for the American people against abuses of power, particularly by an over-reaching government. Such was the case when the Supreme Court ruled in *Gideon v. Wainwright* that the constitutional right to counsel in criminal proceedings was guaranteed regardless of the wealth of the defendant. The Supreme Court gave the words "equal justice under the law" real meaning. Perhaps this decision was to be expected, since the oath of office declared by every federal judge makes it clear that he or she "will administer justice without respect to persons and do equal right to the poor and to the rich."

I believe that our next Associate Justice and the whole Supreme Court should be guided by legal risks.

precedent and the best traditions of the Supreme Court in advancing constitutional rights for individuals against the abuses of power, whether by government or businesses, even as our world continues to change and evolve. Justice Thurgood Marshall said in a 1987 speech, "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."

Some change has not been for the better, I have been troubled by the increasing number of 5-4 decisions over the last five years in which a divided Supreme Court reversed decades of progress and precedent with rulings that side with powerful corporate interests rather than protecting individual rights. This trend was clearly shown in *Citizens United* where the Supreme Court reversed precedent and over-ruled Congressional intent giving corporate special interests even more power and influence in elections. In the *Ledbetter* case, the majority of the Supreme Court protected employers over workers in gender discrimination, again reversing the clear intent of Congress. In another 5-4 split court decision, *Gross v. FBL Financial*, the Court made it easier for corporate America to discriminate against aging Baby Boomer workers.

If you work for a living, if you are a woman, or if you are worried that corporations can buy a louder voice in an election than hardworking, everyday Americans, you need to keep an eye on the activism being practiced by this Supreme Court.

Are you a consumer? Do you buy products for you or your family? If so, the Supreme Court in *Leegin* – yet another 5-4 split – should be of concern to you too. Here, the court ignored long-standing precedent to protect big business to perpetuate price fixing. It was a ruling that put consumers at risk.

Rapanos also was a step backwards, this time for the environment by reducing protection for wetlands under the Clean Water Act. If you are like the rest of us and wonder if BP will be held fully accountable for the economic and environmental devastation brought on by the ongoing oil spill in the Gulf of Mexico, you will be equally alarmed by the Supreme Court's decision in *Exxon v. Baker* which imposed limits on damages that can be recovered in environmental disasters.

Time and time again, by the narrowest of margins, this activist court has sided with big businesses over Main Street America wiping away protections set in place by years of legal precedent and congressional action.

Just last month, the court – once again by a 5-4 decision – ruled against the individual protections enshrined in the Constitution and its Bill of Rights. In the *Tompkins* case, the court reversed prior decisions and weakened such cases as *Miranda* – a bedrock of our legal system -- by offering a counterintuitive pronouncement that an accused has to speak up in order to remain silent. I believe that "innocent until proven guilty" and the "right against self-incrimination" are still part of our system of law.

Having just joined the Senate in 2007, I have had just one other opportunity to exercise my constitutional duty to provide "advise and consent" for a Supreme Court Justice. I was proud to see that Justice Sonia Sotomayor, who I voted to confirm last year, authored the dissent opinion in the *Tompkins* case. Unfortunately, it seems only a minority of the current court understands the concept that the rule of law should be defined by the law itself and not public opinion.

As Justice Stevens stated in *Citizens United*, "Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law?there were principled, narrower paths that a Court that was serious about judicial restraint could have taken."

I join him in wondering just how or why those who profess to oppose judicial activism have voiced their support for these Supreme Court decisions in which justices have over-turned long-standing precedent and substituted their own legislative voices for Congress, blurring the line between the legislative and judicial branches of government.

Justice Stevens followed in the best traditions of the Supreme Court in advancing individual Constitutional rights. His name will stand beside John Marshall, Louis Brandeis, Thurgood Marshall, and Sandra Day O'Connor as giants in our nation's highest court. Elena Kagan comes to this confirmation hearing with very impressive credentials to help fill the shoes of Justice Stevens.

As I said earlier, I had the honor to chair her confirmation hearing for Solicitor General. Like Justice Stevens, she is a known consensus builder. She also is an unquestioned legal scholar, a proven leader, and a dedicated public servant. As someone who has worked my whole career to expand access to "justice for all," I have been particularly impressed by her record at Harvard of greatly expanding the number of law school clinics, which provide essential pro bono work for individuals who otherwise could not afford legal representation.

Ms. Kagan, I consider it a strength that you come from outside of the judiciary, yet I know that having served as Solicitor General – a position often referred to as the 10th justice – you are well prepared for the day-to-day responsibilities of the Court. You join a distinguished line of justices, including William Howard Taft, Stanley Forman Reed, Robert H. Jackson, and, of course, Thurgood Marshall, all of whom served as U.S. Solicitor General before serving on the high court. I expect that your broad experiences will serve you and the American public well.

I welcome the American public to these hearings as we open a window to the Supreme Court and shine a light on the critical role the Constitution and the rule of law plays in all our lives. I come to these hearings not solely as a U.S. Senator, a legislator, and a lawyer, but as a husband, father, and grandfather. Every ruling made by the Supreme Court that continues to uphold the constitutional protections that keep my granddaughters and their future safe and secure is a victory. Every Supreme Court ruling that opens the door to abuses of power, by the government or big corporations, by over-turning long-standing precedent or reversing Congressional intent, puts my granddaughters, and your granddaughters, and your children at greater risk.

I will do all I can within my power to protect my family and every American family from such

Solicitor General Kagan, I welcome you to this confirmation hearing and look forward to your testimony and responses to our questions.

###

Testimony of Robert C. Clark, Professor and former Dean, Harvard Law School
Before the Senate Committee of the Judiciary
Concerning Supreme Court Nominee Elena Kagan
July 1, 2010

I am pleased to be invited to this hearing. I support the appointment of Elena Kagan as associate justice of the Supreme Court, and would like to offer some perspectives based on my experience as her colleague and as her predecessor in the role of dean at Harvard Law School. I believe her superb performance as dean should be a positive factor in your decision making.

The case for Solicitor General Kagan has many parts, of course. First, as she demonstrated as both a student and a teacher, she is extremely bright. I know this from having observed and graded her as a law student in the mid-'80s, and from having judged her legal scholarship in the late '90s when I supported her appointment to our faculty. Moreover, she really thinks like a lawyer – and I mean this in a good way. She makes sure she understands the law and the facts precisely and accurately before she draws conclusions on legal issues, and explains her reasoning in ways that take careful account of likely objections. A lawyer who actually does think this way is unlikely to get too creative or loose when she makes decisions as a judge. She will feel obligated to follow the law, not make it up. Furthermore, she has relevant experience with the law, not just in her recent job as Solicitor General of the United States, but also in her years of spectacularly successful teaching of constitutional law and administrative law to hundreds of bright and tough students. This teaching experience tends to get neglected when people discuss her qualifications for the Court, but it is important. She knows legal doctrines relevant to service on the Supreme Court inside and out, in a way that few practitioners do.

But I want to stress her performance as an institutional leader, and explain why I think the skills and attributes she brought to the complex task of being Dean of Harvard Law School would benefit her and the Court if she is confirmed as a Justice.

I was Dean of Harvard Law School for 14 years (1989-2003), and strongly supported Elena Kagan as the choice to be my successor. From my viewpoint, once she became dean she did a great job of taking positive changes and initiatives that had begun in the '90s and building on them. She brought the school to a new level of greatness.

For example, we hired a large number of new faculty members, including top scholars from other leading schools, during her tenure. (The number of full-time professors went from about 81 to 105 from 2003 to 2009.) In my view this is a positive indicator because, in the case of our complex law school, it says something about the ability of the dean to build consensus. The appointment process is democratic – you need two-thirds of the faculty to approve each new appointee – and in a strong willed faculty with widely varying views about what really counts as good scholarship, you need a dean who can understand many different points of view and then encourage people to work together. Dean Kagan did this successfully. I watched her learn and grow in the process. She wasn't just "political"; she actually learned to understand and appreciate many different points of view.

Similarly, she took over and led a very successful fundraising campaign. In the late '90s, under my guidance, the law faculty developed an ambitious long term strategic plan. We then proceeded to get university-level approval for a campaign that would fund it, and I spent a couple of years getting initial gifts and commitments. In June of 2003, my last month in office, we had a so-called kickoff of the campaign's public phase. I announced \$170-plus million in commitments and gave the about-to-become dean Elena Kagan and her team the hard task of getting the amount up to at least \$400 million. Five-plus years later, in the fall of 2008, the campaign closed, having greatly exceeded its goal, by reaching over \$476 million – a record in law school fundraising.

This fundraising success – of fundamental importance to an institution like Harvard Law School – would not have happened without Elena Kagan's skill in seeing other people's perspectives. In order to gain support from about 23,000 alumni and friends, as the law school did, its dean had to learn to understand and appreciate the viewpoints of many very different people, with strongly varying attitudes toward what the school was doing and proposing to do. I watched her get better and better at this task over time, and I believe it will help her to be a better justice on the Court.

As with faculty and alumni, so with students: Dean Kagan did a superb job of boosting the mood and morale of the student body. She did this with gestures great and small – everything from free coffee and an ice skating rink to initiating major substantive changes in the first year curriculum, in order to make it fit better with the modern legal world. (For example, first year students must now take introductory courses in international or comparative law, and in legislation and regulation, in addition to the old classics like property, contracts, and torts.)

I could go on listing her other achievements as dean, and will gladly elaborate during the questioning period if you are interested. But my general theme should be clear. She did a great job as leader of a complex organization, and that indicates she has personal characteristics that are relevant for service on a court that is also full of diverse and sometimes conflicting perspectives.

I do note that the topic of military recruiting at Harvard, and Elena Kagan's actions as dean with respect to it, have already received a great deal of attention. I wrote an Op Ed for the Wall Street Journal that set out some relevant facts and expressed my views. I would like to put into the record a copy of my Op Ed.

In conclusion, I think the Committee's decision about Solicitor General Kagan ought to be positive. Yes, it may happen that as a justice she will sometimes fill in the blanks of received constitutional law in a way that some of us, including me, do not like. As history shows, it is hard to predict accurately what the future decisions of a new justice will be. But I think worrying obsessively about the downside possibilities is to miss the forest for the trees. Elena Kagan is an excellent choice for the Supreme Court and should be confirmed.

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OPINION

MAY 11, 2010

Kagan and the Military: What Really Happened

As dean, she upheld a policy already in place.

By ROBERT C. CLARK

With the announcement of Elena Kagan as nominee for the open seat on the Supreme Court, comments both sound and foolish are sure to flood the media. In the prior category is the observation that Ms. Kagan is a brilliant legal scholar with a superb record of service in the federal government and as a law school dean. In the foolish category, we are already hearing a replay of an attack critics used against her when she was being considered for her current position as solicitor general.

That attack goes something like this: During her time as dean of Harvard Law School (2003-2009), Ms. Kagan showed herself to be antimilitary—an extremist bent on harming the military's efforts to hire some of the best law school graduates in the country.

I write to rebut that argument, and believe that I am in a good position to do so. I served as dean of Harvard Law School from 1989 to 2003, and know the history of military recruiting there. I taught Ms. Kagan in the mid-1980s—she was one of the best students I've had—served as dean when we hired her as a tenured professor, and strongly supported her appointment as my successor.

As dean, Ms. Kagan basically followed a strategy toward military recruiting that was already in place. Here, some background may be helpful: Since 1979, the law school has had a policy requiring all employers who wish to use the assistance of the School's Office of Career Services (OCS) to schedule interviews and recruit students to sign a statement that they do not discriminate on the basis of race, gender, sexual orientation, and so on.

For years, the U.S. military, because of its "don't ask, don't tell" policy, was not able to sign such a statement and so did not use OCS. It did, however, regularly recruit on campus because it was invited to do so by an official student organization, the Harvard Law School Veterans Association.

The symbolic effect of this special treatment of military recruiters was important, but the practical effect on recruiting logistics was minimal. In 2002, however, the Air Force took

a hard line with Harvard and argued that this pattern did not provide strictly equal access for military recruiters and thus violated the 1996 Solomon Amendment, which denies certain federal funds to an education institution that "prohibits or in effect prevent" military recruiting. It credibly threatened to bring an end to federal funding of all research at the university.

This penalty would not have hurt the law school, which has virtually no such funding. But it would have hurt other schools at Harvard, principally the medical school and the school of public health. It would have eliminated about 15% of the university's operating budget.

After much deliberation with the president of Harvard and other university officials, we decided to make an exception for the military to the school's nondiscrimination policy. At the same time, I, along with many faculty and students, publicly stated our opposition to the military's policy, which we considered both unwise and unjust, even as we explicitly affirmed our profound gratitude to the military. Virtually all law schools affiliated with large universities did the same.

When Ms. Kagan became dean in July of 2003, she upheld this newer policy. Military recruiters used OCS services, but at the beginning of each interviewing season she wrote a public memorandum explaining the exception to the school's nondiscrimination policy, stating her objection to "don't ask, don't tell," and expressing her strong view that military service is a noble and socially valuable career path that should be encouraged and open to all of our graduates.

In November 2004, however, the Third Circuit Court of Appeals found that the Solomon Amendment infringed improperly on law schools' First Amendment freedoms. So Ms. Kagan returned the school to its pre-2002 practice of not allowing the military to use OCS, but allowing them to recruit via the student group.

Yet this reversion only lasted a semester because the Department of Defense again threatened to cut off federal funding to all of Harvard, and because the U.S. Supreme Court reversed the Third Circuit's decision. Once again, military recruiters were allowed to use OCS, even as the dean and most of the faculty and student body voiced opposition to "don't ask, don't tell."

Outside observers may disagree with the moral and policy judgments made by those at Harvard Law School. But it would be very wrong to portray Elena Kagan as hostile to the U.S. military. Quite the opposite is true.

Mr. Clark is a professor and former dean at Harvard Law School.

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Change Course, Confront Crises, Continue the Legacy

June 28, 2010

Senator Patrick J. Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

The Congressional Black Caucus (CBC) believes that Elena Kagan possesses outstanding academic and professional credentials, and applauds President Obama for nominating a person who understands the real-world consequences of judicial decisions. However, the CBC has questions about the nominee's views on issues of particular importance to African Americans. The CBC respectfully requests that the Senate Judiciary Committee pose the following questions to the nominee:

1. In a 1997 memorandum to President Clinton, you supported reducing the sentencing disparity between crack and powder cocaine to 10:1. Do you support eliminating the sentencing disparity?
2. In a case pending before the Supreme Court in 1997, *Piscataway Bd. Of Education v. Taxman*, in which a school district used its affirmative action policy to lay off a white teacher instead of a black teacher with the same seniority, the then Solicitor General wrote a memo that suggested filing a brief arguing that the teacher should not have been laid off in this particular case, and that if the court adopted this position, it would not have to address whether Title VII "always precludes non-remedial affirmative action." You wrote on that memo, "I think this is exactly the right position -- as a legal matter, as a policy matter, and as a political matter." Are race-based remedies ever permissible? If left to you alone, would you have applied the "mend it, don't end it" affirmative action policy to race-neutral remedies only?
3. Please explain why you apparently opposed the formation of a commission on race by President Clinton during his second term.



Senator Patrick Leahy
June 28, 2010
Page 2

4. During your tenure as Dean of Harvard Law School, the law school faculty grew by almost 50%, with the hiring of 43 full-time faculty, including 32 tenured or tenure track. Of those 32, please explain why only one minority, an Asian American, and only seven women were hired, and, of the 11 non-tenure track faculty, why only three minorities – two black and one Indian – and only two women were hired.
5. While Dean, you apparently offered faculty positions to several minority candidates who turned down the offers. How many were African American?

Handwritten signatures of Congresswomen Barbara Lee and Eleanor Holmes Norton in cursive script.

Congresswoman Barbara Lee
Chairwoman
Congressional Black Caucus

Congresswoman Eleanor Holmes Norton
Chairwoman
CBC Judicial Nominations Taskforce

PAGE 2



Center for Military Readiness

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The Honorable Patrick Leahy, Chairman
 The Honorable Jeff Sessions, Ranking Member
 Committee on the Judiciary
 United States Senate
 Washington, DC 20510

June 29, 2010

Dear Chairman Leahy and Ranking Member Sessions:

As you begin reviewing the qualifications of Solicitor General Elena Kagan for confirmation as Associate Justice of the United States Supreme Court, the Center for Military Readiness (CMR) would appreciate the opportunity to file for the record our concerns about her past official actions with regard to military law and policies with which she disagrees.

CMR opposes this nomination because Solicitor General Kagan has demonstrated a consistent pattern of anti-military actions that contradict her statements of support for the armed forces. When Ms. Kagan has had an opportunity to side with military policy as stipulated in law, General Kagan has chosen the opposite position. Her record calls into question not only her legal judgment, but her lack of regard for the tradition of judicial deference to Congress and the Executive branch on military issues. We hope that you will question Ms. Kagan about the principle of judicial deference to the other branches of government—a long-standing principle that is vital to national security.

Witt v. Department of the Air Force

In her current capacity as Solicitor General, the top lawyer for the United States, Elena Kagan failed to take action against an unjustified and problematic procedural ruling of the U.S. Ninth Circuit Court of Appeals in a case challenging the 1993 law stating that homosexuals are not eligible for military service. (*Witt v. Department of the Air Force*).

The case involved an Air Force nurse named Margaret Witt, who was living with a lesbian partner and was discharged in accordance with Section 654, Title 10, U.S.C. Witt challenged that action in a federal district court, and when she lost her case she appealed to the U.S. Court of Appeals for the Ninth Circuit.

Overcoming strong dissent among its own members, the Ninth Circuit sent the *Witt* case back to be reheard at the district level under unusual evidentiary requirements imposing a heavier burden than the “rational basis” standard that should have applied. Ms. Kagan’s irresponsible failure to ask for Supreme Court review of the rogue procedural ruling of the Ninth Circuit in the *Witt* case contradicted assurances she had given to Senator Jeff Sessions in a letter to Senator Arlen Specter dated March 18, 2009.

Solicitor General Kagan should have filed a petition for *certiorari*, asking the Supreme Court to review the Ninth Circuit's ruling. That petition likely would have succeeded. Instead, Kagan accepted the unprecedented and burdensome standard of review that the Ninth Circuit had imposed. This means that the Department of Justice will have to defend the law in personal terms related to Margaret Witt as an individual, even though the 1993 law does not require this. Even if the Department of Justice prevails in the *Witt* case, the unfortunate procedural ruling of the Ninth Circuit will remain until it is challenged, inviting more litigation under rules in conflict with those used in other circuits.

Solicitor General Kagan's irresponsible decision to allow the Ninth Circuit to substitute its judgment for the findings of Congress enacted in current law calls into question her support for the military as well as her respect for a duly-enacted law that she has the duty to defend.

Rumsfeld v. Fair

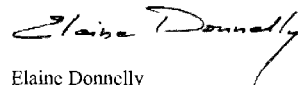
Senators considering this nomination also should question her flawed logic reflected in an *amicus* brief she joined challenging the Solomon Amendment in *Rumsfeld v. Fair*. It is significant that the U.S. Supreme Court upheld the constitutionality of that legislation, which protects equal access for military recruiters on college campuses, with a unanimous (8-0) vote. General Kagan, as Dean of Harvard Law School while *Rumsfeld v. Fair* made its way through the courts, removed military recruiters from the Office of Career Services at Harvard even though there was an immediate stay on the U.S. Third Circuit Court of Appeals ruling overturning Solomon, pending Supreme Court review.

Then-Dean Kagan's deliberate discrimination against military recruiters, therefore, was in violation of the Solomon Amendment, and even more inappropriate because the Harvard campus is not located within the territory of the Third Circuit. Ms. Kagan acknowledged this action in a September 20, 2005, email addressed "To all members of the HLS [Harvard Law School] community." Her gratuitous actions toward military recruiters during her tenure at Harvard show disturbing contempt for legal judgments with which she disagrees, as well as misplaced antagonism toward the military due to a law that Congress passed.

The Supreme Court's unanimous rejection of the challenge to Solomon not only repudiated Kagan and her colleagues' *amicus* brief, but exposed her to be a liberal activist promoting an ideological agenda contrary to federal law.

In the two situations described above, General Kagan deliberately acted in opposition to laws protecting the culture and best interests of the American military. In view of these official actions, the Center for Military Readiness opposes confirmation of Elena Kagan to be an Associate Justice of the Supreme Court.

Respectfully submitted,



Elaine Donnelly
President, Center for Military Readiness

Hearing on the Nomination of Elena Kagan to
The United States Supreme Court
Senate Committee on the Judiciary, July 1-2, 2010
Testimony of Hon. Fernando R.V. Duffly

Mr. Chairman and members of the Committee on the Judiciary, thank you for this opportunity to speak in support of Solicitor General Elena Kagan's nomination to the Supreme Court of the United States.

The National Association of Women Judges is the voice of our nation's female jurists. NAWJ has supported the advancement of women in the judiciary since our founding in 1979, when we sought the appointment of the first woman to the United States Supreme Court. It was in this chamber, some three decades ago, that NAWJ's founding mother, Joan Dempsey Klein testified on behalf of Sandra Day O'Connor's historic appointment as the first woman on the Court; I am honored to be here today as NAWJ Past President and chair of our Judicial Selection Committee, and on behalf of NAWJ's current President, Alaska Supreme Court Justice Dana Fabe.

The first woman attorney, Margaret Brent, arrived in Maryland in 1683, but women in this country were not admitted to state bar until 1869, and first woman was appointed to a judicial position a year later, in 1870. Nearly a century would pass before every state had a woman on the bench. The advancement of women in the legal profession has not been rapid nor inevitable, but we are now past celebrating our firsts. We look forward to celebrating full diversity on our nation's courts.

The National Association of Women Judges supports with enthusiasm and without qualification the nomination of Elena Kagan to the Supreme Court of the United States.

Justice Fabe and I are appellate judges with nearly two decades of judicial service each. We well recognize the essential qualifications that a justice of our highest court must have: superior intellectual capacity as well as intimate knowledge and a deep understanding of constitutional law and the driving principles of legal jurisprudence in this country. Solicitor General Kagan has these qualifications in abundance.

Additionally, Elena Kagan's rich and varied legal career -- as a private attorney, a white house lawyer, professor, dean and as the government's attorney in matters before the Supreme Court -- will provide her with a unique constellation of experiences that will bring fresh ideas to the court. The depth and breadth of General Kagan's educational and professional experience, coupled with her intellectual aptitude and preparedness will serve her well on the high court. A brilliant and highly regarded lawyer and law professor whose communications skills are renowned, her views will be respected and welcomed if not adopted by her colleagues on the Supreme Court.

Not all judges appointed to our appellate courts have, or need, prior experience as trial judges. My interactions with General Kagan derive from the years she served as the Dean of Harvard Law School, 2003-2009, which coincided with my leadership of NAWJ. Among other things, we worked together on an initiative that sought to provide information to law students about women and minority advancement in the country's law firms, and on educational programing for The Women's Leadership Summit, that Elena Convened at Harvard Law School in 2008; and, as an active alumna of Harvard, I had a number of opportunities to interact with her and to hear her speak.

I learned from these interactions that she comes prepared, has a quick and nimble intellect, humor, and a respect for her audience that commands respect in turn; these attributes shared by the most successful of my colleagues.

I believe that the presence of women and minorities on a court has an impact on overall decision-making that goes beyond the opinions of the female or minority judges themselves. When judicial colleagues respect each other, they are open to the interchange of new ideas that those from diverse backgrounds can bring. Women judges bring unique experiences that inform their own decisions, but the interchange between male and female colleagues has in my experience profoundly affected the decisions of both the female and male jurists.

That Elena Kagan would be one of three women on the Supreme Court of the United States is significant. In order to benefit from the diversity of background and experience that women bring to the bench, the presence of women cannot be occasional or token. Our courts, and most importantly our nation's highest court, must reflect the diversity of our citizenry. For well over two decades women and men have been graduating from our law schools in nearly equal numbers which likely means that men and women are equally represented in the current pool of attorneys eligible for judicial appointment. With the appointment of Elena Kagan, the Supreme Court of the United States will come a step closer to reflecting the broad diversity of those individuals who call America home.

Statement of

The Honorable Richard J. Durbin

United States Senator

Illinois

June 28, 2010

JUDICIARY COMMITTEE HEARING: CONFIRMATION OF ELENA KAGAN TO BE A
SUPREME COURT JUSTICE

Monday, June 28, 2010

General Kagan, welcome to you, your family, and friends, and congratulations on your nomination.

This isn't your first hearing on a Supreme Court Justice nominee. If my notes are correct, some seventeen years ago you were sitting at the Senate Judiciary Committee hearing on Ruth Bader Ginsburg's nomination to serve on the Supreme Court. Your capacity was as a staff attorney for the chairman of the committee, Joe Biden.

So you've seen this exercise as a staffer, and now in this revered position as the nominee of the President of the United States.

At that hearing on Justice Ginsberg, my former colleague and friend Paul Simon set forth a standard for assessing Supreme Court nominations which I have mentioned from time to time. He said to Justice Ginsberg, "You face a much harsher judge . . . than this Committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

It's a simple calculus—it was for Senator Simon and it is for me as well.

I used this standard and asked the same question of Justices Alito, Roberts, and Sotomayor. I think it's an important question. Nine men and women on the Supreme Court serve for a lifetime, and they have a significant impact on the lives of every American.

In our most celebrated Supreme Court decisions, we have seen an expansion of freedom: *Brown vs. Board of Education*, *Loving vs. Virginia*, *Griswold vs. Connecticut*. And in the most infamous decisions, restrictions on our freedom: *Dred Scott*, *Plessey vs. Ferguson*, and *Korematsu*.

Now of course, we are in the new generation and a new time, and many questions are going to be raised. I think we have heard repeatedly from the other side of the aisle their loyalty to the concept of traditionalism and their opposition to judicial activism. I have two words for them:

Citizens United.

Earlier this year in the Citizens United case, a 5-4 majority of the court demanded to hear arguments on an issue that wasn't posed by the parties in the case; reversed its own precedents; ignored the will of Congress; and ruled that corporations and special interests can spend unlimited amounts of money to affect elections. This decision has the power to drown out the voices of average Americans.

Justice John Paul Stevens wrote in the Citizens United dissent and I quote, "Essentially, five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."

If that isn't judicial activism, what is? And it was espoused and sponsored by men who had stood before us under oath and swore they would never engage in judicial activism.

That is the reality.

There is something that has occurred today that has come as somewhat of a surprise to me. On at least three or four occasions, I have been disappointed by my Republican colleagues warning us that you just might follow in the tradition of Justice Thurgood Marshall.

Well, Ms. Kagan, you deserve to be judged on your own merits. Not on the basis of the strength and weakness or philosophy of any judge for whom you clerked. But before I leave this subject, let me say for the record: America is a better nation because of the tenacity, integrity, and values of Thurgood Marshall.

Some may dismiss Justice Marshall's pioneering work on civil rights as an example of empathy—that somehow as a black man who had been a victim of discrimination, his feelings became part of his passionate life's work—and I say thank God. The results which Justice Marshall dedicated his life to broke down barriers of racial discrimination that had haunted America for generations.

For those who would disparage his life's work on the court and as Solicitor General arguing before court, the record is pretty clear: Thurgood Marshall argued 32 cases before the Supreme Court of the United States and won 29 of them, earning more victories in the Supreme Court than any other individual. And I might also add—his most famous case, *Brown vs. Board of Education*, if that is an activist mind at work we should be grateful as a nation that he argued before this Supreme Court based on discrimination in this society and changed America for the better.

And I know that my good friend, Judge Abner Mikva's name has been mentioned as well.

I will just say briefly that his political views are not veiled, they are well known—from when he served in Congress and since. But my colleagues will find universal acclaim for Abner Mikva's record as a thoughtful, fair judge of the highest level of integrity and intelligence. We share a high regard for this extraordinary American, and the kind words you've had to say about him.

There will be questions raised, as well, about modesty, humility, and your role, if you are chosen—and I believe you will be—to serve on the Supreme Court. I think a study of judicial ideology conducted recently by the Seventh Circuit Judge, Richard Posner, in my home state of Illinois is worth noting.

Judge Posner, who is no liberal himself, ranked the 43 Justices who've served on the Supreme Court since 1937 from the most liberal to the most conservative. He concluded that 4 of the 5 most conservative Justices since 1937 are on the Court at this moment: Clarence Thomas, Antonin Scalia, John Roberts, and Sam Alito.

Our Supreme Court is badly in need of a person with your skill, your knowledge, and your background, who can reach across the ideological aisle in pursuit of expanding our freedom. The Court needs as person who has an ability to build consensus and find common ground. Elena Kagan, you are such person.

As a Solicitor General of the United States, you have defended bipartisan laws like McCain-Feingold campaign finance and you have deftly balanced competing interest within the Federal Government.

As Dean of the Harvard Law School, your efforts to reach out to conservative faculty and students are well documented. Professor Charles Fried, who served as President Reagan's Solicitor General and who now teaches at Harvard, praised you for "recruiting excellent teachers from across the ideological spectrum" and for your efforts to "make sure students had every point of view feel as if they were part of an intellectual and professional enterprise."

Professor Fried told the story, which I have recounted, about your speech to the Federalist Society in which you opened by saying, "I love the Federalist Society, but you are not my people!" Well, they took your statement out of context and made t-shirts that they wore around the campus saying, "I Love the Federalist Society" with your name, Elena Kagan, below that. But it is an indication of a friendship and an effort to reach out—even to those whose opinion you might not share.

Earlier in your career you worked as a counselor to President Clinton, working with Republicans to find bipartisan solutions on tough issues like tobacco regulation, religious liberty, and community policing. In the 170,000 pages of documents from your White House service that were turned over to this committee, there is ample evidence of your efforts to bridge the political gaps that haunt us in America.

In closing, I would like to recognize the Justice whom you would replace. Justice John Paul Stevens, a native of Chicago, has been one of the wisest and most accomplished jurists of our time. The third-longest-serving Justice in U.S. history, Justice Stevens' judicial philosophy may be hard to label but his integrity is rock solid. A lifetime in the law and the courage to speak his mind made him a national treasure on our highest court.

General Kagan, I believe you can follow in that tradition. I look forward to your testimony.

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Client:

May 14, 2010

Via facsimile (202) 224-9516

The Honorable Patrick Leahy
 Chairman
 Senate Committee on the Judiciary
 United States Senate
 SD-224 Dirksen Senate Office Bldg.
 Washington, D.C. 20510-6275

Via facsimile (202) 224-9102

The Honorable Jeff Sessions
 Ranking Member
 Senate Committee on the Judiciary
 United States Senate
 SD-224 Dirksen Senate Office Bldg.
 Washington, D.C. 20510-6275

Re: *Nomination of Elena Kagan*

Dear Chairman Leahy and Senator Sessions:

I write in support of Elena Kagan's confirmation as an Associate Justice of the Supreme Court of the United States. I have known Elena for 27 years. We met as first-year law students at Harvard, where we were assigned seats next to each other for our classes. We were later colleagues as editors of the Law Review and as law clerks to different Supreme Court Justices; and we have been friends since.

Elena possesses a formidable intellect, an exemplary temperament and a rare ability to disagree with others without being disagreeable. She is calm under fire and mature and deliberate in her judgments. Elena would also bring to the Court a wealth of experience at the highest levels of our government and of academia, including teaching at the University of Chicago, serving as the Dean of the Harvard Law School and experience at the White House and as the current Solicitor General of the United States. If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we will have reached a point where no capable person will readily accept a nomination for judicial service.

I appreciate that considerations of this type are frequently extolled but rarely honored by one side or the other when the opposing party holds the White House. I was dismayed to watch the confirmation hearings for then-Judge Alito, at the time one of our most distinguished appellate judges, and find that they ranged from the anodyne and uninformative to the utterly disgraceful. And one could readily identify members of the current Senate majority, including several who serve on the Judiciary Committee, who, when they previously assessed the judicial nominees of the other party, earnestly articulated many of the same objections that doubtless will be raised against Elena (such as a lack of judicial

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GIBSON DUNN

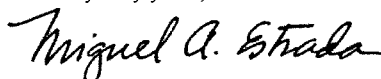
The Honorable Patrick Leahy
The Honorable Jeff Sessions
May 14, 2010
Page 2

experience, a perceived absence of a “paper trail,” or whether the nominee’s views truly are in the legal mainstream). I respectfully submit that it brings no credit to our government, and risks affirmative harm to our courts, when our elected representatives simply swap talking points—emphasizing the same considerations they previously minimized or derided—only to revert to their former arguments as soon as electoral fortunes turn.

Lest my endorsement of Elena’s nomination erode the support she should receive from her own party, I should make clear that I believe her views on the subjects that are relevant to her pending nomination—including the scope of the judicial role, interpretive approaches to the procedural and substantive law, and the balance of powers among the various institutions of government—are as firmly center-left as my own are center-right. If Elena is confirmed, I would expect her rulings to fall well within the mainstream of current legal thought, although on the side of what is popularly conceived of as “progressive.” This should come as a surprise to exactly no one: One of the prerogatives of the President under our Constitution is to nominate high federal officers, including judges, who share his (or her) governing philosophies. As has often been said, though rarely by senators whose party did not control the White House at the time, elections have consequences.

Elena Kagan is an impeccably qualified nominee. Like Louis Brandeis, Felix Frankfurter, Robert Jackson, Byron White, Lewis Powell and William Rehnquist—none of whom arrived at the Court with prior judicial service—she could become one of our great Justices. I strongly urge you to confirm her nomination without delay.

Very truly yours,



Miguel A. Estrada

MAE/pl

June 8, 2010

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6275

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Bldg.
Washington, DC 20510-6275

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Senator Sessions:

I write in support of Elena Kagan's nomination as Associate Justice of the United States Supreme Court. I have known Elena for over 10 years, ever since she was my Administrative Law Professor at Harvard Law School. In that time, she has also been my friend and colleague in legal academia. Over all of these years, I have known Elena to be a person of utmost integrity, extraordinary legal talent, and relentless generosity. Simply put, I can imagine few people who will better serve the American people as a Justice of the Supreme Court.

It is true that Elena and I do not share the same political persuasion, but it would be naïve to expect that any nominee to the Court would share my persuasion at a time when my party controls neither the White House nor the Senate. The best those of us on my side of the aisle can hope for at this time are Supreme Court nominees who are thoughtful and open minded, with views nearer the center than the poles. There is little doubt that Elena fits this bill. In my experience, her ideas have been more than reasonable, and she has always treated those who may disagree with her with respect and understanding.

Some have expressed unease over Elena's efforts while Dean to accommodate military recruiters at Harvard Law School despite the Law School's concern over the military's don't-ask-don't-tell policy. I do not share this unease. I was a student at the Law School around this time and the military's policy put the Law School in a difficult situation. On the one hand, the Law School wanted to protect its gay and lesbian students from discrimination by employers and it sought to do so by refusing to make its office of career services available to employers who had discriminatory policies. On the other hand, the Law School wanted to ensure that its students interested in military service had access to military recruiters. The accommodation struck by Elena's predecessor, Robert Clark (who was the Dean when I was a student), was to allow students to interview with military recruiters but to ask that those interviews be arranged directly between students and the military rather than through the office of career services. This is the accommodation that Elena reinstated for a time while she was Dean.


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I do not doubt that this accommodation made it harder for students to arrange interviews with the military than with other employers, but, as I witnessed first hand, any such burden was slight. I remember plentiful advertisements around campus alerting students to the fact that military recruiters would be arriving to interview students and many of my classmates had no trouble securing jobs in the military.

But the most important point that should be made about all of this is that there is absolutely nothing in Elena's efforts to accommodate the military that suggests that she will not make a superb Supreme Court Justice. Elena's job as Dean was to serve the best interests of the students at the Law School, and she did that by trying to serve the interests of all the Law School's students—gays, lesbians, and those interested in the military alike—instead of picking one group of students over another. Although reasonable people can disagree over whether she struck the right balance, her managerial efforts to serve the interests of Harvard's students say little to nothing about her personal and professional qualifications for the job of Supreme Court Justice.

About those personal and professional qualifications, there is no doubt. I had the privilege of serving as a law clerk to Justice Antonin Scalia, and I also had the privilege of serving on the staff of the United States Senate when Chief Justice John Roberts and Justice Samuel Alito were nominated to the Court. All three of these jurists have served the American people with great distinction. So will Elena Kagan.

Sincerely,



Brian Fitzpatrick

Law Clerk, The Honorable Antonin Scalia, 2001-2002

Special Counsel for Supreme Court Nominations, The Honorable John Cornyn, 2005-2006

Assistant Professor of Law
Vanderbilt University

[REDACTED]
[REDACTED] du

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Statement of

The Honorable Al Franken

United States Senator
Minnesota
June 28, 2010

REMARKS ON SOLICITOR GENERAL ELENA KAGAN'S
SUPREME COURT CONFIRMATION HEARING
Senator Al Franken

Thank you Mr. Chairman. General Kagan, I'm last.

Every Senator who has spoken before me has sworn to "support and defend the Constitution of the United States." And so have I. There are few things that we do that are more important to fulfilling that oath than making sure that the Justices of the United States Supreme Court are brilliant, humane, and just individuals.

But these hearings are also a learning experience for Minnesotans and all Americans watching at home. Before I joined the Senate, I watched at least part of every Supreme Court confirmation hearing that was televised. And I think part of my job here is to continue that learning experience for the American people.

Now, last year, I used my time during these hearings to highlight what I think is one of the most serious threats to our Constitution and to the rights it guarantees the American people: the activism of the Roberts Court.

I noted that for years, conservatives running for the Senate have made it almost an article of faith that they won't vote for activist judges who make law from the bench. And when asked to name a model justice, they would often cite Justice Thomas, who I noted has voted to overturn more federal laws than Justices Stevens and Breyer combined. In recent cycles, they would name Chief Justice Roberts.

Well, I think we established very convincingly during the Sotomayor hearings that there is such a thing as judicial activism. There is such a thing as legislating from the bench.

And it is practiced repeatedly by the Roberts Court, where it has cut in only one direction: in favor of powerful corporate interests, and against the rights of individual Americans.

In the next few days, I want to continue this conversation. Because I think things have only gotten worse.

And so I want to say one thing to the Minnesotans watching at home: With few exceptions, whether you're a worker, a pensioner, a small business owner, a woman, a voter, or a person who drinks water, your rights are harder to defend today than they were five years ago.

Our state has been victim to the third-largest Ponzi scheme in history.

And yet in 2008, in a case called *Stoneridge*, the Roberts Court made it harder for investors to get their money back from the people that defrauded them.
The Twin Cities have more older workers per capita than almost any other city in the nation.

And yet in 2009, in a case called *Gross*, the Roberts Court made it easier for corporations to fire older Americans and get away with it.

Minnesota has more wetlands than all but three states.

And yet in a case called *Rapanos*, the Court cut countless streams and wetlands out of the Clean Water Act—even though they'd been covered for up to 30 years.

Our state has banned all corporate spending on elections since 1988.

And yet in January, in *Citizens United*, the Roberts Court nullified our laws and turned back a century of federal law by allowing corporations to spend as much money as they want, whenever they want, in our elections.
Not just federal elections. Duluth elections. Bemidji elections. Minnesota elections.

There is a pattern here. Each of these decisions was won with five votes. And in each of these decisions, that bare majority used its power to help big business.

There's another pattern here. In each of these decisions, in every one, Justice John Paul Stevens led the dissent.

Now Justice Stevens is no firebrand liberal. He was appointed to the Seventh Circuit by Richard Nixon. And he was elevated to the Supreme Court by Gerald Ford. By all accounts, he was considered a moderate.

And yet he didn't hesitate to tell corporations that they aren't a part of "'We the People,' by whom and for whom our Constitution was established." And he didn't flinch when he told a President that "the Executive is bound to comply with the rule of law."

General Kagan, you've got big shoes to fill.

But before I turn it over to you, General Kagan, I want to talk a bit more about one of the decisions I mentioned. I want to talk more about *Citizens United*.

Now, you've heard a lot about this decision already today, but I want to come at it from a slightly different angle.

There is no doubt: the Roberts Court's disregard for a century of federal law—and decades of the Supreme Court's own rulings—is wrong. It's shocking. And it's torn a gaping hole in our election laws.

So of course I'm worried about how Citizens United is going to change our elections.

But I am more worried about how this decision is going to affect our communities—and our ability to run those communities without a permission slip from big business.

Let me give you two examples of what I am talking about.

In the early 1960s, car companies knew that they could avoid a large number of fatalities just by installing seat belts in every vehicle. But they didn't want to. They said "safety doesn't sell."

But Congress didn't listen to the car companies. And so in 1966, Congress passed a law requiring that all passenger cars have seatbelts.

Since then, the fatality rate from car accidents has dropped 71 percent.

Here's another story. Around the same time that we passed the seatbelt law, people started to realize that the leaded gasoline that cars ran on was poisoning our air. But oil companies didn't want to take the lead out of gasoline. Because altering their refineries was going to be, in the words of the Wall Street Journal, a "multi-billion dollar headache."

But in 1970, Congress passed the Clean Air Act anyway. And thanks in part to that law, by 1995, the percentage of children with elevated levels of lead in their blood had dropped by 84%.

Along with the Clean Water Act of 1972, the Clean Air Act of 1970 and the Motor Vehicle Safety Act are three of the pillars of modern consumer safety and environmental laws.

But here's something else they have in common. They were all passed around 60 days before an election.

Do you think those laws would have stood a chance if Standard Oil and GM could have spent millions of dollars advertising against vulnerable congressmen, by name, in the last months before their elections?

I don't.

So here's my point, General Kagan: Citizens United isn't just about election law. It isn't just about campaign finance.

It's about seat belts. It's about clean air and clean water. It's about energy policy and the rights of

workers and investors. It's about health care. It's about our ability to pass laws that protect the American people even if it hurts the corporate bottom line.

As Justice Stevens said, it's about our "need to prevent corporations from undermining self-government."

But I think that you get that. Maybe more than anyone else in this room.

General Kagan, you've shown remarkable skill as a lawyer for our government, and remarkable candor as one of its critics—say, for example, of Supreme Court confirmation hearings. I like that.

I want to see that legal skill in action. And I want to see if you might continue the work of Justice Stevens.

Thank you, Mr. Chairman.

June 22, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Senator Sessions:

We write to support the nomination of Elena Kagan to be the next Associate Justice of the Supreme Court of the United States. We have served as Solicitors General in the administrations of Presidents Ronald Reagan, George H. W. Bush, William Clinton, and George W. Bush. We support the Kagan nomination in the same spirit of fairness and bipartisanship, and deference to presidential appointments of well-qualified individuals to serve on the Supreme Court, that was also due the nominations of then-Judges John G. Roberts, Jr. and Samuel A. Alito, Jr. to serve on the Supreme Court.

Elena Kagan would bring to the Supreme Court a breadth of experience and a history of great accomplishment in the law. In addition to her most recent service as Solicitor General, at various points of her career she has served as a law clerk to Supreme Court Justice Thurgood Marshall, she has been in private practice at one of America'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 served as a law professor at two of the nation's leading law schools, Harvard and Chicago, and she has served as Dean of the Harvard Law School.

During the past year, Kagan has honored the finest traditions of the Office of the Solicitor General and has served the government well before the Supreme Court. The job of Solicitor General provides an opportunity to grapple with almost the full gamut of issues that come before the Supreme Court and requires an understanding of the Court's approach to numerous issues from the criteria for certiorari review to the Justices' approach to oral argument. The constant interaction with the Supreme Court that comes with being the most-frequent litigator before the Court also ensures an appreciation for the rhythms and traditions of the Court and its workload. Moreover, as Solicitor General, Kagan had the opportunity to work with the immensely talented career lawyers in the Office of the Solicitor General, who have a deep understanding of and appreciation for the Court. Kagan's most recent experience as Solicitor General will serve her well as she wrestles with the difficult questions that come before the Court.

The Constitution gives the President broad leeway in fulfilling the enormously important responsibility of determining who to nominate for a seat on the Supreme Court of the United States. In that spirit, we support the nomination of Elena Kagan to be Associate Justice and believe that, if confirmed, she will serve on the Court with distinction, as have prior Solicitor Generals who have had that great honor.

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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June 8, 2010

Via First-Class Mail

The Honorable Patrick J. Leahy
433 Russell Senate Office Bldg.
United States Senate
Washington, DC 20510

The Honorable Jeff B. Sessions
326 Russell Senate Office Bldg.
United States Senate
Washington, DC 20510

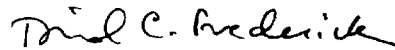
Dear Chairman Leahy and Senator Sessions:

I am writing to support the nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States. I have appeared regularly before the Court over the past 15 years and have argued 30 cases to date to the Court. I also clerked for Justice Byron White and saw first-hand the qualities of mind and diligence needed to perform that critical role. In my opinion, Ms. Kagan has all the requisite attributes of industry, intellect, judgment, fair-mindedness, and discretion to be an outstanding justice.

As Solicitor General, Ms. Kagan has argued difficult cases and done so without prior advocacy experience. Her ability to do so as well as she has is a credit to her intellect and character. Advocacy before the Court in this era is an extremely challenging endeavor, requiring copious preparation and planning even as the hearing itself is a relatively unstructured experience in which questions from justices can throw an advocate off-stride. Ms. Kagan has acquitted herself well in her role as Solicitor General. She has demonstrated confidence, steady judgment, a quick mind, and great preparation. All of those attributes will stand her in good stead as a justice. I also believe that her advocacy experience before the Court will shape her understanding of the important role that advocacy plays in the Court's deliberative processes and in the corollary principles of judicial restraint in avoiding issues not raised directly by the lawyers in the case.

Others will write about her scholarship and administrative skills, but as I have observed her in public forums and gotten to know her especially over the past eighteen months, I have been impressed by her sense of discretion, evenhandedness, diligence, and work ethic. I believe that she can become an outstanding Justice and that she warrants confirmation by the United States Senate.

Sincerely yours,

A handwritten signature in black ink, reading "David C. Frederick". The signature is written in a cursive, flowing style with a prominent "D" and "F".

David C. Frederick

STATEMENT OF GREGORY G. GARRE

Partner, Latham & Watkins LLP

**Former Solicitor General of the United States,
United States Department of Justice**

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Hearing Titled:

**“The Nomination of Elena Kagan to be an Associate Justice
of the Supreme Court of the United States”**

PRESENTED ON JULY 1, 2010

STATEMENT OF GREGORY G. GARRE**Hearing Titled:****“The Nomination of Elena Kagan to be an Associate Justice
of the Supreme Court of the United States”****July 1, 2010**

Chairman Leahy, Ranking Member Sessions, and Members of the Committee on the Judiciary, it is an honor to appear before you today and testify in support of the nomination of Solicitor General Elena Kagan to be Associate Justice of the Supreme Court of the United States. The Committee considers few matters as important as the nomination of an individual to serve on the Supreme Court of the United States and it is a privilege to participate in the Committee's consideration of the nomination of General Kagan to serve on the Court.

By way of introduction, I am a partner in the Washington, D.C. office of Latham & Watkins LLP and global chair of the firm's Supreme Court and Appellate Practice Group. In 2008-2009, I had the great privilege of serving as the 44th Solicitor General of the United States, preceding General Kagan in that position. I previously served as Acting Solicitor General (2008), Principal Deputy Solicitor General (2005-2008), and Assistant to the Solicitor General (2000-2004), and am the only person to have served at all three levels of the Solicitor General's office – as an Assistant, Deputy, and Solicitor General. I have served in the Department of Justice under both Democratic and Republican Administrations and as a career lawyer as well as a political appointee. And I have been very fortunate to serve under three of the nation's finest Solicitors General: Paul D. Clement, Theodore B. Olson, and Seth P. Waxman. Between my periods of government service, I have represented corporations, individuals, and other entities before the Supreme Court and appellate courts as a lawyer in private practice. Over the past decade, I have argued 29 cases before the Supreme Court, including two cases during the past

term. In 1992-1993, I served as a law clerk to former Chief Justice William H. Rehnquist. I have written and spoken frequently about the Supreme Court and have served for nearly ten years at various times as a visiting professor of law and an adjunct professor of law at the George Washington University Law School, focusing on Supreme Court practice and constitutional law.

In my testimony today, I will explain why General Kagan's experience as Solicitor General will serve her well on the Supreme Court, and why prior judicial experience is not a necessary prerequisite to service on the Supreme Court. While my testimony is focused on these particular aspects of General Kagan's background, I also appear before you in support of General Kagan's nomination to be Associate Justice of the Supreme Court. Indeed, I was pleased to sign a joint letter recently sent to this Committee by ten former Solicitors General from different Administrations going back for nearly a quarter of a century supporting General Kagan's nomination, which I have attached hereto. I believe that General Kagan has the background and experience to serve with distinction on the Supreme Court, as have prior Solicitors General and alumni of the Office of the Solicitor, including Justice Robert H. Jackson (Solicitor General, 1938-1940), Justice Thurgood Marshall (Solicitor General, 1965-1967), and, more recently, Chief Justice John G. Roberts, Jr. (Principal Deputy Solicitor General, 1989-1993), and Justice Samuel A. Alito (Assistant to the Solicitor General, 1981-1985).

* * * * *

When she was nominated to be Solicitor General of the United States in January 2009 by President Obama, General Kagan had already accumulated a wealth of experience and distinction in the law and academia. She had clerked on the Supreme Court for the nation's 33d – and first African American – Solicitor General, Thurgood Marshall. She had worked for a top tier private law firm in Washington, D.C. She had served as an associate counsel and policy

advisor to President Clinton. She had served as a law professor at two of the nation's leading law schools. And she had served as Dean of the Harvard Law School.

Elena Kagan was confirmed by the Senate as the nation's 45th Solicitor General of the United States in March 2010. I first met her in January 2010 at the close of the Administration of George W. Bush while I was serving as the 44th Solicitor General, shortly after she was nominated to serve as Solicitor General in the incoming Administration of Barack Obama. Our first meeting focused on the work of the Office of the Solicitor General and the job of the Solicitor General as she began her preparations to assume that important post. I have had several subsequent discussions with her concerning the Office of the Solicitor General and have always been impressed by her obvious intellect, charm, and fair-mindedness. It was evident from the outset that General Kagan had a great respect for the Office of the Solicitor General and its lawyers and staff, and was focused on doing everything she could to hit the ground running once she was confirmed by the Senate. Looking back, it is clear that she succeeded in that task. While the Committee of course will consider all aspects of her background and work, her tenure as Solicitor General will be an enormous asset to her as an Associate Justice.

The Office And Responsibilities Of The Solicitor General

To understand why, let me first briefly outline the job of the Solicitor General, which – at least to anyone who has been privileged to hold the post – is surely one of the unique and most treasured legal positions in American government. The Solicitor General is an Executive Officer who reports to the President and Attorney General. She is the only Executive Officer required by statute to be “learned in law.” The Solicitor General oversees a relatively small office of about 20 attorneys – including the Principal Deputy Solicitor General, three Deputy Solicitors General, and 15 Assistants to the Solicitor General – and an extremely qualified support staff.

There are only two political positions in the Office – Solicitor General and Principal Deputy Solicitor General. The remaining positions are all “career” slots, held by attorneys who generally stay from one Administration to the next. There is no finer or more dedicated group of lawyers, and – no matter who the Solicitor General is – the Office of the Solicitor General simply could not function without them. By tradition, and for good reason, the Solicitor General exercises a significant degree of independence within the Department of Justice, and even within the Executive Branch, though the Solicitor General is of course ultimately accountable to the President and Attorney General like other officers.

The Office of the Solicitor General was established in 1870 and charged with the same principal duties that the Solicitor General carries out today. There are two overriding responsibilities. The first, and most well known, is to supervise and conduct the litigation in the Supreme Court on behalf of the federal government and its officers. The United States is involved in about two-thirds of all the cases the Supreme Court decides on the merits each year. The Solicitor General – and the small cadre of lawyers in her Office – is responsible for briefing and arguing all of those cases. But that is only a part of the work that the Solicitor General does before the Supreme Court. She also is responsible for determining when to petition for certiorari review to the Supreme Court and for opposing certiorari in the thousands of cases each year in which individuals, primarily those in the criminal justice system, challenge lower court rulings in cases in which the United States is a party, as well as many other non-merits filings.

The Solicitor General and the lawyers in her Office appear before the Supreme Court as advocates for their client, but it is also a deeply ingrained in the ethos and mission of the Office that these lawyers have a duty to serve Justice and the best interests of the United States as well. Former Solicitor General Simon Sobeloff put it this way: “The Solicitor General is not a neutral,

he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish Justice." Each amicus brief that the Solicitor General files in the Supreme Court begins with a statement of "Interest of the United States" explaining the government's interests in the case. Likewise, in considering whether the United States's participation in a case is warranted, or what position the United States should take, the lawyers in the Office from the Solicitor General to the Assistants consider the best interests of the United States – with an eye toward the long term and in view of prior positions that the United States has taken before the Court. Because the Solicitor General's duty is to represent the interests of her client and the United States more generally, the positions taken by the Solicitor General do not necessarily reflect her personal views.

The Office's reputation for excellence is inextricably tied to the Solicitor General's work before the Supreme Court. As one of the nation's greatest Solicitors General, Rex Lee, once observed: "There is a widely held, and I believe substantially accurate, impression that the SG's office provides the Court from one Administration to the next – and largely without regard to either political party or the personality of the particular Solicitor General – with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers." The Solicitor General's credibility – and thus currency – before the Court depends on ensuring that the lawyers in the Office at any given time live up to that standard of excellence.

The other primary responsibility of the Solicitor General is generally to oversee litigation conducted by the federal government and its officers in the federal appellate courts. In particular, the Solicitor General is responsible – with assistance from the litigating divisions within the Department of Justice and affected agencies – for reviewing cases decided adversely

to the federal government in the district courts to determine whether they should be appealed and, if so, what position should be taken. In addition, the Solicitor General is responsible for determining whether the government will participate as an amicus curiae, or intervene, in cases in any appellate court, when the federal government is not currently a party to the case. The Solicitor General makes literally thousands of decisions each year on such matters, which typically reach the Solicitor General in often voluminous packets of materials called "appeal recommendations." While these decisions are typically not as high-profile as the Supreme Court cases handled by the Office, they are an important part of the Solicitor General's job and duty to protect the interests of the United States in the federal court system and help to ensure that the United States speaks and acts with one voice throughout the appellate courts across the country.

General Kagan's Service As Solicitor General Is An Enormous Asset

It goes without out saying that service as a Solicitor General is not a prerequisite to service on the Supreme Court, and that service as a Solicitor General does not alone qualify an individual to serve on the Court. Nevertheless, many Solicitors General and alumni of the Office of the Solicitor General have gone on to serve with distinction on the Supreme Court, including Justice Robert H. Jackson (Solicitor General, 1938-1940), Justice Thurgood Marshall (Solicitor General, 1965-1967), and, more recently, Chief Justice John G. Roberts, Jr. (Principal Deputy Solicitor General, 1989-1993), and Justice Samuel A. Alito (Assistant to the Solicitor General, 1981-1985). (A list of the Justices who have served as Solicitor General, or in another capacity in the Office of the Solicitor General, is included in the addendum hereto.) And in a number of different respects, the job of Solicitor General, and service in the Office of Solicitor General more generally, provides an invaluable learning experience and training ground for any individual who is given the enormous privilege and responsibility of serving on the Court.

To begin with, the Solicitor General has a special relationship with all three branches of government, giving her a unique perspective on our system of government. The Solicitor General is foremost an Executive Officer who is the President's chief advocate before the Supreme Court. But the Solicitor General has a special relationship with Congress as well, because by tradition and statute the Solicitor General is generally obligated to defend the constitutionality of federal statutes whenever she determines that a reasonable, good faith defense may be made. In discharging that important duty, it is not uncommon for the Solicitor General vigorously to defend the constitutionality of a statute that may not be politically in favor of the current Administration. And the Solicitor General of course has a special relationship with the Supreme Court, as an Officer of the Court and the most frequent litigant before the Court. The Solicitor General's relationship with all three branches of government gives the Solicitor General an opportunity to see the legal problems facing our government from different vantage points, which would serve a Justice well in analyzing those problems on the Bench.

The Solicitor General's special relationship with the Court is particularly important in considering the value of this experience when it comes to service on the Court. The Solicitor General has been referred to as the "Tenth Justice," though – as many Solicitors General have remarked – never by the Justices themselves. The Solicitor General is the most frequent litigant before the Court and has an office in the Supreme Court building itself – making the Solicitor General only one of two government officials with offices in another branch of government, the other being the Vice President (who of course has an office in the Senate, in his capacity as President of the Senate). The Supreme Court relies on the Solicitor General and the lawyers in her office for a forthright and fair presentation of the cases in which the government is involved as a party or amicus. And the Solicitor General is the only person whose "views" the Court

regularly seeks out, as the Court does on a dozen or so occasions each term in deciding whether to grant certiorari in cases (by issuing an order calling for the views of the Solicitor General). The Solicitor General's schedule virtually revolves around the Court's, and a Solicitor General spends a great deal of time in Court both watching the Court in action and interacting with the Court at oral argument. One cannot hold the position of Solicitor General without a profound respect for and appreciation of the Supreme Court and its role in American government.

Service as Solicitor General provides a unique look at the workload and rhythms of the Court as well as the idiosyncrasies of the business of the Court, including its certiorari process for determining which cases to hear on the merits and more arcane facets of the Court's docket such as original actions. The Solicitor General ordinarily is involved in about two-thirds of the merits cases pending before the Court in any given term and an enormous number of cases pending before the Court at the certiorari stage. For example, in recent terms, the Solicitor General has filed from 11 to 31 petitions for certiorari or jurisdictional statements, filed from 485 to 911 responses to petitions for certiorari, filed from 14 to 23 amicus invitation briefs, participated as an amicus curiae (in briefing and oral argument) in 16 to 23 cases, and filed merits briefs and presented oral argument in 59 to 63 cases – annually. The subject areas in which the Solicitor General has filed briefs runs the gamut of the Court's docket ranging from administrative law to antitrust law to civil rights to constitutional law to criminal law to environmental law to tax to any number of other subjects. As part of her day-to-day job, the Solicitor General – in reviewing and revising briefs, preparing for oral argument, and reviewing recommendations from other agencies or offices within the Department of Justice for action before the Court – must grapple with the same range of issues facing the Court. That experience no doubt will be invaluable in undertaking the difficult work load of the Court first hand.

One of the most visible -- and nerve wracking -- duties of the Solicitor General is to argue cases before the Supreme Court. The Solicitor General customarily assumes the responsibility for arguing the most important and invariably most difficult cases in which the government is involved before the Court -- and General Kagan did just that. In the past term, she presented oral argument in several of the most contentious and complex cases before the Court, including *Citizens United v. FEC*, *Salazar v. Buono*, *Free Enterprise Fund v. Public Company Accounting Oversight Accounting Board*, *United States v. Comstock*, and *Holder v. Humanitarian Law Project*, and she ultimately prevailed on behalf of the government in most of those cases. General Kagan has learned first hand the rigors of oral argument before the current Court -- surely the most active and intellectually rigorous Court from the Bench in the nation's history when it comes to oral argument -- and immediately proved herself up to the challenge. Her numerous appearances as an oral advocate before the Court no doubt will prove beneficial in approaching oral argument from the other side of the Bench as well.

A Solicitor General also gains a deep appreciation for the general presumption of the constitutionality of Acts of Congress and the importance of consistency in the law over time -- two of the hallmarks of the rule of law in our system of government. As discussed, one of the most important responsibilities of the Solicitor General is generally to defend the constitutionality of statutes challenged before the Court. That duty is a part of the ethos of the Office and ingrained in all of its lawyers. So too is the importance of ensuring the consistency of the legal positions that the Solicitor General takes before the Court. The currency of the Solicitor General before the Court is in many respects tied to the credibility of the positions that the Solicitor General takes before the Court. And if those positions changed from one Administration to the next, the credibility of the Solicitor General would be severely damaged.

The importance of maintaining the consistency of the legal positions that the Solicitor General takes before the Court is thus in a general sense analogous to the importance of maintaining the consistency of the Supreme Court's own precedents under the doctrine of *stare decisis*.

In this respect, in particular, General Kagan has distinguished herself and honored the finest traditions of the Office. Being Solicitor General at the time of a change of Administrations is particularly challenging because of the natural tendency of those in political positions to expect a change – at least at the margins – in positions that the prior Administration has taken before the Court. Former Solicitor General Seth Waxman, the outgoing Solicitor General at the end of the Clinton Administration, once remarked: “In the past year, many people have asked me, ‘Is Ted Olson going to adhere to the position that you took before the Supreme Court in the *X* or *Y* case?’ My response always is, ‘I can’t speak for the solicitor general, but the positions that we took were positions that represented the views of the United States.’” General Kagan has managed the invariably challenging transition from one Administration to the next with the best interests of the Office of Solicitor General and the United States in mind – as opposed to any political objective – and stepped into and just as forcefully defended the interests of the United States in cases that I authorized and filed as Solicitor General at the end of the Bush Administration (such as, to take only one example, *Salazar v. Buono*, which she successfully argued in October 2009) as the cases that she authorized and filed as Solicitor General. The Office of the Solicitor General, and the nation, have benefitted greatly from that approach.

One of the important responsibilities of the Solicitor General is to make decisions on the numerous “recommendations” that reach the Solicitor General’s desk each day – in batches. These recommendations, such as on whether to appeal a case that the government lost in the district court, often are unanimous and relatively routine. But they may also be extremely

complex and contentious, and involve situations where different executive agencies or divisions within the Department of Justice – with different and equally legitimate interests in mind – disagree strongly over what action or position the United States should take and what is in the long term interests of the United States. The Solicitor General – with the wise counsel of the lawyers in her office – must resolve these disputes, usually after meeting with and hearing from the interested agencies and components of government and receiving written recommendations from multiple outside entities and lawyers within the Solicitor General’s office. This process gives the Solicitor General a special appreciation for the many challenges that our government faces and the fact that different entities – typically with equally legitimate interests and views, but different institutional perspectives – may disagree strongly about the proper course in a matter. While this process is certainly distinguishable from the Article III judicial process, I believe General Kagan’s experience in approaching and resolving these intra-Executive branch disputes will help her in the enormously challenging task of analyzing and deciding the nation’s most difficult legal problems – *i.e.*, the matters that routinely reach the Supreme Court.

Since the September 11 attacks, the Solicitor General has taken on an additional – and vitally important – responsibility in overseeing litigation arising out of and involving the war on terror. There are scores of cases pending in federal court today involving enemy combatants captured in connection with the ongoing hostilities in Iraq and Afghanistan, and numerous other cases involving other aspects of the government’s response to the grave threat posed by al Qaeda and other terrorist organizations, including challenges to the government’s foreign electronic surveillance programs. This far-ranging litigation has raised novel, challenging, and enormously important legal and constitutional issues, many of which have reached the Supreme Court on an almost annual basis since September 11, 2001. And one of the most important responsibilities of

the Solicitor General today is to manage and oversee this litigation at least when it reaches the appellate level. General Kagan has fully embraced that critical responsibility.

For example, she successfully argued *Holder v. Humanitarian Law Project*, involving a First Amendment challenge to the “material support” statute (18 U. S. C. §2339B(a)(1)); she briefed and was prepared to argue *Kiyemba v. Obama*, involving the authority of the United States courts to order the transfer of alien detainees held at the Guantanamo Bay Naval Base in Cuba into the United States (shortly before the case was argued, the Supreme Court sent it back to the court of appeals for further consideration); and she was involved in the government’s successful appeal in *Al Maqaleh v. Gates* (D.C. Circuit), involving the scope of habeas corpus with respect to alien enemy combatants held in Afghanistan. It is not possible to work on this vitally important litigation without gaining a deep appreciation for the grave national security challenges facing America in the war on terror and a profound gratitude for the men and women in our military services around the world who are confronting those challenges on a daily basis.

Finally, as Solicitor General, General Kagan has had an opportunity to work with – and, like all Solicitors General, learn from – the enormously talented and dedicated career lawyers in the Office of the Solicitor. These men and women – like Deputy Solicitor General Edwin Kneeder, who has served in the Office for decades and himself argued more than 100 cases before the Supreme Court – not only among the finest lawyers in the land but the finest public servants as well. Collectively, these lawyers have briefed and argued literally thousands of cases before the Supreme Court and they have an unparalleled knowledge of the Court and profound respect for both the Court as an institution and its Members. During her tenure as Solicitor General, General Kagan has earned the confidence, trust, and deep admiration of the career lawyers and other personnel of the Office of the Solicitor General. I cannot think of a higher

compliment when it comes to her service as Solicitor General, or better affirmation that she possesses the intellect, fair-mindedness, and dedication to duty and the rule of law that are the hallmarks of a Supreme Court Justice.

Prior Judicial Service Is Not A Prerequisite To Service On The Court

General Kagan's service as Solicitor General rounds out and bolsters in important respects the breadth of experience and reputation for excellence that she had already before becoming Solicitor General — as a Supreme Court law clerk, lawyer in private practice, top advisor to the President, law professor, and dean at perhaps the finest law school in the country. General Kagan does not have prior judicial experience. But, as history shows, prior judicial experience is by no means a necessary prerequisite to exemplary service on the Supreme Court, and it especially ought not be viewed as a prerequisite to service on the Court for someone with General Kagan's significant and varied legal experience and training.

Judicial service in the lower federal courts or state courts is certainly a valuable and natural training ground for service on the Supreme Court. But in our nation's history, some forty individuals who served on the Supreme Court have joined the Court with no prior judicial experience. (A list of those individuals is included in the addendum hereto.) And any argument that prior judicial service is a necessary qualification for service on the Court is strongly refuted by simply listing a few of the Justices who lacked such experience — John Marshall, Joseph Story, Louis Brandeis, Felix Frankfurter, Robert Jackson, and William Rehnquist. I was extremely privileged to serve as a law clerk to Chief Justice William Rehnquist, who also joined the Court from a high-ranking position in the Department of Justice (Assistant Attorney General for the Office of Legal Counsel), and he served with great distinction on the Court. The unique perspectives of individuals, like Chief Justice Rehnquist, who have taken different paths before

joining the Court likewise almost certainly benefits the Court as a whole. Particularly given the rich background and experience -- including as Solicitor General -- that General Kagan would bring to the Court, the absence of prior judicial experience is in my view inconsequential.

* * * * *

The Constitution grants the President broad leeway in determining how to fulfill the great responsibility of filling a seat on the Supreme Court of the United States. And this Committee considers few matters as important as the nomination of an individual to serve on the Court. In undertaking that task, this Committee customarily looks to the entirety of a nominee's background, experience, and body of work. While I will leave it to other witnesses to opine on how other aspects of General Kagan's background, experience, or philosophy will serve her on the Court, I am confident that, if confirmed, General Kagan's experience as Solicitor General will be a great asset to her. And, like my predecessors as Solicitor General going back to 1985, who have served in different Administrations and hold widely varying views on the important legal issues facing the country, I am pleased to support General Kagan's nomination to be Associate Justice of the Supreme Court, and urge the Committee and Senate to do so as well.

Thank you, Mr. Chairman, Ranking Member Sessions, and Committee Members for the privilege to testify before you today.

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ADDENDUM

JUSTICES WHO LACKED PRIOR JUDICIAL EXPERIENCE WHEN APPOINTED TO THE COURT

- **John Jay, C.J.:** Governor of New York (1795-1801); Sec. of Foreign Affairs (1784-90); joined SCOTUS 1789 (Washington)
- **John Rutledge, C.J.:** Governor of South Carolina (1779-82); joined SCOTUS 1789 (Washington)
- **William Paterson:** Governor of New Jersey (1790-93); joined SCOTUS 1793 (Washington)
- **Bushrod Washington:** Virginia House of Delegates; joined SCOTUS 1799 (Adams)
- **John Marshall, C.J.:** Sec. of State (1800-01); US Representative from Virginia (1799-1800); joined SCOTUS 1801 (Adams)
- **Joseph Story:** US Representative from Massachusetts (1808-09); joined SCOTUS 1811 (Madison)
- **Henry Baldwin:** US Representative from Pennsylvania; joined SCOTUS 1830 (Jackson)
- **Roger Taney, C.J.:** Sec. of the Treasury (1833-34); AG (1831-33); joined SCOTUS 1836 (Jackson)
- **John McKinley:** US Senator from Alabama (1826-31, 1837); joined SCOTUS 1837 (Van Buren)
- **Benjamin Curtis:** Massachusetts state legislator; joined SCOTUS 1851 (Fillmore)
- **John Campbell:** Alabama state legislator; joined SCOTUS 1853 (Pierce)
- **Nathan Clifford:** AG (1846-48) and private practice; joined SCOTUS 1858 (Buchanan)
- **Noah Swayne:** US Attorney for Ohio; joined SCOTUS 1862 (Lincoln)
- **Samuel Miller:** Private practice; joined SCOTUS 1862 (Lincoln)
- **Salmon Chase, C.J.:** Sec. of the Treasury (1861-64); joined SCOTUS 1864 (Lincoln)
- **Joseph Bradley:** Private practice; joined SCOTUS 1870 (Grant)
- **Lucius Quintus Cincinnatus Lamar:** Sec. of the Interior (1885-88); joined SCOTUS 1888 (Cleveland)
- **Melville Fuller, C.J.:** Private practice; joined SCOTUS 1888 (Cleveland)
- **George Shiras:** Private practice; joined SCOTUS 1892 (Harrison)
- **William Moody:** AG (1904-06); joined SCOTUS 1906 (T. Roosevelt)
- **Charles Evans Hughes:** Governor of NY (1907-10); joined SCOTUS 1910 (Taft); left SCOTUS 1916; re-appointed as C.J. 1930 (Hoover)
- **James McReynolds:** AG (1913-14); joined SCOTUS 1914 (Wilson)
- **Louis Brandeis:** Private practice; joined SCOTUS 1916 (Wilson)
- **George Sutherland:** US Senator from Utah (1905-17); joined SCOTUS 1922 (Harding)
- **Pierce Butler:** Private practice; joined SCOTUS 1922 (Harding)
- **Harlan Fisk Stone, C.J.:** AG (1924-25); joined SCOTUS 1925 (Coolidge); elevated to C.J. 1941 (F. Roosevelt)
- **Owen Roberts:** Special prosecutor for the Teapot Dome scandal; joined SCOTUS 1930 (Hoover)
- **Stanley Reed:** SG (1935-38); joined SCOTUS 1938 (F. Roosevelt)
- **Felix Frankfurter:** Academic and advisor to FDR; joined SCOTUS 1939 (F. Roosevelt)

- **William Douglas:** Chairman of the SEC (1937-39); joined SCOTUS 1939 (F. Roosevelt)
- **James Byrnes:** US Senator from South Carolina (1931-41); joined SCOTUS 1941 (F. Roosevelt)
- **Robert Jackson:** SG (1938-40); AG (1940-41); joined SCOTUS 1941 (F. Roosevelt)
- **Harold Burton:** US Senator from Ohio (1941-45); joined SCOTUS 1945 (Truman)
- **Tom Clark:** AG (1944-49); joined SCOTUS 1949 (Truman)
- **Earl Warren, C.J.:** Governor of California; joined SCOTUS 1953 (Eisenhower)
- **Byron White:** Deputy AG; joined SCOTUS 1962 (Kennedy)
- **Arthur Goldberg:** Secretary of Labor; joined SCOTUS 1962 (Kennedy)
- **Abe Fortas:** Private practice and govt. service in DC, close friend of Lyndon Johnson; joined SCOTUS 1965 (Johnson)
- **Lewis Powell:** Private practice in VA; joined SCOTUS 1972 (Nixon)
- **William Rehnquist, C.J.:** Asst. AG for OLC (1969-71); joined SCOTUS 1972 (Nixon); elevated to C.J. 1986 (Reagan)

**JUSTICES WHO SERVED AS SOLICITOR GENERAL OF THE UNITED STATES OR
IN THE OFFICE OF THE SOLICITOR GENERAL**

- **William Howard Taft, C.J.:** SG (1890-92); joined SCOTUS 1921 (Harding)
- **Charles Evans Hughes, C.J.:** SG (1929-30); joined SCOTUS (for second time, as C.J.) 1930 (Hoover)
- **Stanley Reed:** SG (1935-38); joined SCOTUS 1938 (F. Roosevelt)
- **Robert H. Jackson:** SG (1938-40); joined SCOTUS 1941 (F. Roosevelt)
- **Thurgood Marshall:** SG (1965-67); joined SCOTUS 1967 (Johnson)
- **John G. Roberts, Jr., C.J.:** Principal Deputy SG (1989-93); joined SCOTUS 2005 (G.W. Bush)
- **Samuel A. Alito, Jr.:** Assistant to the SG (1981-85); joined SCOTUS 2006 (G.W. Bush)

Jennifer Gibbins
Testimony before the United States Senate Judiciary Committee
July 1, 2010

- Good day Mr. Chairman and committee members. My name is Jennifer Gibbins.
- I am from the fishing town of Cordova in Prince William Sound, Alaska, site of the 1989 Exxon Valdez oil spill - "EVOS".
- I am Soundkeeper/executive director of Prince William Soundkeeper and I serve as President of the Cordova Chamber of Commerce. I am a trained and certified crew member for a commercial fishing oil spill response vessel in Prince William Sound.
- I am here today to speak briefly regarding the spill's ongoing impacts, and how the decision by the United States Supreme Court to overturn the lower courts decision regarding punitive damages has affected fishermen and other small business owners, and Alaska Natives.
- I want to be sure that everyone here is clear that I myself am not an EVOS plaintiff.
- The precedent setting decision in that case equated Exxon's punishment, at the time the most profitable corporation in the world, to the loss of individual people after twenty years of litigation.
- In my town, the streets were silent, people were somber, they just did not speak for days. You walked into the local breakfast dive which is typically bustling with fishermen talking about boat work and getting ready for the upcoming season and it was quiet. People sat there dazed, staring at their eggs, or at the wall.

There are five key messages I wish to deliver to you today:

- *First*, above all, you cannot clean up an oil spill. Period.
- *Second*, the more than 32,000 victims of the Exxon Valdez spill were never made whole as Exxon promised. Regardless of compensatory or punitive dollars, life as they knew it was permanently and irrevocably altered.
- *Third*, lingering oil persists in Prince William Sound to this very day and you don't need a shovel to find it.
- *Forth*, there is the pervasive sense that government and the courts have failed the people - to the point where many question their relevance -- and question far beyond the health of their fundamental *right to justice* -- they question its simple existence.
- *Fifth*, and perhaps most sadly, almost twenty years to the day, it is as if there is an echo coming from the Gulf of Mexico. While the people of Prince William Sound stand

in solidarity with the people in the Gulf, I do not know a single person who is surprised. We tell them very clearly, do not believe a single word that BP is telling you. Do not expect anyone to help you. And don't hold your breath when it comes to the courts.

- Let me now speak briefly to the four key areas of impact of the ExxonValdez. While the specifics will vary, generally there is a parallel unfolding in the Gulf, although given the enormity of what is happening it will be far greater in every way.
- The Environment. The ExxonValdez Oil Spill Trustee Council reported as of May 2010, only 10 of 26 resources/species have recovered from the oil spill, and none of the four 'human services' (i.e., commercial fishing, subsistence, recreation and tourism, and passive use) have recovered.
- The most notably wildlife species not to recover is pacific herring—an environmental, cultural and economic keystone species.
- *Cultural.*
- Alaska Natives and most of the non-Natives that I know in Prince William Sound practice a subsistence culture - wild foods are collected and shared. It is a commonwealth and a way of life. Food was not safe following the spill and to this day Alaska Natives cannot eat traditional foods like seal because of contamination by lingering oil. They cannot fish for herring and gather herring spawn the way they have done since before the arrival of europeans and until 1989. In addition to the fact that there isn't are not grocery stores in two of the Sound's Native villages, and the fact that most residents live below the poverty line, *they are being denied their way of life, their identity.*
- *Economic.*
- The herring fishery which I mentioned above, accounted for as much as 50% of the annual income of many fishermen in our region prior to the spill. That income has not been replaced.
- With the decline in the fishery overall the town's tax base has plummeted - this includes personal property tax, sales tax and the very important fish tax (based on commercial landings of fish) that is the base of our economy.
- A fisherman friend who I work with on EVOS issues will go bankrupt this year, 20 years after the spill. He in his 50's with a son who hopes to go to college. The State of Alaska has already taken most of his fishing assets (boats, permits), and will get all of his punitive damages settlement to settle the score for debts incurred in the aftermath of the ExxonValdez when the fisheries struggled with no market due in great part to the mistaken perception that the fish was tainted by the spill.

- *Societal.*
 - One of the least understood impacts of the ExxonValdez spill is the impact of litigation that continued for 20 years. Victims were promised - in exact words from Exxon - that they were "lucky it was Exxon", Exxon would "make them whole" and that the litigation "would not go on for 20 years".
 - After the spill, there were divorces, suicides, there were families that lost everything they had and more than a few left. Men will speak of the psychological struggle due to losing their identity as family provider.
 - I have one friend, now 50, who has described to me of sinking into a mental abyss over the years following the spill when his wife had to become the sole breadwinner for the family. He was so affected that he began to fantasize about killing her. Fortunately he got to a therapist.
 - Another fisherman friend about the same age, stunned the community at a gathering just two years ago by declaring that he had recently been contemplating suicide because of feelings of worthlessness. About that same time, a woman in Cordova told me that the endless court case made her feel that she simply did not exist as a human being.
 - Personal resource loss, chronic stress, feelings of alienation, anxiety, social disruption - these have been studied by highly credential social scientists in our town for 20 years. These same scientists have now begun to work in the gulf coast communities.
 - Because Exxon has such deep pockets - which not incidentally, expanded exponentially over the past 20 years - they could litigate endlessly, wearing down their victims who, even as they stood together, were dwarfed. Exxon knew that if they played it as long as they could, memories would fade, the context could be changed and they could win big.
 - In 2008, a representative for Exxon speaking in the media called the punitive damages as originally awarded "an excessive windfall" for plaintiffs.
 - Exxon fought hard to avoid a precedent, the cruelest irony for plaintiffs is that a precedent was set that diminished them further.
 - To be dragged through litigation for 20 years is to be victimized over and over again. The burden of proof is always on the victim - as we are now hearing from BP - they will pay all "legitimate" claims. We in Prince William Sound know what that really means.
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- Somewhere along the way America has forgotten that corporations do not own the air or the lakes, or the rivers or the seas. A privilege to use them has been granted on behalf of the millions of citizens who do in fact own them and the business community is not living up to that privilege.
 - How often is the root of disaster a cost cutting - profit margin issue.
 - Citizens need a better way of ensuring that people in business take the time to do what is right.
 - I support the Big Oil Polluter Pays Act, and I believe that it is time to update OPA 90.
 - I also think it is time to look at some new methods to ensure that folks do the right thing -- methods that don't necessarily mean more government, and might in fact mean less.
 - To give you one simple example, the US Forest Service has a policy whereby a guide who has a permit violation cannot reapply for five years. Why not institute the same for business? A violation puts you on probation and while you may continue your current level of business, you may not apply for a new permit for five years.
 - We need to take some of the things instituted in Alaska following the ExxonValdez, and things that will be coming out of the Gulf BP disaster, and institutionalize them.
 - Citizen Regional Advisory Councils and access to to response plans should be standard and transparent. There should be citizen representation built into the Incident Command System.
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- Today in Prince William Sound we are working to move on. It has been a long haul.
 - This journey is just beginning for the people in the Gulf.
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- Elena Kagan seems like a fine nominee to the Supreme Court. She clearly knows the law and has a passion for it. And, she actually wants the job. If you don't really want the job you should not be there and you should not be on the court.
 - I just wish the nomination process was less about looking for some silly "gotcha" or "ah-ha" and more an open discussion. More of an opportunity to think.
 - You know what they say, "Think, It's patriotic."

Thank you.

United States Senate Committee on the Judiciary**Hearing on the Nomination of Elena Kagan
to be an Associate Justice of the Supreme Court of the United States****July 1, 2010****Prepared Statement of
Jack Goldsmith
Henry L. Shattuck Professor
Harvard Law School**

Members of the Committee:

Thank you for the opportunity to comment on the nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States.

I am a professor at Harvard Law School. I previously served in the George W. Bush administration as Assistant Attorney General, Office of Legal Counsel from 2003-2004, and as the Special Counsel to the General Counsel of the Department of Defense from 2002-2003. I have also taught at the University of Virginia and University of Chicago law schools. My teaching and scholarship focus on national security law, international law, foreign relations law, and internet law.

I have come to know Elena Kagan well since Harvard Law School hired me in 2004 during her tenure as dean. (We had met briefly a few times before then.) In the last six years, I have seen Kagan up close in many settings. We have had hundreds of conversations, many about the law. I have also read some (but not all) of her scholarship. Based on my experiences with Kagan, my reading of her scholarly work, and my assessment of her very successful legal career, I believe that she will be a truly outstanding Supreme Court Justice. I urge this Committee to approve her nomination and the entire Senate to confirm her.

Experience

Some have questioned Kagan's qualifications for the Supreme Court because she has not previously served as a judge. The criticism is belied by the fact that many of our greatest justices – including Chief Justices Warren and Rehnquist, and Justices Black, Brandeis, Frankfurter, Jackson, Powell, and White – did not serve as judges before joining the Supreme Court. And contrary to the criticisms, I believe that Kagan is among the most qualified candidates for the Supreme Court in many years.

Kagan possesses an extraordinary knowledge of the legal issues before the Supreme Court. Whatever else may be said about being a law professor, it is a profession that requires one to know legal subjects comprehensively enough to teach them. As an

academic, Kagan taught and was expert in constitutional law, administrative law, First Amendment law, civil procedure, and labor law. These subjects constitute a large chunk of the Supreme Court's docket. In addition, as Solicitor General Kagan did much more than argue six cases before the Supreme Court. She read many hundreds of briefs in cases before the Court, and thought broadly about the entire docket of the Court and the issues facing the Justices. Her broad academic expertise and her tenure as Solicitor General, taken together, make Kagan unusually prepared to understand and address the array of issues that come before the Court.

In addition, few nominees in recent memory have had Kagan's breadth of legal experiences. After graduating magna cum laude from Harvard Law School, she clerked for Thurgood Marshall at the Supreme Court. She worked on complex civil litigation cases at Williams & Connolly, one of the finest law firms in the nation. She served as a lawyer in the legislative branch as Special Counsel to the Senate Judiciary Committee. She served in the White House in the Counsel's office and as an assistant to the President for Domestic Policy. She was a law professor at two of the best law schools in the country where she was a great teacher and wrote important legal scholarship. She was Dean of Harvard Law School. Then she became Solicitor General. In short, she has had an unusually rich and varied life in the law. And she has been extraordinarily successful in each of these very different legal roles.

Kagan's breadth of relevant experience does not end there. One aspect of her record that has been underappreciated is her experience running the small business known as Harvard Law School. As dean, Kagan was the chief executive officer of a 500-person non-profit organization. She had to set a budget, make a payroll, and address a variety of employee issues. She also felt the bite of an array of private and public regulations. For example, when she added a large new building to the Harvard Law School campus, she had to deal with city of Cambridge, Massachusetts concerning its zoning, planning, and historical landmark ordinances. She thus appreciates firsthand the effects of regulation on firms. These are valuable experiences that will inform Kagan's work on the Court, especially in the many important regulatory cases that affect for-profit and not-for-profit organizations. They are also experiences of a type not possessed by any Supreme Court nominee in recent memory.

Attitude Toward Law

Kagan is one of the smartest lawyers I know. She also cares deeply about law and legal craft. I base this judgment on my reading of her scholarship and on my many conversations with her about law.

Our first conversation about the law, in 1994, was for me a memorable one. I was an entry-level law professor candidate visiting the University of Chicago, where Kagan was teaching at the time. We were at dinner the night before I was due to make a presentation to the Chicago faculty of my work on the role of federal courts in deciding foreign relations controversies in the absence of legal guidance from Congress. Kagan was unable to attend the faculty talk, so she asked me about my presentation over dinner.

I gave her a short summary. She responded with an avalanche of difficult questions that pressed me to clarify my thesis and that pushed me on its implications for matters ranging from the conflicts of law to the *Erie* doctrine to the meaning of the Commerce Clause.

I had been on the teaching market for many months and had discussed my work with dozens of professors. But I had not encountered Kagan's razor-sharp and clarifying questions – questions that exposed weaknesses and inconsistencies in my thesis. Kagan knew little about a small corner of the law I knew well, but she quickly grasped my central point and questioned whether it cohered with broader legal doctrines and principles. Here was someone who took legal doctrine very seriously, someone who by instinct cared a lot about getting the doctrine and the case holdings and the broader legal theoretical landscape just right, and someone who was remarkably knowledgeable about the law and unusually adept at legal argument.

I witnessed a similar attitude toward the law countless times during my five years with Kagan at Harvard. In scores of appointments committee meetings involving candidates who had written papers on all manner of topics from many different theoretical perspectives, Kagan was the one who cared most about the quality of legal arguments. And in dozens of faculty workshops, Kagan consistently asked insightful questions that often pressed the paper presenter about real-world legal implications. (In both settings, by the way, it is unusual that a busy dean with so many other responsibilities is consistently able to prepare and participate so fully and meaningfully.)

Kagan's scholarship displays similar qualities. The thesis of her most important work, *Presidential Administration*, is that the President has broad power to craft policy through the control of the executive branch bureaucracy, but that this power is best understood to be grounded, ultimately, in congressional approval. The article is theoretically informed but falls squarely in the tradition of doctrinal legal scholarship that assesses how law works, and should work, in the real world. It is filled with insights about the operation of law on the ground in the Executive branch, Congress, and the courts. And it takes law seriously as a tool for both empowering the presidency and constraining and legitimizing it.

In sum, Kagan views the law with earnest respect; she thinks it has a reality, an autonomy, and a constraining bite. This is an important quality for service on the Supreme Court. While I do not purport to speak for fellow conservatives of various stripes, I think this quality is one reason why so many prominent conservative lawyers who know Kagan well admire her and support her confirmation. John Manning, who has known Kagan since law school, writes in his letter of support that she is "careful and reflective in her legal analysis" and "cares deeply about law and the legal craft." Michael McConnell, who was Kagan's colleague at the University of Chicago and has known her for twenty years, writes that she has "demonstrated a fidelity to legal principle even when it means crossing her political and ideological allies." And Paul Cappuccino, Miguel Estrada, and Peter Keisler, joining a letter from twenty-nine lawyers who clerked with Kagan on the Supreme Court, comment that during that clerkship year she displayed "a superb legal mind" and was "remarkably fair-minded and intellectually honest." These are

extraordinary testaments to Kagan's commitment to the integrity of the law, and should count heavily in favor of her confirmation.

Temperament

A final important consideration is Kagan's temperament. Kagan is genuinely interested in listening to all sides of an argument, to engaging colleagues frankly and charitably, and to exercising judgment openly. These are obviously important qualities for a Justice.

The record shows that Kagan has possessed these qualities all of her professional life. The letter from the law clerks, which comments on Kagan at the dawn of her career, states:

Regardless of whether any given one of us agreed or disagreed with Elena on a particular issue, however, we came to appreciate her approach in those situations. She always has had a wonderful temperament, and is an extraordinary listener who is genuinely interested in what other people think. Elena is able to advance, and at times adjust, her positions while maintaining respect for and openness to other views.

And as is well known, these same qualities – in combination with Kagan's vision and imagination, her fierce work habits, her extraordinary management skills, and her good judgment – were instrumental in bringing harmony to the discordant Harvard Law faculty, and to making Harvard Law School an intellectually richer and intellectually more diverse law school.

It is a little awkward for me to comment on Harvard Law School's doubtless improvement under Kagan's deanship. For one thing, I was not there before she became Dean. (My sense is that she extended and accelerated improvements begun under her predecessor, Robert Clark.) For another, her hiring and defense of me – a conservative scholar who came to Harvard from the Bush administration – are often held up as evidence of her open-mindedness and commitment to intellectual diversity. With these caveats, I do think that Kagan's actions as dean demonstrate a profound commitment to the frank and open exchange of ideas, and reveal a temperament ideally suited for the Supreme Court.

Kagan was not, I believe, interested in balance for balance's sake. Rather, she thought that intellectual excellence in a law school required an intellectual environment where every idea can flourish. (This might seem like an obvious point, but in the American legal academy, and especially among the most elite law schools, it is far from obvious and not at all established.) For example, she not only supported the conservative Federalist Society (which has a membership of over four hundred Harvard Law students, and is one of the largest student organizations in the law school); she took pride in its many contributions to the intellectual life of the law school. On a more personal note, in many conversations on many matters, Kagan sought my views and expressed a genuine interest in my arguments and ideas. I never got the sense that she wanted to know what I

thought as a conservative. For Kagan, it was the idea and the argument that mattered, and not their political or ideological provenance.

Kagan's engagement with people and their ideas on the merits rather than through an ideological lens, and her openness to ideas and debate, are in my view the distinguishing characteristics of her deanship. They are characteristics that, through her actions and the force of her personality, she stamped on the Harvard Law School community. I agree with Michael McConnell that this aspect of Kagan's deanship "demonstrate[s] qualities of mind and character that are directly relevant to being a Justice on the Supreme Court: respect for opposing argument, fair-mindedness, and willingness to reach across ideological divides, independence, and courage to buck the norm."

Kagan's warm and open embrace of all manner of students from all walks of life extended to those students who were current and past members of the U.S. armed forces. Whatever one thinks about the decisions Kagan made in connection with the Solomon Amendment, I can attest that she genuinely and deeply admired the U.S. military and those who served in it. I know this not only because of the things she did to honor veterans, and not only because the veterans I knew were happy and fully integrated at Harvard Law School. I know it also because we had at least two conversations when she was drafting her 2007 West Point Speech. In those conversations she made plain her esteem for the military and military service, and sought my counsel (and, I am sure, the counsel of others) about how best to express it. Based on these conversations, I have no doubt that she meant it when she said in that speech that she was "in awe" of the cadets' "courage and dedication, especially in these times of uncertainty and danger," that her "security and freedom and indeed everything else I value depend on all of you," and that she wished the cadets "godspeed as you go forward to serve your country and your fellow citizens in the greatest and most profound way possible."

Conclusion

It is discouraging that I feel compelled to add, in closing, that nothing in my assessment of Kagan's suitability to be a Supreme Court Justice turns on a prediction of how she will vote on particular cases as a Justice. Many people assume – based on her service in the administrations of two Democrat presidents, and the fact that President Obama nominated her – that on many legal issues Kagan's will come down on the left. It would be surprising if this assumption were not true to some degree; but I do not know it to be true. What I do know is that Kagan will be open-minded and tough-minded; that she will treat all advocates fairly and will press them all about the weak points in their arguments; that she will be independent and highly analytical; and that she will seek to render decisions that reflect fidelity to the Constitution and the laws.

The President of the United States is entitled to choose a judicial nominee whom he believes reflects his judicial philosophy; and his decision to nominate a highly qualified individual who swims in the broad mainstream of American legal life – a description that Kagan easily satisfies – warrants deference from the Senate. Some

Democratic members of this Committee implicitly or expressly embrace this principle today but did not do so during the hearings for Justices Roberts and Alito. Some Republican members of this Committee implicitly or expressly embraced this principle during the hearings for Justices Roberts and Alito, but not today. The Democrats are right now and the Republicans were right then. But the opportunistic embrace of the principle, and the often-extremely-uncharitable characterization of the records of nominees of presidents of the opposite party, can only mean that neither side really believes in it. Such opportunism under the guise of principle is, with respect, worse than just regrettable; it damages the very judicial system the Committee is charged with nurturing and overseeing.

Miguel Estrada, a distinguished conservative lawyer who in my view was treated very unfairly by this Committee when he was nominated to serve on the federal bench, wrote to this Committee of Kagan: "If such a person, who has demonstrated great intellect, high accomplishments and an upright life, is not easily confirmable, I fear we have reached a point where no capable person will readily accept a nomination for judicial service." I completely agree. Elena Kagan is immensely qualified to serve on the Supreme Court. She should be easily confirmed.



**TESTIMONY OF MARCIA D. GREENBERGER
CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER**

**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**ON THE NOMINATION OF ELENA KAGAN TO
BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT**

July 2, 2010

My name is Marcia Greenberger and I am Co-President of the National Women's Law Center ("Center"). The Center began in 1972, as did my work on women's legal rights. Since that time, the Center has been involved in virtually every major effort to secure and defend women's legal rights. I very much appreciate your invitation to testify before the Committee on behalf of the Center on an issue of such enormous importance – the nomination of Elena Kagan to be an Associate Justice of the United States Supreme Court.

The Center has the greatest respect for Elena Kagan's outstanding accomplishments, considerable legal skills, and fair-mindedness. Her qualifications and her record give great confidence that she will respect the rule of law and approach legal questions with the intent of the law and its contours as her guiding principles. We strongly support Solicitor General Kagan's nomination, and we celebrate the fact that, upon her confirmation, she will make history once again. When confirmed, she will join the other two female Justices on the current Court so that, for the first time in history,

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three women will serve simultaneously on the highest Court in the land, and she will be only be the fourth woman ever to have served on the Supreme Court in 221 years.

I testify here today with extraordinary pride in this prospect, and in our country's hallmark of eliminating barriers and expanding opportunities, so that the talent and skill of every one of us can be fostered and recognized. Our country is the stronger and the surer for this progress. Elena Kagan shines as an example of the progress that our country has made, and why we are the better for it. Hers is a remarkable legal career for any person to have accomplished, but all the more so because she had to break down barriers along the way.

None of the positions she has held came to women with ease, and she excelled at each. Judge Mikva has said "she understands what the law is about . . . she was one of the best clerks I ever had,"ⁱ He strongly recommended her as a clerk to Justice Thurgood Marshall—a higher compliment to her as a person and to her legal skills is hard to imagine. Justice Marshall obviously agreed: she served as a clerk to this giant of a lawyer and a Justice, and was one of only a handful of other women, just seven out of 30, to clerk for the Court that term. Becoming a tenured law professor at the University of Chicago Law School in 1995, and at Harvard Law School in 2001, was not an accomplishment shared by many women. In 1994 only four women were tenured or even

ⁱ Andrew Greiner, *Kagan and Obama Go Way Back*, NBC CHICAGO, May 10, 2010, available at <http://www.nbcchicago.com/news/local-beat/Kagan-and-Obama-Go-Way-Back-93267019.html>.

on tenure track at the University of Chicago Law School.² The over 100,000 documents released from her positions as Associate Counsel to the President and deputy director of the White House Domestic Policy Council in the Clinton White House demonstrate for all to see the breadth of responsibility she was given and respect in which she was held. And, of course, she became the first woman to be Dean of Harvard Law School in its almost two hundred year history, and in 2009 became the first woman Solicitor General. Kudos have accompanied her performance in those most demanding roles as well.³

Given her broad background of judicial clerkships, private law practice, academia, and government service, including as Solicitor General of the United States, and her experience in a broad array of legal issues, coupled with the extraordinary outpouring of bipartisan support she has received,⁴ it is hardly surprising that she received a unanimous rating of Well-Qualified from the ABA's Standing Committee on the Federal Judiciary. Our review of her record led the Center to conclude that, indeed, if

² Press Release, Stanford University, Law Professors Differ on Affirmative Action (Oct. 25, 1994), available at <http://news.stanford.edu/pr/94/941025Arc4083.html>.

³ For example, Michael McConnell, the Director of the Constitutional Law Center at Stanford Law School, wrote a letter in support of Elena Kagan to the Senate Judiciary Committee stating that "By universal acclaim, across the political spectrum and among both students and faculty, Elena Kagan was an exemplary Dean of Harvard Law School." Letter from Michael McConnell to United States Senate Judiciary Committee (June 25, 2010), available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/062510MichaelMcConnell.pdf>. And in a letter to the Senate Judiciary Committee the last eight Solicitors General wrote in support of Elena Kagan's confirmation, "During the past year, Kagan has honored the finest traditions of the Office of Solicitor General and has served the government well before the Supreme Court." Letter from Former Solicitors General to United States Senate Judiciary Committee (June 22, 2010), available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/062210JointLetter.pdf>.

⁴ Her nomination has the bipartisan support of nine former Solicitors General, 69 law school deans, and nearly 30 of her former co-clerks on the Supreme Court. Her nomination has also been endorsed by such organizations as the National Association of Women Judges, the National Association of Women Lawyers, the National Partnership for Women and Families, the Leadership Conference for Civil and Human Rights, the Alliance for Justice, the NAACP, the NAACP Legal Defense Fund, the National Council of Jewish Women, the Women's Bar Association of the District of Columbia, the National Senior Citizens Law Center, and the Older Women's League.

confirmed, her approach to legal questions would be open-minded, scrupulously fair, and in keeping with the law's purpose and intent.

I will briefly summarize some of the elements of Solicitor General Kagan's record that led us to support her nomination.

All Americans rely upon our Constitution and laws to ensure that our fundamental freedoms are protected, and that fairness and equal opportunity, through the rule of law, are not only bedrock principles, but a reality in our daily lives. Women have a particularly great stake in equal justice and judges' commitment to give life and vitality to the laws of our land. It is therefore of the greatest importance that a nominee understand and protect the legal rights of ordinary Americans, including women's constitutional rights under the Equal Protection Clause and the right to privacy, as well as the core statutory protections women fought so hard to secure in such fundamental areas as education, employment, health and safety, and economic welfare. Elena Kagan's record demonstrates that she will bring to the Court that understanding and commitment to the rule of law and to equal justice.

Women have a great stake in the application of constitutional and statutory protections against sex discrimination and other forms of discrimination that is faithful to the purpose of these protections. Elena Kagan's record includes descriptions of many of the efforts she has made to ensure that antidiscrimination protections are available in all spheres, including at work and at school, to those whom the law is intended to protect.

She worked to ensure these laws were not distorted or ignored in order to protect powerful institutions bent on continuing unfair discrimination that has so injured women and their families over the years. She testified before this Committee during her Solicitor General hearings, “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.”⁵ And a series of documents released reflecting her work during the Clinton Administration show she had substantial familiarity with the key civil rights protections so important to women, and made efforts to ensure their effective implementation. For example, during her service in the Clinton Administration, she worked on Executive Order 13,160, which broadly protected against discrimination in federally-conducted educational and training programs on the basis of sex, race, ethnicity, and several other forms of invidious discrimination.⁶ Before this Executive Order was issued, while Title IX, for example, prohibited sex discrimination in education programs receiving federal financial assistance, its protections did not apply to these programs run by the federal government itself. That gap in coverage applied to Title VI of the 1964 Civil Rights Act and the Age Discrimination Act as well. Executive Order 13,160 addressed this gap, and assured that the statutes’ protections against sex discrimination and the other prohibited bases of discrimination applied to the federal government itself. Elena Kagan also worked to increase funding for civil rights enforcement across agencies with civil rights responsibilities, and to establish mechanisms to coordinate and

⁵ Elena Kagan, Answers to Written Questions of Sen. Specter (Feb. 10, 2009) at 9, *available at* <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.

⁶ *See, e.g.*, Memorandum to Phil Kaplan from Nicole Rabner (June 12, 1997); Memorandum for Distribution from Jennifer Klein and Nicole Rabner (June 11, 1997); *see also* Exec. Order 13,160, 65 Fed. Reg. 39775 (June 27, 2000) (“Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs”).

strengthen enforcement efforts across agencies.⁷ Further, she worked on legislation expanding federal protections against hate crimes, including those based on gender.⁸ That legislation has finally been enacted, and many in this country, including women, are the safer for it.⁹

The right to privacy and its application to women is a second pillar upon which women rely. Available documents show, particularly from her days as a law clerk to Justice Marshall and her service in the Clinton Administration, that Elena Kagan supports the constitutional right to privacy, and its application to women in *Roe v. Wade*. As a law clerk, she identified a concern to Justice Marshall about the possibility that the Court might undermine *Roe v. Wade*.¹⁰ And while serving at the White House in the Counsel's Office and on the Domestic Policy Council, she again grappled with attempts to overturn *Roe v. Wade*'s core protections for women, in the context of proposed legislation then

⁷ See, e.g., Fact sheet, The Clinton Administration Announces New Civil Rights Enforcement Initiative, Jan. 19, 1998.

⁸ See, e.g., Memorandum from Legislative Subgroup to Hate Crimes Working Group, Proposed Bill to Amend 18 U.S.C. 245 (June 30, 1997).

⁹ Beyond this work in the Clinton Administration, she has participated in the Boston Bar Association Diversity Task Force, spoken on problems women face in the legal profession and suggested concrete actions to ameliorate those problems, served as a member of the Harvard University's Task Force on Women Faculty, and taken steps to diversify the student body at Harvard Law School, with good results. Elena Kagan, *Women and the Legal Profession - A Status Report* (Leslie H. Arps Memorial Lecture), 61 THE RECORD 37 (2006), available at <http://judiciary.senate.gov/nominations/111thCongress/ExecutiveNominations/SolicitorGeneral/ElenaKagan.cfm>; Brent L. Henry & Michael E. Mooney, Co-Chairs, Boston Bar Association Diversity Leadership Task Force, *Recommendations of the Boston Bar Association Diversity Leadership Task Force*, Nov. 18, 2008, available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/12B-1-111808BostonBarAssociationDiversityLeadershipTaskForce.pdf>. That the same positive results did not occur regarding diversity in faculty hiring during her tenure as dean of the Law School is very disappointing. It is, of course, proper to explore concerns about these results, as well as any other civil rights issues that arise in connection with her record.

¹⁰ Memorandum from Elena Kagan to Justice Thurgood Marshall (Apr. 26, 1988), available at <http://documents.nytimes.com/a-selection-of-kagans-marshall-memos#document/p12>.

pending in Congress.¹¹ We draw the conclusion from this record that she will respect *Roe v. Wade* and the protections for women that are at its core. We are mindful of the fact that the available documents reflect her attempts, pursuant to her responsibilities in the positions she held, to advance the views of the Justice for whom she clerked and the Administration and the President she was there to serve, and therefore, they are not entirely dispositive regarding her own judicial philosophy. Nonetheless, the absence of any suggestion in these documents that she is hostile to *Roe* and its core holding is reassuring.

Finally, with respect to other health and safety concerns of women, it is worthy of note that during her tenure as Solicitor General, Elena Kagan decided to argue personally as *amicus* in *Robertson v. United States ex rel. Watson* (No. 08-6261), a case which dealt with prosecutions of violations of civil protective orders. These orders can be an important tool to protect victims of domestic violence. At least fourteen states, in addition to the District of Columbia, have statutes that permit private litigants to bring criminal contempt proceedings for violations of civil protective orders. I highlight this case, in contrast to other cases handled by the Solicitor General's office with a bearing on women's rights, because it was one that Elena Kagan chose to argue herself. Also noteworthy is the apparent attention she gave to the case. In her oral argument, she elaborated on an argument in the Solicitor General's brief in a way that provided more support to the ability of private litigants to initiate contempt proceedings for violations of civil protection orders. While this case did not result in a ruling on the merits, Solicitor

¹¹ See, e.g., Memorandum from Elena Kagan & Bruce Reed to the President, Subject: Daschle and Feinstein Amendments (May 13, 1997).

General Kagan's personal efforts and involvement evidence a concern for and an understanding of the ways in which the legal system can affect victims of domestic violence.¹²

Even this brief review of Solicitor General Kagan's record demonstrates the extraordinary range of legal issues she has addressed, the important and varied positions that she has held, and the breadth of legal knowledge and life experience that she would bring to the Court if confirmed. Her record also demonstrates why I testify on behalf of the Center with the greatest respect for her outstanding accomplishments, considerable legal skills, and ability to be fair. That is not to say that we agree with all of the legal or policy positions taken by her and the Administrations she has served,¹³ nor that we would necessarily agree with all of the decisions she would reach on the Court. But her commitment to respect the law and the protections it provides to the women of the country is clearly demonstrated.

While the Center's analysis began with Solicitor General Kagan's intellect, legal accomplishments, and commitment to the rule of law, I must conclude with some words about the great advance for the country it will be when, for the first time in the nation's history, three women sit on the Supreme Court together. Experience has shown that one, even two women on the Supreme Court are seen as exceptions to the rule. Perhaps the

¹² In a per curiam order without opinion issued on May 24, 2010, the Court dismissed this case as improvidently granted. *Robertson v. United States ex rel. Watson*, 560 U.S. ____ (2010).

¹³ For example, in documents reflecting debates within the Clinton Administration on whether to grant the state of Wisconsin's request to waive various provisions of the Aid to Families with Dependent Children, Food Stamps and Medicaid programs in order to carry out a state welfare demonstration program, she made both policy and constitutional arguments with which we disagree. *See, e.g.*, Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman, Wisconsin Waiver Application (June 10, 1996).

clearest demonstration came when, during oral arguments, even experienced members of the Supreme Court bar would call Justice O'Connor and Justice Ginsburg by each other's name. Moreover, an unrealistic expectation and heavy burden fall on only one or two women to somehow bring the experience of all women to bear. That may be why, following the announcement of Solicitor General Kagan's nomination, former Justice Sandra Day O'Connor said that three women on the Court could make a big difference. "I'm so pleased," she said. "That's much better than one or two."¹⁴

A Supreme Court that includes three women is more reflective of the diverse population of this nation and gives women, and men, a greater sense that their lives and needs, and those of their family, are understood by the Court. With Elena Kagan on the bench, the country will be one step closer to the day when it is not only accepted, but in fact expected, that women are just as likely as men to be on the Supreme Court or in any position of great importance.

But perhaps even more fundamental, the quality of justice is improved for both men and women when the bench is more representative. One recent study demonstrated that male federal appellate court judges are more likely to see aspects of the law differently, particularly regarding claims of sex discrimination, if a female judge is on the panel.¹⁵ This may be because, as Justice Ginsburg said in a speech last year, "Even

¹⁴ Greg Stohr, *Kagan Would End Gender Bar as Third Female Justice*, BLOOMBERG BUSINESSWEEK, May 27, 2010 (updated June 1, 2010), available at <http://www.businessweek.com/news/2010-05-27/kagan-would-end-gender-bar-as-third-female-justice-update1-.html>.

¹⁵ Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010), available at <http://epstein.law.northwestern.edu/research/genderjudging.pdf>. Studies outside the judicial context strongly suggest that even as few as three women can make a major difference that two women do not in the deliberative process. In the context of corporate

though a wise old man and a wise old woman will reach the same decision, there are life experiences a woman has that come from growing up in a woman's body that men don't have."¹⁶ Those experiences can enrich the deliberative process for all of the judges—or Justices. This was nowhere clearer than in *Safford Unified School District v. Redding*.¹⁷ In that case, a girl and her mother sued her school district because, at age 13, school officials subjected her to a strip-search because they suspected that she was hiding ibuprofen. At oral argument, Justice Ginsburg, then the sole woman on the Court, described the humiliation and indignity a teenaged girl would have suffered by being forced to strip and even shake out her underwear in front of school officials.¹⁸ A number of the male Justices questioned why it was so traumatic—one thinking back, for example, to experiences in locker rooms as a 13-year-old male. Significantly, when the Court rendered its decision, eight Justices joined the ruling that the search violated the student's constitutional rights, due no doubt at least in part to the perspective that Justice Ginsburg brought to the consideration of the case. Elena Kagan's record, as described above, demonstrates that she has the capacity, and the breadth of life experience, to bring an understanding of the impact of the law on the lives of women and girls to the bench, and to enrich the Court's understanding of how best to realize the intended purpose and effect of the law that the Court is charged with applying.

boards, for example, one study found that once three or more women serve on a board, "women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially." Vicki Kramer, Alison Konrad, & Sumru Erkut, Executive Summary at 2, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, Wellesley Centers for Women, 2006. Studies have also shown that when the percentage of women in legislatures surpasses a minimum—generally 30%—women are able to introduce and pass more bills on women's issues. Sarah Childs & Mona Lee Krook, *Critical Mass Theory and Women's Political Representation*, 56 POL. STUD. 732 (2008).

¹⁶ Joe Hallett, *Ginsburg Wants Court to Add Second Woman*, COLUMBUS DISPATCH, Apr. 11, 2009, available at http://www.dispatchpolitics.com/live/content/national_world/stories/2009.04.11.ginsburg_ART_ART_04-11-09_A3_111019PG.html?sid=101.

¹⁷ 557 U.S. ___, 129 S. Ct. 2633 (2009).

¹⁸ Transcript of Oral Argument at 45-46, *Safford*, 557 U.S. ___ (No. 479).

In short, Elena Kagan's record is one that demonstrates that she, as President Obama suggested when he announced her nomination, is indeed a worthy successor to retiring Justice John Paul Stevens.

Conclusion

Justice O'Connor recently noted that Canada has four women on its nine-judge high court, including a female chief justice. "Now what's the matter with us?" she was quoted as saying. "You know we can do better."¹⁹ With the confirmation of Solicitor General Kagan to the Supreme Court, this country rightfully continues on the road to doing better. Our country's history is a history of barriers being broken, of remarkable individuals being the first, to be followed by seconds and thirds, and finally of reaching a point where the additions are no longer of note. It is in keeping with the proud tradition of this country to have such an accomplished woman as Elena Kagan confirmed to join the two other distinguished women currently on the Supreme Court.

Thank you again for this opportunity to testify before the Committee.

¹⁹ Larry Neumeister, *O'Connor: More Justices May Skip State of Union*, ASSOCIATED PRESS, Apr. 6, 2010 available at <http://abcnews.go.com/US/wireStory?id=10302946>.

**SENATOR GRASSLEY'S OPENING STATEMENT
FOR HEARING ON ELENA KAGAN, NOMINEE TO
THE UNITED STATES SUPREME COURT**

Solicitor General Kagan, congratulations on your nomination to be an Associate Justice on the Supreme Court of the United States. This is an extremely important appointment, a real honor. I also welcome your family and friends. I'm sure they're proud of your nomination. I'm glad they're here to support you throughout your confirmation.

I'm committed to ensuring that this process is fair and respectful, but also thorough. The Constitution tasks the Senate with conducting a comprehensive review of the nominee's record and qualifications. You've been nominated to a lifetime position on the Supreme Court. Consequently, the Senate has a tremendous responsibility to ensure that you truly

understand the proper role of a Justice and the Supreme Court in our system of government. We want to ensure that, if confirmed, you'll be true to the Constitution and laws as written.

We had a nice meeting in my office a few weeks ago. You have an accomplished academic and policy background. You excelled at Princeton University and Harvard Law School. You went onto be an Oxford Scholar. You clerked on the D.C. Circuit Court and the United States Supreme Court. You were a law professor at the University of Chicago Law School, as well as Dean of Harvard Law School. You were a lawyer here on the Judiciary Committee, and then with the Clinton Administration. You're now the United States Solicitor General.

What is lacking from your background is any experience on a state or federal court, or much experience as a practicing lawyer. We don't have any substantive evidence to demonstrate your ability to transition from a legal scholar and political operative to a fair and impartial jurist. We'll need to acquire that evidence through your writings and the positions you've taken over the years, as well as your hearing testimony. I hope that you'll answer our questions in a candid and forthright manner.

Our goal is not to have you commit to ruling in a certain way or for a particular party. Our goal is to see if you are capable of exercising judicial restraint. We want to know that you'll exercise the preeminent responsibilities of a Justice by adhering to the law and not to the latest opinion polls. The policy choices need to be reserved for Congress.

It's our duty to confirm a nominee who has superior intellectual abilities. But more importantly, it's our duty to confirm a nominee who won't come with a results-oriented philosophy or an agenda to impose his or her personal politics, feelings or preferences from the bench. It's our duty to confirm a Supreme Court nominee who will faithfully interpret the law and Constitution without personal bias.

The fact that you haven't been a judge is not dispositive. But because you don't have that experience, it's even more critical that we are persuaded that you have the proper judicial philosophy and will practice it once confirmed. We must be convinced that you have the most important qualification of a Supreme Court Justice. That qualification is the ability to set aside your personal feelings and political beliefs so you can administer equal justice for all in a dispassionate way.

Your relatively thin record clearly shows that you've been a political lawyer. Your papers from the Clinton Library have been described as showing "a flair for the political" and a "flair for political tactics." You've been described as having "finely tuned . . . political antennae" and "a political heart."

You were involved in a number of high profile, hot-button issues during the Clinton Administration, including gun rights, welfare reform, abortion, and the Whitewater and Paula Jones controversies. A review of the materials produced by the Clinton Library shows that you forcefully promoted liberal positions and offered analyses and recommendations that often were more political than legal in nature.

Not only that, your Marshall memos indicate a liberal and seemingly outcome-based approach to your legal

analysis. More to the point, you have admitted that your upbringing steeped you in deeply held liberal principles. We should know whether, as you've said, you have "retained them fairly intact to this date."

A judge needs to be an independent arbiter, not an advocate or rubberstamp for a political agenda. This point is absolutely crucial for Supreme Court Justices, since they aren't as constrained to follow precedent to the same extent as judges on the lower courts. If you are confirmed to be an Associate Justice, you'll have the final say on the law.

You've been a prominent member of President Obama's team as Solicitor General. In nominating you to be an Associate Justice, President Obama clearly believes you measure up to his judicial "empathy" standard — a judge's ability to "empathize" with certain groups over others.

Indeed, President Obama said that you credited your “hero” Justice Marshall with “reminding [you] that, . . . ‘behind the law there are stories – stories of people’s lives as shaped by the law, stories of people’s lives as might be changed by the law’”

This “empathy” standard has been soundly rejected because it endorses the application of personal politics, feelings and preferences when judges decide cases. It encourages judges to usurp the functions held by the executive and legislative branches of government. A judge, and particularly a Supreme Court Justice, must unequivocally reject that standard. It does not comport with the proper role of a judge or an appropriate judicial method.

We all know that’s not what our great American tradition envisioned for the role of the judiciary. Rather, the Constitution requires that judges be free

from personal politics, feelings and preferences. Judges and Justices are supposed to check their biases, personal preferences and politics at the door of the courthouse, so they can administer justice in an evenhanded manner. Our constitutional system of checks and balances prohibits Justices from implementing their political and social agendas through the judicial process.

You now have the burden of showing us that, despite your record as a political lawyer – rather than as a sitting judge or practitioner – you’ll apply the law impartially and not be a rubberstamp for the President’s agenda. A Supreme Court Justice shouldn’t be a member of someone’s team working to achieve a preferred policy result on the bench.

We'll want to explore your views on whether and how a judge should use his or her background and experiences when deciding cases. We'll want to ask you about your ability to decide cases in an impartial manner, in strict accordance with the law and Constitution, without bias or prejudice.

I'll be asking you about your judicial philosophy, and whether you will allow biases and personal preferences to dictate your judicial method. You once wrote that it "is not necessarily wrong or invalid" for judges to "try to mold and steer the law in order to promote certain ethical values and achieve certain social ends." You've also praised jurists who believe that the role of a judge is to "do what you think is right and let the law catch up" and "bridge the gap between law and society." To me, this kind of judicial philosophy endorses judicial activism, not judicial restraint.

I want to be sure that your judicial philosophy rejects legislating from the bench. I want to know that you'll be able to exercise judicial restraint and resist the temptation to "mold and steer" the law and the Constitution to satisfy your fiercely-held beliefs and preferences. I want to be assured that your judging will be anchored in the Constitution, rather than in pursuit of a personal and political agenda from the bench.

Again, I'm committed to giving you a fair, respectful, but also deliberative process. You don't have a judicial record on a state or federal bench that evidences your ability to be an impartial jurist. So I hope that you'll be forthcoming in your responses to our questions about your judicial philosophy and positions on Constitutional issues. You urged the Judiciary Committee to delve more deeply into a

nominee's record so that the Supreme Court confirmation process doesn't turn into a "vapid and hollow charade." I hope you'll live up to your own standard so we can make an informed decision. I look forward to hearing your testimony and answers to our questions.

Testimony of
Jack Gross, CPCU, CLU, ChFC, AIC, AU
U.S. Senate
Committee on the Judiciary
Confirmation Hearing on U.S. Supreme Court Nominee
Elena Kagan
Hart Senate Office Building, Room 216
July 1, 2010

Thank you, Chairmen Leahy and Ranking Member Sessions for inviting me to tell my story and state my position regarding the outcome of the Supreme Court decision in my case, Gross v. FBL.

I was born in 1948 in Creston, Iowa, and lived in Chariton, Iowa until first grade, when we moved to Mt. Ayr, Iowa. My father was an Iowa Highway Patrolman and my mother was a third grade teacher. Mt. Ayr is a small town in southern Iowa of about 1,700. (My dad always said the population never changed because whenever a baby was born, some guy sneaked out of town!) Mt. Ayr is in Ringgold County, which was always called the "poverty" county because it traditionally had the lowest per capita income in Iowa. It is the only county in Iowa without a single stoplight. The nearest "city" was Creston, population about 7,000, which was 30 miles away. Growing up in a small town in the 50's was like living in a Norman Rockwell painting. It's farm country.

I spent most of my summers when I was young working on my grandpa's farm, and was fortunate to have my dad, both grandfathers and many others as mentors and role models. One of the lessons I learned from all of them was to always find the hardest working person wherever I went, and make sure I worked at least 10% harder than that person. They assured me it was the "secret" to success. It's the same advice I passed on to my son. It was never that difficult, and it always worked for us.

Much of my childhood was defined by my health issues. I developed chronic ulcerated colitis at age five, and spent 25 years in constant chronic pain. I was kept alive for many years by heavy daily doses of cortisone. However, I learned how to deal with the pain at an early age and function at a very high level. For instance, my last two summers in high school, I started my days at 5:00 to take papers to nearby towns, came home and did chores (I always rented pastures and raised sheep and horses), then went to work for the county scooping gravel on roads all day until 5, when I headed to the hay fields to pick up hay bales until dark. During the school year, I delivered the papers, did chores, and then was a janitor for the vocational agriculture building before and after school. I was also president of the FFA (the largest chapter in the state), on the student council, editor of the paper, etc. On Sundays, I had rural paper routes that I started at 3:00 a.m. My sophomore year, I had a bad accident with my horse and missed an entire semester with a badly broken leg. I made up for that semester during the second semester.

I started going with my wife, Marlene, the week before our junior prom in 1965, and we've been together ever since. We were engaged to be married soon after high school graduation and one year later were married after I completed my freshman year of college and transferred to Drake University in Des Moines, Iowa. During my freshman year, in addition to a part-time job, I was class president, editor of the school paper, member of the student council and other organizations. I did not ask for nor accept a single cent of help from my parents in getting my college degree. They were very lean years for a young married couple.

By the time I graduated, we had our two children. I spent the last two years of college working more than full-time in a factory, and we got student loans for the amount I couldn't earn. I worked every spare minute to take care of my family and get my education, in spite of my bad health. I weighed 87 pounds when I graduated from Drake University with a B.S. degree in Personnel Management.

Upon graduation, I went to work as a claims adjuster for Farm Bureau (FBI). I had always had old "junkie" cars that I kept pieced together and running the best I could, and was attracted by the company car. Also, aptitude tests that I took at that time scored very high for an adjusting career.

We moved to a rented farm house in southeast Iowa, and were there for about five years when Farm Bureau had an opening for a Regional Manager on the Federation side of the organization in southwest Iowa, closer to my home town. I took that job, and Marlene became a district sales Manager with Avon, so we both had company cars and life was finally comfortable, financially. I still had my strong work ethic, and excelled at this quasi-political job until 1978, when I was approached by a seed corn company with an offer to be a sales manager for Nebraska and Southwest Iowa.

In 1979, soon after I started my seed corn career, the doctors told me I probably only had a few more months to live because of the condition of my colitis. On December 19 of that year, they removed my entire colon and a large part of my small intestine. With that surgery, I became pain-free for the first time in my memory.

The family-owned seed corn company sold out to British Petroleum in the eighties, and most of the sales managers and I declined to go with them. I applied to Farm Bureau to come back as an adjuster, and was hired again in 1987.

I was assigned three counties, but volunteered to also work the two counties I was driving through to get to them, making me the highest volume adjuster in the company. I worked long hours and excelled at that, as well as taking professional classes at a rate never before attempted. By doing that, and also coming up with some better ways of doing things, I got noticed and promoted. Once I had all of my professional designations, (CPCU, CLU, ChFC, AIC and AU) I also began teaching several classes to other employees. To make a long story short, I kept adding value to the company and coming up with successful proposals and implementing them until I became Claims Administration Vice President. In 1997, I was asked to rewrite all of Farm Bureau's policies and combine them into a totally unique package policy. I did that in record time (working extremely long hours) and gave them the modular package policy they are now using as their exclusive product. In addition, I was writing a quarterly newsletter that was being circulated around the country and was managing the subrogation and call center departments (which I proposed and developed from scratch), the property claims area, the physical damage claims area, the work comp area, the medical claims review area, the claims information technology area, etc. all of which were functioning at extremely high levels.

My performance and contributions were reflected in my annual reviews, which were in the top 3-5% of the company for 13 consecutive years. That was my status with the company at the time of my first demotion in 2000, which also affected several others.

In 2003, all claims department employees over age fifty with a title of supervisor and above were demoted on the same day. In my case, I was replaced with a person I had hired who was in her early forties, but who did not have the required skills for the position as stated on the company job description, nor did she have my breadth of experience.

I filed an age discrimination suit in Federal Court, and a jury ruled in my favor after a very aggressive week-long trial in 2005. FBL appealed to the 8th Circuit on the "mixed motive" jury instruction, and we ended up in the U.S. Supreme Court in 2009. The High Court accepted certiorari on the single issue of whether direct evidence was required to obtain a mixed-motive jury instruction. Rather than answer that question, however, they vacated the 8th Circuit's decision, ignored decades of precedent and the clear intent of the ADEA, and set a new standard of proof for age discrimination.

In the meantime, I endured seven years of retaliation at FBL, and retired in December, 2009 because the stress was exacting a physical toll.

I've learned that some of the platitudes I've heard over the years are true. One of those is that "justice delayed is justice denied". It's been more than seven years since the wholesale demotions that started my case. That is a long time to go to an office every day knowing that I would endure retaliation for exercising a legal right. This all began in January of 2003, in a much different economic environment. My employer merged with the Kansas Farm Bureau. However, they did not want to add any more employees who were over the age of 50, and offered all the Kansas employees who were over 50 with a certain number of years of employment a buyout, to purge them from the company. At the same time, in Iowa and the other states of operation, they demoted virtually everyone who was over 50 and was a supervisor or above. They claimed that this was not discrimination, but simply a reorganization.

Now, if I may, I want to put my case and life in context for what is the much larger and broader issue of age discrimination.

My family, on both sides, has always been very conservative, in lifestyle and politically. My great-uncle was H.R. Gross, congressman from Iowa's third district from 1948-1968. His moniker was "watchdog of the treasury". Prior to that, he was the news broadcaster for WHO radio in Des Moines, Iowa at the same time as Ronald Reagan.

I am a hard-working, patriotic 61 year old, as are my friends. I did not pursue this case just for myself. I had watched the new management at FBL push the envelope of what they could get by with further and further without being challenged. Most people are simply just not in a position to fight back, financially, emotionally or intellectually. I

was in that position, and I was raised to always stand up to bullies. Many of my friends are also farm or small town "kids" who now feel like they are the forgotten minority. Many of them have been forcibly retired or laid off. Some have been aggressively looking for work for months, only to find doors closed when they reveal the year they graduated. Others have accepted janitor jobs in spite of successful careers and college educations. They all know that age discrimination is very real and pervasive. They are coloring their hair and doing everything possible to look young enough to get an interview. This fight has become more about them than it is for me. I am just one person in this fight, but I know that what happens here will affect literally millions. That is what this is about, making the protection of the law for older people no less than the protection afforded to people of color, for women, or for people of different faiths.

One of the things I have always counted on was the rule of law. I believed it was consistent, it was blind, and it applied to all equally. If the rule of law had been applied to my case, I would have won at the Supreme Court level. Instead, they threw out 20 years of case law precedent and gutted the clear intent of congress and the ADEA. The jury in my case heard the law as written, listened to a week of testimony from both sides, and applied the law to the evidence. They didn't parse each word like the attorneys and judges tend to do, they just measured the law as stated against the evidence. As Souter said during the oral arguments, "juries are smarter than judges".

Age discrimination suits, I've learned, are very hard to win under any rule of law, and only a small percentage of them prevail. And, the process is onerous and not well known to anyone but lawyers who specialize in that area of practice. For instance, if a complaint is not filed with the Civil Rights Commission within three-hundred days and a Right to Sue letter is not issued by them, the claim is statutorily estopped. That process eliminates frivolous lawsuits not only because the short time frame is not well known, but also because the Commission will not grant a Right to Sue letter unless a prima facie case is shown. Once I received the Right to Sue Letter, it took two years to get to a jury trial. After a jury of my peers heard the evidence and the law and decided in my favor, the appeals process began four years ago. We are now facing the prospect that we could be starting all over with a new trial under a new set of rules, five years after the first trial. In that time, witnesses have moved out of state and memories have faded. While we are confident that our evidence will meet even the new higher standard, a new trial and new round of appeals could end up with this litigation consuming 20 percent of my life instead of the 10 percent it has already exacted. That, in itself, is unjust and extremely stressful.

I feel like my case has been hijacked by the high court for the sole purpose of rewriting both the letter and the spirit of the ADEA. I believe the overwhelming majority of my fellow citizens share my disappointment in activist judges, from either party, who use their personal ideology to misinterpret the law as clearly intended. In this case, the clear intent was to abolish discrimination in the workplace, not to make exceptions for it. I am especially mortified when the only people (judges) who are immune from age discrimination vis a vis their lifetime appointments, can rewrite laws that are designed to protect people in the "real" world.

As our former Iowa Lieutenant Governor recently stated in an editorial, "the party of Abraham Lincoln is against discrimination in all its forms". She (Joy Corning) happens to be a Republican, but this should be a non-partisan issue. The branch of government closest to the people long ago recognized that age discrimination was a problem, and they legislated against it. I relied on that legislation. Now, it appears, the Supreme Court has decided that age discrimination is not like all the other forms of discrimination and should have it's own set of (much tougher) rules. To accomplish this outcome, the Court had to disregard its own rules. They did not address the single issue upon which certiorari was granted, and they allowed the opposing side to introduce for the first time an entirely new argument that had not been previously raised nor briefed. This was clearly motivated by ideology, much like it was in the Lily Ledbetter case. In both instances, the Court seemed to be directly challenging the congress to write new and tighter legislation if they don't want 5 lifetime appointees to circumvent their clear intent. I don't know Lily Ledbetter, but I think all citizens owe both her and congress a "thank you" for correcting a clearly unjust ruling. It is my understanding, however, that while Ms. Ledbetter got an act named after her, she still did not receive justice in the way of an award. That was unfair both to her and to her attorneys who, judging from my own experience, put in countless hours fighting for her and for a common sense ruling.

My own attorneys, Beth Townsend and Mike Carroll from Des Moines, Iowa, have likewise been fighting tirelessly on my behalf for over seven years without a dime of compensation. They took this case on a contingency basis because they believe in me, in the evidence, and now in the need to get some essential corrective action from our elected representatives. This case has become much larger in scope than we ever imagined, and thus much more expensive. I have personally spent over \$30,000 in costs and expenses. That is money that was intended to help my grandchildren get a college education so they wouldn't have to starve their way through like I did.

I have been encouraged by the comments made about my case by Senators Harkin and Leahy, Representatives Miller and Andrews, and others. And I am grateful to all who signed on as sponsors. However, I am also keenly aware of the current agenda faced by this congress. I am hopeful that each of you recognize that this also needs immediate attention. Headline after headline have proclaimed that it is now easier for employers to discriminate based on age, following the decision in my case. I am not at all comfortable with having my name associated with a decision that is now causing pain to other employees in my age bracket simply because I took a stand seven years ago. And, as expected, my employer is pushing for a new trial as quickly as possible to take advantage of the new court-made law before it can be corrected. For both reasons, I urge corrective legislation be taken as soon as possible, but there has recently become another reason that is even more compelling:

The tentacles of the Court's decision into other areas of employment discrimination are many, and growing. There have already been hundreds of Federal Court cases citing *Gross v. FBL* to deny access to the legal system, or to impose the new and much higher standards of proof on victims of workplace discrimination, ranging from the Americans

with Disabilities Act to the Juror Protection Act, and the list is growing monthly. This is an example of how one seemingly innocuous decision on one case, that went largely unnoticed by the public and media, can have serious negative consequences for all workplace discrimination victims, except those covered under Title 7. Congress has enacted legislation to prevent discrimination in each of those areas, and the courts are using *Gross v. FBL* to diminish the civil rights of millions by applying the decision universally. In one day, the civil rights advancements congress achieved over the past four decades were seriously set back by a 5 to 4 decision on an issue that was not presented to them through the appeals process.

I hope my story puts a real and human face on this issue for you. I am before you as a man who agonized over the decision to pursue this case, knowing it would not be an easy ride, and that I would effectively be burning my career bridges behind me once I was branded as "litigious". My wife and I prayed about it, decided it had to be done, and then we left the outcome in God's hands. We never dreamed it would end up here. If my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God's plan for my life.

What you do here with what the Court did to your law may or may not help me, but I know for sure you are in a position to help millions of your constituents who have stories like mine. Justice Thomas challenged you to clearly state that age has to be a "motivating factor" in age discrimination if that is what you intended. The Protecting Older Workers Against Discrimination Act does that, and I urge you on behalf of myself and millions of others who want to continue working, to pass it in the same bi-partisan spirit you've shown in the past on civil rights issues.

Sincerely and Respectfully,

Jack Gross, CPCU, CLU, ChFC, AIC, AU

Licia L. Harper
The IHIELP
Detroit, MI 48214

May 18, 2010

The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Majority Leader Reid, Minority Leader McConnell, Chairman Leahy and Ranking Member Sessions:

As a young African-American woman in my 20's, and the creator of the Hip Hop Entertainment Law Project (IHIELP), I write this letter to express my avid and enthusiastic support for President Obama's nomination of Elena Kagan to serve on the Supreme Court of the United States.

Majority Leader Reid, Minority Leader McConnell, Chairman Leahy, and Ranking Member Sessions
May 18, 2010
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In March 2008, I contacted Ms. Kagan regarding my interest in developing HHELP, which seeks in part to motivate high risk inner city youth in school by introducing them to various careers on the business side of the music industry; at Harvard Law School due to Harvard's extensive research into the School to Prison Pipeline as well as Ms. Kagan's well-known commitment to public and community service. Thus, I felt it was important to voice my support of Ms. Kagan's nomination because Ms. Kagan is the ideal candidate for Supreme Court Justice.

Elena Kagan has the rare ability to view the facts of an issue independently within the context of the circumstances without interposing her personal viewpoints or beliefs. Consequently she is able to gain a true understanding of the viewpoints of all sides which results in balanced, fair, and unbiased decisions based on the relevant facts. Her decisions are rational and fair yet not over-reaching. She is flexible yet pragmatic.

One of Ms. Kagan's important goals as Dean of Harvard Law School was to impress upon students the importance of public and community service. The way in which she achieved this was by stressing the importance of serving the community outside the Harvard gates. I for one can attest to this having created a Hip Hop based project that Ms. Kagan not only supported but embraced solely because it promotes diversity and serves a community of youth society as a whole tends to ignore.

In September 2008, I began developing HHELP with the support of Harvard Law School organizations and research institutes as a result of Ms. Kagan's instrumental role in bringing the Hip Hop Entertainment Law Project to Harvard Law School. To date, HHELP has co-organized two extremely successful panels geared towards high risk youth at Harvard Law School; and HHELP along with the resulting symposiums has changed the lives of several high risk inner city youth for the better. Consequently, youth who less than two years ago were deemed "high risk" and whose end goal looked to be incarceration or death are now motivated to do well in school with goals of being accepted to attend Harvard College or Berkley School of Music.

Majority Leader Reid, Minority Leader McConnell, Chairman Leahy, and Ranking Member
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Ms. Kagan is uniquely yet highly qualified for the Supreme Court because of her strong commitment to civil rights, human rights, the equitable administration of justice for all citizens, due process, fairness, and a commitment to the rule of law not the advancement of her personal beliefs or policies; and I am a testament to her commitment to diversity, fairness, and community outreach.

Sincerely,

/s/Licia L. Harper

Licia L. Harper
Creator of the Hip Hop Entertainment Law Project(HHELP)

cc:
Senator Herb Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin
Senator Benjamin L. Cardin
Senator Sheldon Whitehouse
Senator Ron Wyden
Senator Amy Klobuchar
Senator Edward E. Kaufman
Senator Arlen Specter
Senator Orrin G. Hatch
Senator Charles E. Grassley
Senator Jon Kyl
Senator Lindsey Graham
Senator John Cornyn
Senator Tom Coburn

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June 17, 2010

Hon. Patrick J. Leahy
 Chairman, U.S. Senate Committee on the Judiciary 433
 Russell Senate Office Building
 Washington, D.C. 20510

Hon. Jefferson B. Sessions
 Ranking Member, U.S. Senate Committee on the Judiciary
 335 Russell Senate Office Building
 Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

We the undersigned professors of law write in support of the confirmation of Elena Kagan as an Associate Justice of the United States Supreme Court.

Solicitor General Elena Kagan has distinguished herself as an exceptionally intelligent, knowledgeable, and fair-minded lawyer who would serve the Court with deep respect for the rule of law. She has extensive knowledge of the Court and its role in American society. After clerking for Judge Abner Mikva, she worked at the Supreme Court as a clerk for Justice Thurgood Marshall. For the past year, she has represented the United States before the Court as the nation's first female Solicitor General. For many years as a scholar at the University of Chicago School of Law and Harvard Law School, she studied and wrote about the Court and our other branches of government. She also worked in both the White House and Congress and, therefore, has a first-hand understanding of the work of the Court and its interactions with the executive and legislature.

Ms. Kagan's stellar academic record at Princeton, Oxford, and Harvard Law School is a testament to her intellect and extraordinary work ethic. That she went on to serve in government as senior counsel to then-Senator Joe Biden, who was chair of the Senate Judiciary Committee and as President Bill Clinton's Associate White House Counsel, deputy assistant to the President for Domestic Policy, and deputy director of the



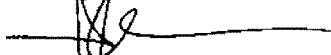
Honorable Patrick J. Leahy
Honorable Jefferson B. Sessions
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Domestic Policy Council speaks volumes about her commitment to public service and our country. When not working in government, Ms. Kagan was helping to strengthen the profession by educating young minds as a professor at the University of Chicago School of Law and as the first female Dean of Harvard Law school.

Ms. Kagan is uniformly described as a brilliant lawyer by colleagues, but she has also demonstrated her deep understanding of people and institutions, most notably in her leadership of Harvard Law School. She is widely credited with making peace among a divided faculty while, at the same time, winning strong reviews from a student body whose depth and diversity increased during her tenure.

Ms. Kagan will bring to the Supreme Court years of study of the law, a keen intellect, and experience as a law clerk, academic, presidential advisor, and the nation's chief litigator. She is exceptionally well qualified to take her place on the Court as an Associate Justice. We urge her speedy confirmation.

Sincerely,



William A. Harrison
Adjunct Professor of Law
William S. Richardson School of Law*
University of Hawai'i at Manoa

* School affiliations are listed for identification purposes only, and shall not be construed as the endorsement of any institution.

June 24, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Jeff Sessions
Ranking Minority Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Ranking Member Sessions:

We write in support of Solicitor General Elena Kagan's confirmation as an Associate Justice of the United States Supreme Court. As alumni who graduated during Elena Kagan's five-year tenure as Dean of Harvard Law School, we are representative of the vastly divergent backgrounds, interests, and accomplishments that characterize each class of Harvard Law students. Some of us anticipate that we would disagree with Elena Kagan's judicial philosophy and the opinions she would author or join while on the bench. But we are united in our belief that Elena Kagan possesses the intellectual rigor, measured judgment and fairness required to serve on the Supreme Court. We believe that Elena Kagan is an exceptionally well-qualified nominee who should be confirmed.

As the Dean of Harvard Law School, Elena Kagan often remarked that the Law School community was her extended family. In our shared experiences, we found that she treated everyone at the Law School accordingly. She demanded excellence of students, faculty, and staff alike, but reminded us that divisive rivalries had no place at an institution dedicated to the intellectual growth of its students. She tirelessly pursued her vision of Harvard Law School as a city rich in opportunities, where a student bearing any belief or perspective could find a welcoming niche while also cohering with a larger community.

Dean Kagan's message was powerful and enduring, largely because she led by example. Seemingly everywhere at once on campus, she regularly attended academic and extracurricular activities for student organizations of widely differing stripes and purposes. Indeed, a striking variety of student organizations—scholarly, social, political, charitable, and more—flourished under Dean Kagan's leadership, in significant part because she encouraged students to act on their passions by founding new student groups or leading existing groups in new directions.

She also encouraged students with legal and political ideas different from her own to re-engage by hiring faculty members with diverse viewpoints and creating a culture that rewarded intellectual diversity. Her approach to groups as divergent as the Federalist Society and the American Constitution Society was always one of support, and her goal was always to create an atmosphere of healthy debate. We have all benefited from her commitment to intellectual excellence and diversity—both during law school and after graduation.

At critical moments when conflicts arose, Dean Kagan was a fair and neutral arbiter who effectively built consensus to overcome issues large and small. Her thoughtfulness, pragmatism, and even-handed approach to mediating conflicts quickly defused tensions among factions of students and led to workable resolutions. Students on both sides of a dispute frequently left her

office frustrated that she had not exclusively taken their side, yet respectful of the integrity of her decision-making process and mutually satisfied with the end result.

Dean Kagan also enhanced the student experience by significantly expanding the Law School's commitment to public service and clinical programming. Clinical placements at the Law School more than doubled during Elena Kagan's deanship, and new clinics such as Child Advocacy and Environmental Law and Policy quickly gained popularity. Harvard Law School now offers nearly thirty clinical opportunities and hundreds of externships, which provide students hands-on legal and ethical training while simultaneously serving the public interest and increasing access to pro bono legal services.

This focus on clinical and public interest programming was part of Dean Kagan's larger effort to establish Harvard Law School as the gold standard of an educational institution that merged academic rigor with civic responsibility—a successful concept that came to define her tenure as Dean. Her overwhelmingly positive impact on student life at the Law School has garnered much praise, and rightfully so. She reinvigorated the human element on campus, where her energy, generosity, and warmth created an atmosphere in which students felt empowered to follow her example. For instance, when hurricanes devastated the Gulf Coast in the 2005-2006 academic year, Dean Kagan announced that the Law School would accept displaced law students from institutions such as Loyola and Tulane for enrollment as visiting students. Students at the Law School followed by organizing fundraisers, charitable events, service-oriented activities, and other efforts to harness the talents and resources of the school's students and faculty—all made possible by the resources and support provided by Dean Kagan and her administration.

Elena Kagan's impact on Harvard Law School and its students is perhaps best illustrated by a singular moment in 2007, when she was being considered for the Harvard University presidency. Upon learning that Dean Kagan was not selected for the position, students quickly organized an event to show excitement and relief that she would remain at the helm of the Law School. A few days later, the campus gathered to celebrate, many wearing t-shirts bearing slogans such as "I (heart) EK." Nearly six hundred students, faculty, and staff joined the largely impromptu event. One faculty member who had taught at the Law School for nearly thirty years remarked publicly that he believed the event was unprecedented for Harvard.

The same factors that prompted our fellow students to organize and attend that celebration in 2007 now motivate us to write in support of her confirmation. Although many differences define us as a group, we are all profoundly grateful for the countless ways in which Elena Kagan touched our lives and shaped our careers. And each of us believes deeply that Elena Kagan was a remarkable leader of our law school who is eminently qualified to serve on this nation's highest court.

Respectfully,



Kevin M. LoVecchio, Class of 2007
Recipient, Righeimer Prize for Student Citizenship



Joshua S. Gottheimer, Class of 2004
Editor, Journal on Legislation

On behalf of the following Harvard Law School alumni:

Class of 2004:

Wade Ackerman—*President*, Law School Council
 Jocelyn Benson—*Editor*, Harvard Civil Rights-Civil Liberties Law Review
 Anjan Choudhury—*Head Marshal*, Class of 2004 Marshals
 James Gignac—*Executive Director*, Harvard Legal Aid Bureau
 Brandon Hofmeister—*Recipient*, Chayes Fellowship for International Public Service
 Dan Rearick—*Student Attorney*, Harvard Legal Aid Bureau
 John S. Williams—*Editor*, Harvard Civil Rights-Civil Liberties Law Review

Class of 2005:

Charlotte S. Alexander—*President*, Harvard Legal Aid Bureau
 Allison Elgart—*Editor-in-Chief*, Harvard Civil Rights-Civil Liberties Law Review
 Lee Rudofsky—*President*, HLS Republicans
 Clifford Sarkin—*President*, American Constitution Society
 Voltaire R. Sterling—*Head Marshal*, Class of 2005 Marshals
 Beth A. Stewart—*Former Special Counsel*, Senate Committee on the Judiciary, Sen. Specter (R)
 Jill Tauber—*Outreach Director and Student Attorney*, Harvard Legal Aid Bureau
 Ryan L. VanGrack—*Co-President*, HLS Democrats

Class of 2006:

Nisha Agarwal—*Vice-President for Membership*, Harvard Legal Aid Bureau
 David S. Burd—*Co-President*, HLS Democrats
 Eun Young Choi—*Editor-in-Chief*, Harvard Civil Rights-Civil Liberties Law Review
 Adam Harber—*Winning Team*, Ames Moot Court competition
 Eric R. Haren—*Co-President*, Harvard Journal on Legislation
 Jeffrey E. Jamison—*Founder*, Legal Services Center Student Advisory Board
 Tracy Larson—*Officer*, Federalist Society
 Shawn O'Connor—*Board Member*, HLS Lambda
 Rachel Rebouché—*Editor-in-Chief*, Harvard Journal of Law & Gender
 Lowell J. Schiller—*President*, HLS Republicans
 Zoe Segal-Reichlin—*Co-Founder and Coordinator*, HLS Gender Justice Working Group
 Michael Steven Stein—*Notes Editor*, Harvard Law Review

Class of 2007:

Daniel F. Benavides—*Founder and President*, Harvard Real Estate Consortium
 Damaris M. Diaz—*Co-Chair*, La Alianza
 Elizabeth Dodson—*Co-Chair*, 2005 Public Interest Auction
 Vibhuti Jain—*Co-President*, HLS South Asian Law Students Association
 Bryce Klempner—*Co-Founder*, Harvard Association for Law & Business
 Adam R. Lawton—*Executive Editor*, Harvard Law Review
 John A. Mathews II—*President*, Harvard Black Law Students Association
 Michele A. Murphy—*Co-Chair*, La Alianza
 Alexi Nunn—*Head Marshal*, Class of 2007 Marshals
 Miriam Seifter—*Inaugural Fellow*, HLS Environmental Law Fellowship
 Lucy Stark—*Co-Editor-in-Chief*, Harvard Journal of Law & Gender
 Ryan D. Taylor—*Co-Founder & Co-Chair*, Harvard Negotiators

James Weingarten—*Co-Founder*, Harvard Law & Policy Review

Class of 2008:

Amy C. Barker—*Editor*, Harvard International Law Journal

Kathryn Baugher—*President*, HLS Student Government

Margaux Hall—*Recipient*, Kaufman Pro Bono Service Award

Sarah M. Isgur—*President*, Federalist Society

Rochelle Lee—*Fellow*, Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics

Derek Lindblom—*President*, Harvard Law & Policy Review

Sandra Pullman—*Founder*, HLS American Civil Liberties Union

Ganesh Sitaraman—*Inaugural Public Law Fellow*, Harvard Law School

Alex Spiro—*Recipient*, Association of Corporate Counsel Law Student Ethics Award

Brandon Weiss—*Co-Editor-in-Chief*, Harvard Human Rights Journal

Andrew M. Woods—*Teaching Fellow*, College of Economics

June 29, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
D-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Jeff Sessions
Ranking Minority Member
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Ranking Member Sessions,

I came to Harvard Law School (“HLS”) in 2005 because of the remarkable transformation that Solicitor General Elena Kagan had accomplished as its dean. Today, having finally realized my childhood dream of becoming a civil rights poverty lawyer—running community-based legal aid clinics for low income youth and their families in Chicago, I reflect upon the enormous debt I owe to Elena Kagan for what she has enabled, and inspired me, and thousands of others, to achieve. Solicitor General Elena Kagan has helped and inspired countless number of public servants—past, present, and future—of which I am only one.

I write in support of Solicitor General Kagan’s confirmation as an Associate Justice of the United Supreme Court not only in gratitude for the incredible, lasting impact she made to the support, development, and happiness of the public servants educated at HLS but also in recognition of her extraordinary commitment to public service both personally and professionally, intellectual acumen, visionary ability to understand and bridge different perspectives and discourses, extraordinary worth ethic, and attentiveness to detail that would make her an ideal member of the Supreme Court.

During her tenure as Dean of Harvard Law School, Elena Kagan radically changed the institution, creating innovative programs, improving resources, and fostering a supportive community for public interest law students. In my final year, for example, Elena Kagan made possible HLS’s inaugural Public Service Reunion—the first of its kind at any law school in the country. The celebration of public interest law brought together public interest HLS graduates from different generations and practice settings to highlight the achievements of those who have dedicated their careers to public service. More importantly, it created a network for past, current and future HLS students to connect and share their efforts to serve their communities and country. The Reunion represents Elena Kagan’s benchmark as Dean of Harvard Law School: creating a thriving, supportive community, at and beyond Harvard, for students exploring public interest law and instituting the school’s commitment to fostering lawyers committed to serving others. Beyond major new ventures, Elena Kagan also contributed to dramatic improvements of equally crucial programs to enable law students to explore public interest work including building the school’s loan repayment program into the most generous in the country, increasing funding for the Summer Public Interest Fellowships, which allow any and all students to receive

funding for summer public interest job, and expanding the resources available for students seeking post-graduate public interest work.

Through serving as President of the Harvard Legal Aid Bureau ("Bureau"), the oldest student-run legal services organization in the country founded in 1913, and the Harvard ROAD (Reaching Out About Depression) Legal Resource Team ("ROAD"), which provides legal support to low-income women combating mental health issues during my time at HLS, I was extremely fortunate in being able to interact directly with Elena Kagan. Through these interactions, I have personally experienced her unswerving support of students, and the Bureau and ROAD were the recipients of her generous spirit and enthusiasm for helping to mold young lawyers to become public servants. On each occasion when I have asked for assistance for the programs, Elena Kagan thoughtfully provided help in the form of guidance, financial contributions, and administrative support. She frequently made time in her hectic schedule to meet with me about projects I was coordinating. She always responded to e-mails on the same day; sometimes, the responses—always positive and supportive—were written well after midnight. In May 2008, I was responsible for a reception for the graduating student attorneys of the Bureau. Despite the last minute planning and the already extremely packed schedule that she had for commencement, Elena Kagan made sure to fit the event into her calendar because of her appreciation for the immense amount of pro bono work completed by Bureau members. She ensured that we received the funds necessary for the event, spoke eloquently and passionately at the reception about the importance of legal aid work, acknowledged individually each graduating member's thousands of hours of pro bono work in front of their families, and presented each of them with a token of appreciation. Elena Kagan did all this while she was supposed to be preparing her speeches for the commencement activities occurring the very same day. The guests, particularly the graduating Bureau members and their families, were tremendously moved by her presence and words on the special day. More importantly, in speaking to her, I have always been impressed by her genuine excitement about my projects. I generally left my meetings with her with greater motivation for and eagerness about my work because of the genuine encouragement and affirmation she offers for public interest work. I cannot understate the importance to public interest law students of having the support of someone like Elena Kagan, who truly cares for the work and who also has dedicated her life to the public good.

Finally, I would like to describe two specific meetings which embody the compassion, integrity, and inspiration that Elena Kagan possesses. When I approached her about supporting the Harvard Law School Giving Tree, a holiday gift-drive for the children of families served by the clinical and pro bono programs at HLS, her instant response was to ask me what I would like for her to do to support the project. To each of my suggestion, she immediately agreed eagerly. Elena Kagan also made a donation out of her own pocket that served as an example to students, faculty, and staff—inspiring them to make their own donations. With her support of the program, we were able to raise almost 1000 gifts for low-income children, and more importantly, united the law school community together in a worthwhile cause.

Secondly, as a member of LAMBDA, HLS's lesbian, gay, bisexual, transgender, and queer ("lgbtq") student group, I was present when Elena Kagan spoke to us about her position on the Solomon Amendment and the military's "Don't Ask, Don't Tell" ("DADT") policy, to which, as a queer man, I am staunchly opposed. She reflected the greatest integrity and thoughtfulness; her

answers to our concerns were honest, forthright, intelligent, and compassionate. While much has been written about her position, and therefore does not require further elaboration, suggestions that Elena Kagan is anti-military or that her decisions sought to punish military recruiters are grossly inaccurate. Indeed, even as Elena Kagan expressed support and sympathy for the consequences of the DADT policy on lgbtq law students and her belief that it was wrong, she clearly also expressed her support of the military and lauded the courage and honor of military servicemen.

In addition to the qualities upon which I have tried to reflect, Elena Kagan also embodies phenomenal humanity, intense passion, and unsurpassed compassion, which inspire those fortunate enough to know her to follow their ideals and become even better public servants and human beings. As an administrator, educator, and role-model, Elena Kagan has touched the minds, hearts, and souls of countless people: leaving them transformed for the better. I believe that, as a justice, she would similarly inspire those who would appear before her, while using her incomparable intellect and skills to uphold the highest standards of the United States Constitution. She represents the very best that the legal world has to offer the people of this country.

Respectfully,

Lam Ho
Juris Doctor, Harvard Law School, 2008

Statement of Peter B. Hegseth

before the

United States Senate Committee on the Judiciary

concerning

“The Nomination of Elena Kagan to be an Associate
Justice of the Supreme Court of the United States”

July 1, 2010

Chairman Leahy, Ranking Member Sessions, and Members of the Committee, thank you for the opportunity to be here today. It's a privilege to take part in these proceedings.

My name is Pete Hegseth and I am the Executive Director of Vets for Freedom, an organization of Iraq and Afghanistan veterans dedicated to supporting America's war-fighters, and their mission on the battlefield. I received my commission from Princeton University in 2003, and have since served two tours with the U.S. Army, first at Guantanamo Bay, Cuba, and later in Iraq with the 101st Airborne Division. I'm currently an infantry Captain in the Massachusetts Army National Guard, and a graduate student at Harvard University. I'm before this committee today as a citizen and a veteran, and do not purport to speak on behalf of the military.

I will start with the bottom line up front. We are a nation at war; at war with a vicious enemy, on multiple fronts. I've seen this enemy first hand, as have a precious few from my generation. The enemy we face detests, and seeks to destroy, our way of life while completely ignoring, and exploiting, the laws of warfare.

This context motivates my testimony today. I have serious concerns about Elena Kagan's actions toward the military, and her willingness to myopically focus on preventing the military from having *institutional and equal access* to top-notch recruits at a time of war. I find her actions toward military recruiters at Harvard unbecoming a civic leader, and unbefitting a nominee to the United States Supreme Court. Ms. Kagan is clearly a very capable academic, and the President has the right to nominate whomever he pleases. But in replacing the only remaining veteran on the Supreme Court in Justice John Paul Stevens—how did we reach a point in this country where we are nominating someone who—*unapologetically*—obstructed the military at a time of war? Ms. Kagan chose to use her position of authority to impede, rather than empower, the warriors who fight, and have fallen, for our freedoms.

I know a number of my fellow veterans will testify to Ms. Kagan's personal support of veterans on Harvard's campus. And Ms. Kagan has had good things to say about our troops, which I appreciate. But, for my money, actions always speak louder than words.

1

And Ms. Kagan's actions toward recruiters—with wars raging—undercut the military's ability to fight and win wars, and they trump her rhetorical explanations.

General David Petraeus, who wrote the book on counterinsurgency and is now tasked with waging war in Afghanistan, calls counterinsurgency “a thinking man's war.” Defeating our enemies, on the battlefield and in the courtroom, takes the best America has to offer. Yet in December of 2004 as you've heard many times already, Ms. Kagan—then Dean of the Harvard Law School—took the law into her own hands, blocking equal access for military recruiters on campus, in direct violation of federal law. Moreover, she even encouraged students to protest, and obstruct, the presence of military recruiters.

These actions coincided with my deployment to Guantanamo Bay; itself a legal maze of graduate-level proportions. Would not the legal situation there, and in the courtrooms of Iraq and Afghanistan, be better off with more participation from lawyers of Harvard Law School caliber? Don't we believe our best and brightest should be encouraged to serve?

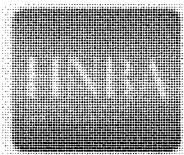
In response to his critique, Ms. Kagan has repeatedly stated that, despite her decision to bar recruiters from the Office of Career Services, the number of military recruits actually increased during her tenure. Let's be clear. This happened *in spite* of Ms. Kagan, not because of her. But I ask a more important question: would not the number have been even higher had she supported recruiters, rather than actively opposing them?

To be fair, I don't begrudge Ms. Kagan's opposition to the so-called “Don't Ask, Don't Tell” legislation; reasonable people disagree about this policy. However, her fierce and activist opposition to the policy was intellectually dishonest and unnecessarily focused on the military.

In emails to students and statements to the press, Ms. Kagan slammed “the military's discriminatory recruitment policy.” Yet as a legal scholar, she knows better. She knows that the policy she “abhors” is not the military's policy, but a policy enacted by Congress and imposed on the military. In fact, after the law was passed, Ms. Kagan went to work for the very man who signed “Don't Ask, Don't Tell” into law—President Bill Clinton. So, for her to call it “the military's policy” is intellectually dishonest, and her opposition to military recruiters at Harvard Law School had the effect of shooting the messenger.

Likewise, while Ms. Kagan sought to block full access to military recruiters, she welcomed to campus numerous Senators and Congressmen who voted for the law she calls “a moral injustice of the first order.” Additionally, Harvard Law School has three academic chairs endowed by money from Saudi Arabia, a country where being a homosexual is a capital offense. So, rather than confront the Congressional source of the policy—or take a stand against a country that executes homosexuals—Ms. Kagan zeroed in on military recruiters for a policy they neither authored, nor emphasized.

In closing, the real “moral injustice” is granting a lifetime appointment to someone who, when it mattered, treated military recruiters like second-class citizens. I urge you to consider this as you consider Ms. Kagan. Thank you for the opportunity to address this important topic, and I welcome your questions.



Román D. Hernández
National President

July 1, 2010

Via Electronic Mail

The Honorable Patrick Leahy
Chairman, U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

The Honorable Jeff Sessions
Ranking Member, U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

The Honorable Harry Reid
Majority Leader, U.S. Senate
522 Hart Senate Office Building
Washington, DC 20410-6275

Dear Senators Leahy, Sessions, and Reid:

On behalf of the Hispanic National Bar Association (HNBA), I write in support of the appointment of U.S. Solicitor General Elena Kagan to serve as Associate Justice of the Supreme Court of the United States.

The HNBA is an incorporated non-profit, non-partisan association that represents the interests of more than 100,000 Hispanic attorneys, judges, law professors, law students, and paralegals in the United States and Puerto Rico. Through its judicial due diligence review process, the HNBA has considered Solicitor Kagan's background and qualifications carefully and in the context of the requirements of the position she seeks.

Based on our review, it is clear that Solicitor Kagan possesses the experience, temperament, and high degree of professionalism required to distinguish herself as a Justice on the Court. The HNBA submits this endorsement with some expression of concern for Solicitor Kagan's less than vibrant record on diversity and community service, principles the HNBA is mindful of in consideration of any nominee. Should Solicitor Kagan be confirmed, we will embrace the opportunity presented by this historic appointment to work with her on these values.

Solicitor Kagan has served as an effective and impressive advocate for the United States government. As the Hispanic community grows in numbers and influence, the HNBA continues

HNBA • 1001 Connecticut Avenue NW, Suite 507 • Washington, DC 20036 • (202) 223-4777 • (202) 223-2324 (fax) • www.hnba.com

HNBA Letter of Endorsement, Elena Kagan
July 1, 2010
Page 2

to advance the participation of Hispanics in the legal profession and ensure that the Supreme Court becomes as diverse as the country it serves. We look forward to working with Solicitor Kagan in promoting a fair, impartial judiciary that understands of the role and gravity of the Supreme Court as the ultimate arbiter of justice in our society.

Sincerely,



Román D. Hernández
HNBA National President

cc: Zuraya Tapia-Hadley, HNBA Executive Director
Diana Sen, HNBA President-Elect
Robert Raben, Chair, HNBA Committee on Judicial Endorsements
Ramona E. Romero, HNBA White House Liaison
HNBA Board of Governors

Congress of the United States
Washington, DC 20515

June 17, 2010

The Honorable Patrick J. Leahy
 Chairman
 Senate Judiciary Committee
 SR-433
 Washington, D.C. 20510

The Honorable Jeff Sessions
 Ranking Member
 Senate Judiciary Committee
 SR-326
 Washington, D.C. 20510

Dear Senator Leahy and Senator Sessions:

As Members of the House of Representatives, we would like to express our strong support for the President's nomination of Solicitor General Elena Kagan to the Supreme Court and urge the Senate's confirmation.

Solicitor General Kagan is a superb candidate who will bring a wealth of legal experience to the Court as one of the nation's leading lawyers and scholars. In particular, her experience as a White House attorney and policy aide, law school Dean, and Solicitor General, will serve her well as a Supreme Court Justice.

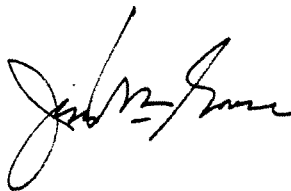
As Solicitor General of the United States, Kagan is tasked with arguing the most important cases before the Supreme Court. Last year the Senate recognized her as eminently qualified for this position by confirming her nomination in a bipartisan fashion. The important role of the Solicitor General has led some to refer to her as the "Tenth Justice of the Supreme Court."

We support the President's decision to nominate an individual who can bring such diversity of experience to the Court. Indeed, Senators on both sides of the aisle have encouraged Presidents to look outside of the so-called "judicial monastery" and have supported the nomination of individuals without prior judicial experience. Throughout our nation's history, several justices have served on the court without prior judicial background – a group that includes John Marshall, Louis Brandeis, Earl Warren, and William Rehnquist, to name a few.

Solicitor General Kagan is also noted for her ability to achieve consensus on complex and sometimes contentious legal or policy issues – a much-needed quality on the Court. Her career has been one of a trailblazer. She was the first woman to serve as Dean in Harvard Law School's 186-year old history. She is the first woman to serve as Solicitor General in representing the U.S. Government before the Supreme Court. Her nomination follows in this same trailblazing tradition as only three women have served as Justices on the Court. If confirmed by the Senate, three women would hold seats on the Court for the first time in our nation's history.

We urge the Senate to consider Solicitor General Kagan's nomination expeditiously and to confirm her to the Supreme Court.

Sincerely,

PRINTED ON RECYCLED PAPER

Letter to Senate Judiciary Committee re: Kagan nomination

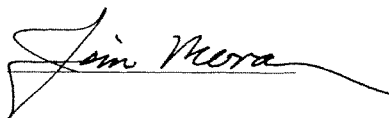
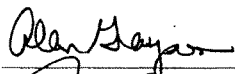
<u>Howard P. Berman</u>	<u>Bill Delahunt</u>
<u>Jon Schukowsky</u>	<u>Henry A. Waxman</u>
<u>David Price</u>	<u>Michael M. Harkin</u>
<u>Mike Quigley</u>	<u>Mazie Hirono</u>
<u>Julie Spier</u>	<u>Grace I. Hightower</u>
<u>Phil Hare</u>	<u>Tom Baldwin</u>
<u>Frank Lautenberg</u>	<u>Debbie Wasserman Schultz</u>
<u>Lucille Roybal-Allard</u>	<u>Lizzy L. Woodsey</u>
<u>Pete Stark</u>	<u>Steve Roth</u>

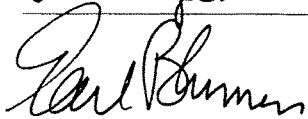
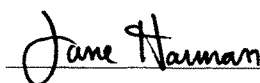
Letter to Senate Judiciary Committee re: Kagan nomination

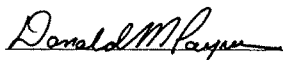
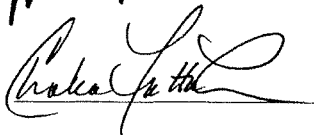
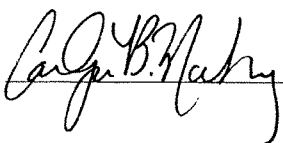
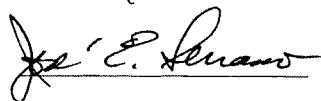
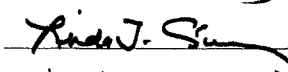
<u>Dan Claitor</u>	<u>Joe Baca</u>
<u>Bob Mendenhall</u> CA10	<u>Russ Holt</u>
<u>Chris Mone</u>	<u>Carolyn McCall</u>
<u>Ed Bradley</u>	<u>Nita Lowey</u>
<u>John G. ...</u>	<u>Alcee D. Hastings</u>
<u>NY-09</u>	<u>Joe ...</u>
<u>Mike Honda</u> (CA15)	<u>Frank Pallone</u>
<u>Paul ...</u> CA-47	<u>Susan ...</u>
<u>...</u>	<u>Sam ...</u>

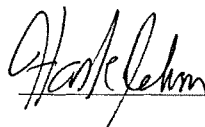

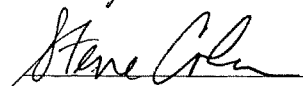
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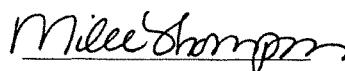
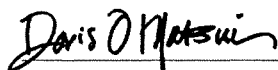
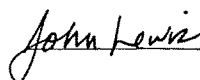
John W. Oliver MA-1 <u>Schulmeyer</u>	Jan M. O'Leary <u>Landrum</u>
Dutch Ruppersburg <u>Ruppersburg</u>	Chris D. Rodriguez <u>Robt. B. O'Leary</u>
W. Lawrence H. H. H. <u>Charles W. Heller</u>	Ernest L. Engel
Tim Hyn	Ed Mackay
Bob Z. Johnson	Elyse F. Temming
Wm. Lacy Clay	Bill Gasperelli

Signatories:

1. Rep. Adam B. Schiff
2. Rep. James P. McGovern
3. Rep. Howard L. Berman
4. Rep. William D. Delahunt
5. Rep. Janice D. Schakowsky
6. Rep. Henry A. Waxman
7. Rep. David E. Price
8. Rep. Michael M. Honda
9. Rep. Mike Quigley
10. Rep. Mazie Hirono
11. Rep. Jackie Speier
12. Rep. Grace F. Napolitano
13. Rep. Phil Hare
14. Rep. Tammy Baldwin
15. Rep. Patrick J. Kennedy
16. Rep. Debbie Wasserman Schultz
17. Rep. Lucille Roybal-Allard
18. Rep. Lynn C. Woolsey
19. Rep. Fortney Pete Stark
20. Rep. Steve Israel
21. Rep. Gary L. Ackerman
22. Rep. Joe Baca
23. Rep. John Garamendi
24. Rep. Rush D. Holt
25. Rep. Dennis Moore
26. Rep. Carolyn McCarthy
27. Rep. Charles B. Rangel
28. Rep. Nita M. Lowey
29. Rep. Joseph Crowley
30. Rep. Alcee L. Hastings
31. Rep. Anthony D. Weiner
32. Rep. Anna G. Eshoo
- ___ (duplicate)
33. Rep. Frank Pallone, Jr.
34. Rep. Loretta Sanchez
35. Rep. Susan A. Davis
36. Rep. John B. Larson
37. Rep. Sam Farr
38. Rep. John W. Olver
39. Rep. Jim McDermott
40. Rep. John Conyers, Jr.
41. Rep. Xavier Becerra
42. Rep. Jay Inslee
43. Rep. Silvestre Reyes
44. Rep. C.A. Dutch Ruppersberger
45. Rep. Ciro D. Rodriguez
46. Rep. Maurice D. Hinchey
47. Rep. Solomon P. Ortiz
48. Rep. Chris Van Hollen
49. Rep. Eliot L. Engel
50. Rep. Tim Ryan
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June 1, 2010

Senator Jeff Sessions
United States Senate
335 Russell Senate Office Building
Washington, D.C. 20510

Re: Application of the "Constitutional Litmus Test" to Elena Kagan

Dear Senator Sessions,

As you are aware, President Barack Obama has nominated Solicitor General Elena Kagan to serve as an Associate Justice on the United States Supreme Court, and she now faces the confirmation process in the U.S. Senate. This letter outlines the Constitutional standard for judicial nominees as well as the relevant evidence surrounding Ms. Kagan. After carefully considering the evidence, we believe you will reach the conclusion that your oath to the Constitution demands that you vote against her confirmation. Accordingly, we urge you to reject her nomination.

I. The Process of Senate Consideration of the Kagan Nomination.

a. The Constitutional Test

The Constitution vests you as a United States Senator with the duty to "advise and consent" as to Presidential appointments to the United States Supreme Court. The U.S. Senate should reject Solicitor General Elena Kagan's nomination to the U. S. Supreme Court because Kagan's record does not support her confirmation under the Constitution's standard.

The Constitution provides that: "[t]he *judicial power* shall extend to all *cases*, in law and equity, arising under *this Constitution, [and] the laws of the United States* " Art. III, Sec. 2 (emphasis added). Simply put, the Constitution confers judicial power upon judges that must be exercised by: (1) performing the judicial function of deciding "cases," (2) under the Constitution and laws of the United States. Accordingly, we believe that your duty to "advise and consent" on the confirmation of judicial nominees would mandate that you only vote to confirm a judicial nominee if that nominee proves by substantial evidence that as a judge: (1) the nominee would perform the function of "deciding cases" while forsaking legislating from the bench, and (2) the nominee would rule according to the "Constitution [and] laws of the United States" while forsaking all reliance upon inapplicable foreign laws. Thus, Article Three of the Constitution

provides a framework of analysis that can be applied to a nominee to the Supreme Court of the United States to determine that nominee's fitness for service.

b. No Constitutional Presumption Attaches with Nomination

The Constitution requires that you as a United States Senator perform the essential of duty of "advise and consent" as to Presidential appointments to the United States Supreme Court. The Constitution does not create a presumption of fitness upon Presidential nominations. The President may be entitled to a certain amount of deference with regard to nominations within his administration and the Executive Branch; however, the Constitution does not provide that the President's nominations to other branches of government, specifically the judiciary, be given deference. A nominee to the Supreme Court, once confirmed, effectively has lifetime tenure. Barring a rare circumstance, like an impeachment, justices serve for the balance of their lifetimes, far longer than the terms of the Presidents and Senators who place them on the bench.

c. The Burden of Proof for Confirmation Rests with the Nominee – not with the Senators and their Constituents.

In cases of lifetime appointments to the Supreme Court, it is appropriate for the burden of proof to lie not with you as a Senator, nor with your constituents, but rather squarely with President Obama and his nominee. As such, Kagan's lack of judicial experience is not a disqualifying factor, but does substantially increase the burden on the White House and on the nominee to prove that she would properly fulfill the Constitutional role of a judge.

In considering whether to confirm any judicial nominee, common sense dictates that the evidence falls into three categories – or types of evidence. The first type of evidence is the past judicial record of the nominee; the second type of evidence is the past non-judicial record of the nominee; and the third type of evidence is the present confirmation testimony and performance of the nominee.

It follows that the strongest type of evidence is type one evidence – the judicial record of the nominee. This nominee does not have a judicial record, and while her lack of judicial record is not fatal, it does substantially increase the burden of proof that she must meet in terms of other evidence. In Kagan's case, the primary evidence in her confirmation will be type two – non-judicial record evidence.

Type three evidence includes evidence that is submitted during the confirmation process, such as a nominee's testimony and performance before the Senate Judiciary Committee. Such evidence should be given far less weight than type one and two evidence because such evidence is not part of the genuine life record of the nominee. If type three evidence should conflict with type one or two evidence, then such conflicting type three evidence should be given little, if any weight. Any conflicting evidence should be resolved in the same way that a job applicant's interview testimony would be resolved when in conflict with that applicant's work history.

II. Elena Kagan's Record Provides Substantial Evidence that She Does not Respect the Constitutional Judicial Role of Deciding Cases and She Believes that Judges May Change the Meaning of the Law and Legislate from the Bench.

The Constitution clearly mandates that the judicial power includes the ability to decide winners and losers in lawsuits, but expressly assigns all law and policy making power to the legislative branch of government. The Judicial Article of the Constitution provides: "[t]he *judicial power shall extend to all cases*, in law and equity, arising *under this Constitution, [and] the laws of the United States*" Art. III, Sec. 2 (emphasis added). But, the Legislative Article of the Constitution provides: "*All legislative powers* herein granted shall be vested in a *Congress* of the United States" Art. I, Sec. 1 (emphasis added).

In short, the first duty of a judge is to exercise "judicial power," and to forsake the exercise of all "legislative power" which is reserved exclusively to Congress. Judges must decide "cases" pursuant to previously enacted legislation from the elected representatives of the People. Accordingly, judges may not legislate from the bench, and judges may not substitute their own view of empathy for the legislative view of empathy.

There are no judicial opinions to research or analyze to determine if Kagan understands and accepts the vital yet limited Constitutional role of the judiciary as Kagan has not served as a judge; however, her record clearly demonstrates that she favors the unconstitutional practice of judicial usurpation of legislative power.

A. Her argument as a Party to the United States Supreme Court in the Solomon Amendment Case¹ Urged the Justices to Participate in Clear Judicial Activism and Change the Clear Meaning and Intent of the Solomon Amendment.

New York Congressman Gerald Solomon authored the Solomon Amendment, which was passed by Congress in 1995. Its purpose and text mandated the withholding of funds from any college that denied, had a policy denying, or effectively denied military recruitment on its campus. It stated: "*No funds* available to the Department of Defense ... may be provided ... *to any educational institution* that has a policy of *denying or which effectively prevents*, the Secretary of Defense from obtaining for *military recruitment* purposes ... entry to campus"² (Emphasis added.)

Elena Kagan, as a party to the Solomon Amendment case, asked the Supreme Court to ignore the clear meaning of the Solomon Amendment and effectively change the law's core meaning. The Solomon Amendment required the denial of federal funds from colleges that barred military recruiters from campus.³ But Kagan urged the Court to disregard the law; arguing that, "The Solomon Amendment's prohibition on funding is triggered only by policies that target the military or its recruiters for disfavored treatment."⁴

Kagan's argument is simply false. The Solomon Amendment is not "triggered only by policies that *target* the military" but rather by *any* policy that "*effectively prevents*" the military

from a campus regardless of whether such policy “targets” the military. Kagan asked the Court to ignore the clear and unambiguous meaning of the law and replace its meaning with one comporting with Kagan’s personal preferences. However, the Supreme Court – eight votes to zero (including Ginsburg and all members of the liberal wing of the Court) – wisely declined to accept Kagan’s invitation to usurp legislative power. The Court upheld the clear language of the Solomon Amendment. One law professor who also participated in the case observed that the Court sent a clear message to Kagan and her fellow would-be usurpers “that the U.S. Supreme Court does not gladly suffer the rank politicization of the law.”⁵

Kagan’s argument favoring extreme judicial activism was unanimously rejected by the Supreme Court; likewise her nomination should be rejected by you and your Senate colleagues.

B. Kagan’s Sworn Testimony Before the Judiciary Committee of the United States Senate Evidences Her Belief that it is Sometimes Permissible for Judges to Engage in Judicial Activism.

During the hearing for her confirmation as Solicitor General, Kagan was asked *in writing* by Senator Specter about her “views of judicial activism.” Kagan commented back *in writing* – presumably after having plenty of time to reflect and choose her words carefully – that “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.”⁶

Kagan’s view is in stark conflict with the Constitution. To say that 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” is like saying “it is a great deal better for one to pay for a television before carrying it out of the store.” The only legal option for one carrying a television out of the store is to pay for it first. Likewise, the only legal option for a judge who would abide by the Constitution is to keep her hands off of the task of “creating justice” and leave it to the elected branches, whether such branches take the lead or not.

Kagan’s contrived deference to the elected branches is a masquerade for her judicial activism. Kagan’s arrogant view of judicial supremacy would allow the elected branches to lead by acting first, so long as she and her fellow paternalistic judicial activists agree with the legislators’ leadership in “creating a more just society.” Kagan’s above testimony when viewed in the context of her arguments in the Solomon Amendment case shows exactly what she would do as a judge. She would legislate from the bench especially when she does not agree with the lead of the elected representatives in creating a more just society. Kagan appears dedicated to justice only when it comports with her personal view of justice. This is a quality that is both personally arrogant and judicially unacceptable.

C. Kagan’s Stated Judicial Role Model is an Activist Judicial Icon of the First Order.

Given Kagan’s lack of judicial experience, her professed judicial role model is of substantial importance in determining how she would function as a Supreme Court jurist. Kagan states that her role model is Justice Aharon Barak of the Israeli Supreme Court. Justice Barak

has been identified by legal commentators from all sides of the political spectrum as one of the most activist judges – if not the leading activist judge – in recent history.

The Hon. Justice Richard Goldstone, a liberal former justice of the Constitutional Court of South Africa and chief prosecutor of the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia, described Aharon Barak as “unashamedly what, in U.S. terms, would be regarded as an ‘activist judge.’”⁷ Goldstone, writing during Kagan’s tenure at Harvard for the Harvard International Law Journal, explained the typical judicial supremacist view that the judiciary is a more mature policy-maker than the people and their elected representatives:

“The popular representatives of the people, not unnaturally or surprisingly, tend to pander to and accommodate the demands of a fearful electorate. It is only the judiciary that can place itself above the fray and dispassionately examine the responses of the legislature and executive to those popular demands. Justice Barak gave the clearest picture of his own judicial philosophy in a lecture he delivered at Harvard Law School in September 2006 upon receiving the Gruber Justice Prize. He is unashamedly what, in U.S. terms, would be regarded as an ‘activist judge.’”⁸

Judge Richard Posner, a respected jurist on the United States Court of Appeals for the Seventh Circuit observed that Justice Barak is a “despot” and is more activist than any judge in the history of the United States: “What Barak created out of whole cloth was a degree of judicial power undreamed of even by our most aggressive Supreme Court justices.”⁹ Posner explains that “Barak bases his conception of judicial authority on abstract principles that in his hands are merely plays on words.... This is not a justification for a hyperactive judiciary, but merely a redefinition of it.” Posner concludes with the ominous observation that in the view of Justice Barak (Kagan’s judicial role model), “the judiciary is a law unto itself.”¹⁰

Not surprisingly, conservative legal scholars don’t disagree with the above assessments of Justice Barak. Judge Robert Bork observed that Justice Barak “establishes a world record for judicial hubris.”¹¹ In his 2003 book “Coercing Virtue: The Worldwide Rule of Judges,” Bork wrote: “Pride of place in the international judicial deformation of democratic government goes not to the United States, nor to Canada, but to the State of Israel. The Israeli Supreme Court is making itself the dominant institution in the nation, an authority no other court in the world has achieved.”¹² Bork continued: “This judicial power grab ‘cannot be understood without reference to one man, Aharon Barak [whose] philosophy, now apparently shared by the [Israeli] court, is that there is *no area of Israeli life that the court may not govern.*’”¹³ (Emphasis added.)

The outrageous philosophy of Kagan’s judicial role model is best seen, however, in his own words. Justice Barak’s judicial philosophy is undeniably activist and an unabashed abuse of power. Barak believes that a “judge has a role in the legislative project,” and that “The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life’s changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.”¹⁴

Justice Barak attempts to excuse his usurpation of legislative power the rubric that "[the judge] must sometimes depart *the confines of his legal system* and *channel into it* fundamental values not yet found in it."¹⁵ Barak's lame excuse for activism would be humorous if it were not utterly despotic. Essentially Barak says that every now and then a judge needs to exceed his power and "channel" into the law new ideas and new meanings that were not yet before found in the law. Presumably, the judge is finding these new meanings in his own heart and in his own observations. The word "channeling" is defined as "the practice of professedly entering a meditative or trancelike state in order to convey messages from a spiritual guide."¹⁶ One would hope that Barak is not literally speaking of gleaning new meanings from the law by entering a trancelike state and meeting with spiritual guides. Regardless, Barak is describing with unabashed arrogance the worst form of judicial despotism that leads judges to change the meaning of laws that do not comport with their personal views.

Barak is not an unknown thinker in the arena of judicial philosophy. He is either loathed or loved, scorned or admired, rejected or emulated. To some he is a "despot," but to others he is a "hero." Elena Kagan considers Barak her hero, the best judge in the world. Introducing him at Harvard Law School, Kagan described him as her "judicial hero;" "[h]e is the judge who has best advanced democracy, human rights, the rule of law, and justice."^{17 18}

D. Conclusion

The first duty of a judge is to exercise "judicial power," and to forsake the exercise of all "legislative power" which is reserved exclusively to Congress. When it comes to judging, Thomas Jefferson properly instructed that "[o]n every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probably one in which it was passed."¹⁹

Were Thomas Jefferson alive today he would surely scold Kagan for her judicial arrogance:

"You seem ... to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so And their power [is] the more dangerous, as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution erected no such single tribunal, knowing that to whatever hands confided, with corruptions of time and party, its members would become despots."²⁰

Elena Kagan has demonstrated through her participation and arguments as a party before the United State Supreme Court, in her testimony before the Judiciary Committee of the United States Senate, and through her modeling of her activist judicial role model that she neither accepts nor respects the Constitutional role of a judge and favors the anti-Constitutional practice of judicial usurpation of legislative power. Accordingly, her nomination to the Supreme Court must be swiftly and decisively rejected.

III. Elena Kagan's Record Provides Substantial Evidence that She Does not Respect the Constitutional Requirement that U.S. Judges Must Limit Themselves to Rulings Under the U.S. Constitution, and Must Forsake All Reliance on Foreign Laws and Judicial Opinions When Deciding Cases Under U.S. Laws.

The second duty of any Justice of the United States Supreme Court is to serve "under *this* Constitution, [and] the laws of the *United States*," not the laws or judicial opinions of any foreign country. Art. III, Sec. 2. (Emphasis added.) Elena Kagan has demonstrated through her testimony and her actions that she fails this sovereignty requirement of the Constitutional Test.

A. Kagan's Written Testimony Before the Senate Judiciary Committee Exemplified that She Believes it is Acceptable to Use and Rely on Foreign Law When Interpreting the United States Constitution.

During her confirmation hearing as Solicitor General, Kagan was asked by Senator Specter:

"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 Constitutions?"²¹

The answer demanded by the United States Constitution is an unequivocal and emphatic "no." Kagan – who was provided the opportunity to reflect over a period of days and offer a well conceived written response – refused to answer no, and instead offer a qualified "yes."

She replied in writing: "... I think [I] should offer reasonable foreign law arguments to attract [certain] Justices' support for the positions that the office is taking."²²

There are at least three problems with Kagan's position. First, she answered in the affirmative, and the significance of this answer cannot be understated. Second, she believes that there are "reasonable foreign law arguments" that can be offered when asking "judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution." To be sure, there is no such thing as a "reasonable foreign law" in such a context; *all* foreign law arguments in such context are constitutionally unreasonable and a violation of U.S. Constitutional sovereignty.

Third, Kagan and her apologists may seek to excuse her answer by claiming that it was spoken in the context of her proposed role as an advocate and not that of a judge. Such an excuse would only further condemn Kagan's integrity and judgment, and would be an admission that Kagan believes it is acceptable to encourage judges to sacrifice the sovereignty of the United States so that Kagan can win a case.

Kagan's written response to Senator Specter is not only unauthorized by the Constitution, it is destructive of it.

B. While Serving as Dean at Harvard Kagan Made "International Law" Rather than "U.S. Constitutional Law" a Required, Foundational First Year Course.

During comments before the New Hampshire Supreme Court, Kagan described changes she implemented as the Dean of Harvard Law School:

"As you may know, Harvard Law School recently introduced its most far-reaching curricular reforms in more than 100 years About five years ago, Harvard embarked on a major curriculum review aimed at determining what changes might help us to prepare our students most effectively for the complex global challenges of this new millennium.

"And we wanted to ensure that students could navigate in a world where a *global perspective* ... is intrinsic to a great deal of human activity, and to a great deal of legal work."

"The *Foundation* of legal education is the 1L curriculum. What students learn during the 1L years *shapes their sense of what law is* For this reason, we focused much of our attention on this *critical first year*.

"Like most law schools, with minor variations, Harvard Law School's traditional first-year curriculum included civil procedure, criminal law and procedure, torts, property, and contracts – all worthy and important subjects but insufficient in themselves for all we need to accomplish. [She added three new required courses:] statutory and regulatory aspects of law, ... *law in a comparative or international framework*, and [team courses resolving] complex problems²³

Under Kagan's leadership, international law became a "critical first year," "foundation[al]," course to "shape [students] sense of what law is," but, U.S. Constitutional law was not. This action betrays Kagan's apparent position that the critical foundation of U.S. legal education includes an array of subjects, including team courses resolving complex problems, but not Constitutional law. This position is simply untenable for a U.S. Supreme Court justice.

C. While Dean at Harvard Kagan Honored and Allowed One of Her Controversial Transnational Law Professors to Speak on the Federally Mandated Occasion of "United States Constitution Day."

In 2004, Congress passed a law requiring that all education institutions that receive federal funds must hold an educational program on the United States Constitution on the 17th of September.²⁴ Kagan has a track record of hostility to – and failure to comply with – federal laws

that condition funding to Harvard. Her pro-homosexual decision to bar military recruiters from Harvard's law campus in violation of the Solomon Amendment has been documented in thousands of articles, editorials, and even during her prior hearing before the Senate Judiciary Committee.²⁵ However, Kagan's action in response to the federal law conditioning federal funding upon Harvard's decision to celebrate U.S. Constitution Day is less documented.

On the occasion of Constitution Day in 2007, Dean Kagan honored Noah Feldman, a professor whom she had hired. Feldman can only be described as an anti-constitutionalist, because he would support weakening the sovereignty of U.S. Constitution by allowing U.S. judges to use "international legal materials ... to actually decide cases," and would force the United States government to treat the judicial interpretations of foreign tribunals "as law."²⁶

Under Kagan's leadership, Feldman was honored two days in a row at Harvard. The day before U.S. Constitutional day, Feldman was awarded the "Bemis Chair in International Law," and asked to speak on "The Constitution and the International Order." According to the Harvard Law Record, Kagan introduced and honored Feldman with the Bemis Chair, which is reportedly "given to a professor who is a 'practical cooperator,' has had a connection with public life, and is capable of seeing the United States as *one nation among many*."²⁷ (Emphasis added.) The following day – U.S. Constitution Day – Feldman was again asked to speak on this same topic of "The Constitution and the International Order."²⁸

Feldman believes that the Constitution should be interpreted with an "outward focus" and includes himself in the camp that "argues for the prudent *use of international legal materials in constitutional decision-making* – not only for purposes of rhetoric and persuasion but also to provide rules and principles to help *actually decide cases*."²⁹ Feldman further argues that "when the United States has undertaken to comply with the decisions of international tribunals, those *tribunals' rulings must be treated as law*, just as the treaties themselves are."³⁰

In addition, Feldman believes that it is worth the benefits, including the benefit of improving the U.S. reputation abroad, to give up a cost and allow "international tribunal[s] to bind the United States in a way that is not responsive to democratic institutions within the United States."³¹

Feldman has been highly critical of what he calls careless conservatives who believe that "upholding international judgments that differ from our own courts" is inconsistent with our core constitutional values. The message sent, then, in the world and at home, is precisely the wrong one for this historical juncture, when the United States needs ... to convince the world that the project of international legality is one in which we believe."³²

Simply put, Feldman's vision for the U.S. Constitution and the International Order would be to put an end to American Constitutional sovereignty and hand it over to foreign judicial tribunals. Kagan should not have hired Feldman at Harvard, should not have honored him the day before Constitution Day, and should never have thumbed her nose at Congress by allowing him to serve as the speaker on this day that was legally intended to honor the Constitution – not advocate its impotence.

Whatever may be said of Kagan she is certainly not ignorant. Accordingly, her decision to honor Feldman, and allow him to air his views on the federally mandated U.S. Constitution Day can only be credibly understood as either an endorsement of – or acquiescence to – Feldman's willingness to cede U.S. Constitutional sovereignty to foreign judges. Either explanation provides ample grounds for the conclusion that Kagan should not be confirmed as a justice of the United States Supreme Court.

D. Conclusion

The second duty of any Justice of the United States Supreme Court is to serve "under *this* Constitution, [and] the laws of the *United States*," not the laws or judicial opinions of any foreign country. Elena Kagan has demonstrated through both her testimony before the Senate Judiciary Committee and her actions as Dean of Harvard that she does not respect the constitutional requirement that U.S. judges must limit themselves to rulings under the U.S. Constitution and must forsake all reliance on foreign law and judicial opinions when deciding cases under U.S. laws.

IV. Conclusion


Elena Kagan's record shows that she favors the anti-Constitutional practice of judicial usurpation of legislative power, and that she has failed to stand against the erosion of United States sovereignty through the use of foreign law in deciding U.S. Constitutional cases. Accordingly, she fails to meet the standard established by the Constitution itself.

The Constitution does not vest Kagan with any presumption of fitness and any evidence that would be offered during her confirmation hearing would either confirm her objectionable record, or contradict her record and, therefore, be of such little weight and credibility that it could not outweigh her record.

Therefore, Judicial Action Group respectfully requests that you fulfill your duty under the Constitution and that you presently commit to vote "nay" on the question of her confirmation to the United States Supreme Court. We will contact your office to discuss your anticipated commitment.

Respectfully,

Judicial Action Group


| Phillip L. Jauregui
President

- ¹ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006).
- ² 10 U.S.C. § 983(b)(1).
- ³ *Id.*
- ⁴ *Brief of Professors William Alford, et. al, as Amici Curiae* at 1, *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) (No. 04-1152).
- ⁵ Prof. Peter Berkowitz, *How did so many professors misunderstand the law?*, *Weekly Standard*, March 20, 2006, Vol. 11, No. 25., available at <http://www.weeklystandard.com/print/Content/Public/Articles/000/000/011/959tzkai.asp?page=3>.
- ⁶ See, "Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter," at page 3., at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.
- ⁷ Hon. Justice Richard Goldstone, *The Jurisprudential Legacy of Justice Aharon Barak*, 48 HARV. I.L.J. 54 at 55 (2007).
- ⁸ *Id.*
- ⁹ Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC, April 23, 2007 available at <http://www.tnr.com/article/enlightened-despot>.
- ¹⁰ *Id.*
- ¹¹ Robert H. Bork, *Barak's Rule* Hudson Institute, December 28, 2006, available at http://www.hudson.org/index.cfm?fuseaction=publication_details&id=4389.
- ¹² ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGE 111 (2003).
- ¹³ *Id.* at 112-13.
- ¹⁴ AHARON BARAK, "THE JUDGE IN A DEMOCRACY 4-5 (2005).
- ¹⁵ Jonathan Resemblum, *The Man Who Would be King*, JERUSALEM POST, 26 September 1997, see also, ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGE 111, 149 (2003).
- ¹⁶ See, <http://dictionary.reference.com/browse/channeling>.
- ¹⁷ Rebecca Agule *Distinguished Israeli Jurist Receives 2006 Justice Prize*, THE HARVARD LAW RECORD, September 28, 2006, available at <http://www.hlrecord.org/2.4463/distinguished-israeli-jurist-receives-2006-justice-prize-1.578536>.
- ¹⁸ Justice Aharon Barak, *On My Judicial Philosophy*, Address at Harvard Law School Ames Courts Upon Receipt of the Peter Gruber Foundation 2006 Justice Prize (September 21 2006) available at <http://web.archive.org/web/20070523181442/http://www.petergruberfoundation.org/justice/Barak+lecture+2006.htm>.
- ¹⁹ Thomas Jefferson, June 12, 1823, in a letter to Justice William Johnson. Thomas Jefferson, *Jefferson Writings*, Merrill D. Peterson, ed., (NY: Library Classics of the United States, Inc., 1984), p. 1475.
- ²⁰ Thomas Jefferson, September 28, 1820, in a letter to William Jarvis. Thomas Jefferson, *Jefferson's Letters*, Wilson Whitman, ed. (Eau Claire, WI: E.M. Hale & Co., 1900), p. 338.
- ²¹ See Written Questions for Elena Kagan, Nominee to be Solicitor General of the United States available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.
- ²² See Written Questions for Elena Kagan, Nominee to be Solicitor General of the United States available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.
- ²³ See, http://www.courts.state.nh.us/press/Kagan_NH_speech_distribution.pdf. (Emphasis added.)
- ²⁴ See, Public law 108-447, signed Dec. 8, 2004.
- ²⁵ Jeffrey Toobin, *Elena Kagan and Gays in the Military*, THE NEW YORKER, May 10, 2010, available at <http://www.newyorker.com/online/blogs/newsdesk/2010/05/elena-kagan-gays-in-the-military.html>, and see articles generally at, http://www.google.com/#hl=en&q=%22elena+kagan%22+%26+%22solomon+amendment%22&aq=f&aqi=&aql=&oq=&gs_rfai=&fp=95b5ca8630a93ba4.
- ²⁶ Noah Feldman, *When Judges Make Foreign Policy*, THE NEW YORK TIMES, September 28, 2008, available at http://www.nytimes.com/glogin?URI=http://www.nytimes.com/2008/09/28/magazine/28law-t.html&OQ=rQ3D4Q26orefQ3DsloginQ26refQ3DmagazineQ26pagewantedQ3Dprint&OP=12802f86Q2FQ2AQ3DQ7E-Q2A@mQ5Q25Q25Q2FQ2AQ2FvvyQ2Av2Q2AQ2FqQ2AO_f_MQ5EuQ7EQ2AQ2FqK_Q3DaQ25PjQ25OK.

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Application of the "Constitutional Litmus Test" to Elena Kagan

This document outlines the Constitutional standard for judicial nominees as well as the relevant evidence surrounding Ms. Kagan. After carefully considering the evidence using the Constitutional standard, the Senate must vote against Kagan's nomination.

The Constitutional Test: See Art. III, Sec. 2

- Constitution vests the United States Senate with the duty to "advise and consent" as to Presidential appointments to the United States Supreme Court (See pg. 1, Sec. I (a))¹
- Senate's duty mandates a vote to confirm a judicial nominee only if that nominee proves by substantial evidence that as a judge: (1) the nominee would perform the function of "deciding cases" while forsaking legislating from the bench, and (2) the nominee would rule according to the "Constitution [and] laws of the United States" while forsaking all reliance upon inapplicable foreign laws (See pg. 1, Sec. I, Para. 2)
- Constitution does not create a presumption of fitness for judicial nominations
- It is appropriate for the burden of proof to lie squarely with President Obama and his nominee, not with the Senate (See pg. 2, Sec. I (b))

Elena Kagan's Record

- Kagan's record provides substantial evidence that she does not respect the constitutional judicial role of deciding cases (See pg. 3, Sec. II)
- She believes that judges may change the meaning of the law and legislate from the bench
- Her argument as a party to the United States Supreme Court in the Solomon Amendment case urged the Justices to participate in judicial activism by changing the clear meaning of the law (See pg. 3, Sec. II (A))
- Her sworn testimony before the Judiciary Committee of the United States Senate evidences her belief that it is sometimes permissible for judges to engage in judicial activism: "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." (See pg. 4, Sec. II (B))
- Her testimony also exemplified that she believes it is acceptable to use and rely on foreign law when interpreting the United States Constitution: "... I think [I] should offer reasonable foreign law arguments to attract [certain] Justices' support for the positions that the office is taking." (See pg. 7, Sec. III (A))

Aharon Barak: Elena Kagan's Judicial Role Model

- Kagan's judicial role model is Justice Aharon Barak of the Israeli Supreme Court (See pg. 4, Sec. II (C))
- Justice Barak has been identified by legal commentators as one of the most activist judges – if not the leading activist judge – in recent history (See pg. 5, Sec. II, Para. 1)

¹ All citations herein are documented with applicable footnotes in JAG's "Senate Letter Opposing Kagan" available at: <http://judicialactiongroup.com/content/home/23735/Constitutional%20Analysis%20of%20Elena%20Kagan>

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To: Friends & Allies
From: Judicial Action Group
Date: June 9, 2010
Re: Elena Kagan's Judicial Philosophy

President Barack Obama has nominated Solicitor General Elena Kagan to serve as an Associate Justice on the United States Supreme Court, and she now faces the confirmation process in the U.S. Senate. Although her lack of judicial experience is not necessarily a disqualifying factor, her Constitutional fitness for the role as a justice of the Supreme Court must still be scrutinized. Given Kagan's lack of judicial experience, her professed judicial role model is of substantial importance in determining her judicial philosophy.

In 2007, Kagan introduced Justice Aharon Barak at Harvard Law School and said that he was her "judicial hero ... the judge who has best advanced democracy, human rights, the rule of law, and justice." Following her statement, Justice Aharon Barak gave a speech entitled: *On My Judicial Philosophy*. Understanding Justice Aharon Barak's judicial philosophy is vital to understanding Elena Kagan's judicial philosophy because she claims him as her judicial hero and logically shares his judicial philosophy.

The following are excerpts from the speech entitled "On My Judicial Philosophy" that Barak gave at Harvard Law School on the occasion that Kagan introduced him as her "judicial hero:"

- "A judge is a part of society, and society influences the judge. The judge is influenced by the intellectual movements and the legal thinking that prevail... It may be true that the judge sometimes sits in an ivory tower — though my ivory tower is located in the hills of Jerusalem and not on Mount Olympus in Greece. The judge progresses with the history of the people. All of these elements contribute to the judge's objective perspective."
- "When judges give expression to the fundamental values of the system, they give expression to the values that, in their eyes, seem proper and basic. Some subjectification of this process is inevitable. Complete objectivity is unattainable. The personal aspect of a judge is always present...it is the judge's personality that finds expression — the same personality that underwent, and passed, the judicial nomination process."
- "*Nevertheless, there are cases — and they must naturally be few — in which the judge carries out his role properly by ignoring the prevalent social consensus and becoming a flag-bearer of a new social consensus.*"
- "We should shape our rules of interpretation in such a way that will allow us to fulfill our role. Indeed the bridging of the gap between law and life and the protection of the constitution and democracy is not just the outcome of the interpretive theory. It is the underlying goal of the interpretive theory

itself. We judges should shape our interpretation rules so as to achieve the two-fold goals imposed upon us.”

- “Another tool that judges use to fulfill their role in a democracy is determining justiciability. That is, judges identify those issues about which they ought not make a decision, leaving that decision to other branches of the state. The more non-justiciability is expanded, the less opportunity judges have for bridging law and society and for protecting the constitution and democracy.”
- “In many cases where some of my colleagues have dismissed claims on the grounds of non-justiciability, I dismissed them on the grounds that the disputed action was legal and therefore that the claim should be dismissed on the merits because of lack of cause of action. The court should not abdicate its role in a democracy merely because it is uncomfortable or fears tension with the other branches of the state.”
- “[I]f we *liberalize* the tests for standing, we will usher in a new era for judicial decision-making whose ramifications are far greater than the issue of standing itself. This is the case because liberal rules of standing enable courts to hear matters that ordinarily would not find their way before a court. How a judge applies the rules of standing is a litmus test for determining his approach to his judicial role.”
- “A judge who regards his judicial role as bridging the gap between law and society and protecting democracy will tend to expand the rules of standing. It follows that I favor expanding the rules of standing and releasing them from the requirement of an injury in fact.”
- I tried to summarize some aspects of my judicial philosophy as to the role of a judge in a democracy. I do realize that such a philosophy has its critics. It may and does sharpen the natural tension between the judiciary and the other two branches of government. It may affect the confidence of the public in the judiciary. *It may be labeled as ‘activist’ in some aspects.*”
- The Supreme Court interpreted those basic laws to mean that the courts have review power of the constitutionality of these laws. The Parliament and the Executive branch are following this decision. In order to properly fulfill such power, one needs a judicial philosophy that views the protection of human rights as a major role of the judges The political non-accountability of Israeli judges makes us fit to protect human rights against excessive demands of security.”

¹ Rebecca Agule *Distinguished Israeli Jurist Receives 2006 Justice Prize*, THE HARVARD LAW RECORD, , September 28, 2006, available at <http://www.hlrecord.org/2.4463/distinguished-israeli-jurist-receives-2006-justice-prize-1.578536>

**Opening Statement of Solicitor General Elena Kagan
Nominee for Associate Justice of the United States Supreme Court
June 28, 2010**

Thank you very much, Mr. Chairman, Senator Sessions, and members of the Committee.

First, I'd like to thank Senators Kerry and Brown for those generous introductions.

I also want to thank the President again for nominating me to this position. I'm honored and humbled by his confidence.

Let me also thank all the members of the Committee, as well as many other Senators, for meeting with me in these last several weeks. I've discovered that they call these "courtesy visits" for a reason; each of you has been unfailingly gracious and considerate.

Most important, I want to thank my family, friends, and students who are here today. I thank them for all the support they've given me, during this process and throughout my life. It's really wonderful to have so many of them behind me.

I said when the President nominated me that the two people missing were my parents, and I feel that deeply again today. My father was as generous and public-spirited a person as I've ever known, and my mother set the standard for determination, courage, and commitment to learning.

My parents lived the American dream. They grew up in immigrant communities; my mother didn't speak a word of English until she went to school. But she became a legendary teacher and my father a valued lawyer. And they taught me and my two brothers, both high school teachers, that this is the greatest of all countries, because of the freedoms and opportunities it offers its people. I know that they would have felt that today, and I pray that they would have been proud of what they did in raising me and my brothers.

To be nominated to the Supreme Court is the honor of a lifetime. I'm only sorry that I won't have the privilege of serving there with Justice John Paul Stevens. His integrity, humility, and independence, his deep devotion to the Court, and his profound commitment to the rule of law – all these qualities are models for everyone who wears, or hopes to wear, a judge's robe. If confirmed, I hope I will approach each case with his trademark care and consideration. That means listening to each party with a mind as open as his to learning and persuasion and striving as conscientiously as he has to render impartial justice.

I owe a debt of gratitude to two other living Justices. Sandra Day O'Connor and Ruth Bader Ginsburg paved the way for me and for so many other women in my generation. Their pioneering lives have created boundless possibilities for women in the law. I thank them for their inspiration and also for the personal kindnesses they have shown me.

The law school I had the good fortune to lead has a kind of motto, spoken each year at graduation. We tell the new graduates that they are ready to enter a profession devoted to “those wise restraints that make us free.” That phrase has always captured for me the way law, and the rule of law, matters. What the rule of law does is nothing less than to secure for each of us what our Constitution calls “the blessings of liberty” – those rights and freedoms, that promise of equality, that have defined this nation since its founding. And what the Supreme Court does is to safeguard the rule of law, through a commitment to even-handedness, principle, and restraint.

My first real exposure to the Court came almost a quarter century ago when I began my clerkship with Justice Thurgood Marshall. Justice Marshall revered the Court – and for a simple reason. In his life, in his great struggle for racial justice, the Supreme Court stood as the part of government that was most open to every American – and that most often fulfilled our Constitution’s promise of treating all persons with equal respect, equal care, and equal attention.

The idea is engraved on the very face of the Supreme Court building: Equal Justice Under Law. It means that everyone who comes before that Court – regardless of wealth or power or station – receives the same process and the same protections. What this commands of judges is even-handedness and impartiality. What it promises is nothing less than a fair shake for every American.

I’ve seen that promise up close during my tenure as Solicitor General. In that job, I serve as our government’s chief lawyer before the Supreme Court, arguing cases on issues ranging from campaign finance, to criminal law, to national security. And I do mean “argue.” In no other place I know is the strength of a person’s position so tested and the quality of a person’s analysis so deeply probed. No matter who the lawyer or who the party, the Court relentlessly hones in on the merits of every claim and its support in law and precedent. And because this is so, I always come away from my arguments at the Court with a renewed appreciation of the commitment of each Justice to reason and principle – a commitment that defines what it means to live in a nation under law.

For these reasons, the Supreme Court is a wondrous institution. But my stints in the other branches of government remind me that it must also be a modest one – properly deferential to the decisions of the American people and their elected representatives. What I most took away from those experiences was simple admiration for the democratic process. That process is often messy and frustrating, but the people of this country have great wisdom, and their representatives work hard to protect their interests. The Supreme Court, of course, has the responsibility of ensuring that our government never oversteps its proper bounds or violates the rights of individuals. But the Court must also recognize the limits on itself and respect the choices made by the American people.

I am grateful for the time I spent in government service, but the joy of my life has been to teach thousands of students about the law, and to have had the sense to realize that they had much to teach me.

I've led a school whose faculty and students examine and discuss and debate every aspect of our law and legal system. And what I've learned most is that no one has a monopoly on truth or wisdom. I've learned that we make progress by listening to each other, across every apparent political or ideological divide. I've learned that we come closest to getting things right when we approach every person and every issue with an open mind. And I've learned the value of a habit that Justice Stevens wrote about more than fifty years ago – of “understanding before disagreeing.”

I will make no pledges this week other than this one – that if confirmed, I will remember and abide by all these lessons. I will listen hard, to every party before the Court and to each of my colleagues. I will work hard. And I will do my best to consider every case impartially, modestly, with commitment to principle, and in accordance with law.

That is what I owe to the legacy I share with so many Americans. My grandparents came to this country in search of a freer and better life for themselves and their families. They wanted to escape bigotry and oppression – to worship as they pleased and work as hard as they were able.

They found in this country – and they passed on to their children and their children's children – the blessings of liberty. Those blessings are rooted in this country's Constitution and its historic commitment to the rule of law. I know that to sit on our nation's highest court is to be a trustee of that inheritance. And if I have the honor to be confirmed, I will do all I can to help preserve it for future generations.

Thank you, Mr. Chairman. And thank you, members of the Committee.

Statement of

The Honorable Ted Kaufman

United States Senator
Delaware
June 28, 2010

Kaufman Opening Statement at Supreme Court Confirmation Hearing
of Solicitor General Elena Kagan

Welcome, Solicitor General Kagan, and welcome also to your family and friends. Like my colleagues, I want to congratulate you on your nomination.

We are now beginning the end of an extraordinarily important process. Short of voting to go to war, a Senator's constitutional obligation to "advise and consent" on Supreme Court nominees is probably his or her most important responsibility. Supreme Court justices serve for life; once the Senate confirms a nominee, she is likely to affect the law and the lives of Americans much longer than the Senators who confirmed her.

As senators, I believe we have an obligation not to base our decision on empty political slogans, or on charges of guilt by association, or on any litmus test. Instead, we should focus on your record and your answers to our questions, which will allow us to determine whether you have the qualities necessary to serve all Americans, and the rule of law, on our nation's highest court.

Over the years, as chief of staff to then-Senator Biden, teaching at Duke Law School, and as a Senator myself, I've thought a lot about the qualities I believe a Supreme Court nominee should have: A first-rate intellect; significant experience; unquestioned integrity; absolute commitment to the rule of law; unwavering dedication to being fair and open-minded; and the ability to appreciate the impact of court decisions on the lives of ordinary people.

Last year, when Justice Souter announced his retirement, and again when Justice Stevens announced his retirement this April, I suggested that the Court would benefit from a broader range of experience among its members. My concern was not just the relative lack of women or racial or ethnic minorities on our federal courts, though that deficit remains glaring.

I was noting the fact that the current Justices all share very similar professional backgrounds. Every one of them served as a federal circuit court judge before being appointed to the Supreme Court. Not one of them has ever run for political office, like Sandra Day O'Connor or Earl Warren or Hugo Black.

General Kagan, I am heartened by what you would bring to the Court based on your experience working in and with all three branches of government, the skills you developed running a

complex institution like Harvard Law School, and yes, the prospect of your being the fourth woman to serve on our nation's highest court.

Some pundits, and some Senators, have suggested that your lack of judicial experience is somehow a liability. I could not disagree more. While prior judicial experience can be valuable, the Court should have a broader range of perspectives than can be gleaned from the appellate bench.

General Kagan, you bring valuable non-judicial experience and a freshness of perspective that is lacking on the current Court. In the history of the Supreme Court, more than one-third of the Justices have had no prior judicial experience before being nominated. And a nominee's lack of judicial experience has certainly been no barrier to success.

When Woodrow Wilson nominated Louis Brandeis in 1916, many objected on the ground that he had never served on the bench. Over his 23-year career, however, Justice Brandeis proved to be one of the Court's greatest members. His opinions exemplify judicial restraint and his approach still resonates in our judicial thinking more than 70 years after his retirement.

Felix Frankfurter, William Douglas, Robert Jackson, Byron White, Lewis Powell, Harlan Fiske Stone, Earl Warren and William Rehnquist all became justices without having previously been judges. And they certainly had distinguished careers on the Supreme Court.

As Justice Frankfurter wrote about judicial experience in 1957, "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero."

We've all now had the opportunity to review your extensive record as a lawyer, a policy advisor, and administrator. Throughout your career, you have consistently demonstrated the all-too-rare combination of a first-rate intellect and an intensely pragmatic approach to identifying and solving problems.

Last summer, during then-Judge Sotomayor's confirmation hearing, I focused on the current Court's handling of business cases. I am convinced, by education, experience, and inclination, that the integrity of our capital markets, along with our democratic traditions, is what makes America great. Too often, however, today's Supreme Court seems to disregard settled law and congressional policy choices, in order to promote business interests at the expense of the people's interests.

Whether it's pre-empting state consumer protection laws in *Medtronic*, striking down punitive damages awards in *Exxon*, restricting access to the courts in *Twombly*, or overruling 96 years of pro-consumer antitrust law in *Leegin*, this Court gives me the impression that in business cases, the working majority is business-oriented to a fault.

The *Exxon* case demonstrates how this pro-business orientation can affect the lives of ordinary people. In that case, four of the eight Justices who participated voted to bar all punitive damages in maritime cases against employers like Exxon for their employees' reckless conduct.

Justice Alito did not participate in the case, so the Court split four-to-four on this point. But had he participated, and voted with the conservatives on the Court, then today individuals harmed by oil spills like Exxon Valdez would be subject to a flat ban on punitive damages in maritime actions. As we consider the current disaster in the Gulf, that prospect is worth contemplating.

The Court's decision last fall in the Citizens United case, which several of my colleagues have mentioned, is the latest example of the Court's pro-corporate bent. The majority opinion in that case should put the nail in the coffin of claims that "judicial activism" is a sin committed by judges of only one political ideology.

What makes The Citizens United decision particularly troubling is that it is at odds with what some of the Court's most recently confirmed members said during their confirmation hearings. We heard a great deal then about their deep respect for existing precedent. Now, however, that respect seems to vanish whenever it interferes with a desired pro-business outcome.

As I've said before, charges of judicial activism are often unhelpful – empty epithets divorced from a real assessment of judicial temperament. But that doesn't mean the term "judicial activism" is necessarily meaningless.

If we want to take the term seriously, it might mean a failure to defer to the elected branches of government; it might mean disregard for long-established precedent; it might mean deciding cases based on personal policy preferences rather than the law; or it might mean manipulating a case to get at issues not squarely presented by the parties.

By any of these definitions, the decision in Citizens United was highly "activist." The Court summarily overturned years of settled precedent and statutory law that had limited the influence of corporate electioneering. Moreover, the Court took it upon itself to order that the case be re-argued on broad constitutional grounds, which neither party had asked it to do. In effect, the Justices wrote their own question of the case in order to obtain their desired result.

I share the fear expressed by Justice Stevens in his dissent – that the Court's focus on results rather than the law in this and other cases will do damage to the Court as an institution.

General Kagan, I plan to spend the bulk of my time asking you about the Court's business cases, based on my concern about its apparent bias.

One of the aspirations of the American judicial system is that it render justice equally to ordinary citizens and the most powerful. We need Justices on the Supreme Court who not only understand that aspiration, but also are committed to making it a reality. For Americans to have faith in the rule of law, we need one justice system in this country, not two.

Very soon, those of us up here will be done talking, and you'll have the chance to testify, and then to answer our questions. I look forward to your testimony.

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*Testimony of Peter N. Kirsanow
Before the Senate Judiciary Committee on the
Nomination of Elena Kagan to the United States Supreme Court*

July 1, 2010

Chairman Leahy, Ranking Member Sessions, members of the Committee, I am Peter N. Kirsanow, a partner in the labor and employment practice group of the Cleveland, Ohio, law firm, Benesch, Friedlander, Coplan & Aronoff, and a member of the U.S. Commission on Civil Rights. I am here today in my individual capacity.

The Civil Rights Commission was established by the Civil Rights Act of 1957 to study and collect information related to discrimination or the denial of equal protection under the law on the basis of color, race, religion, sex, age, disability or national origin; to appraise the laws and policies of the federal government relating to discrimination or denials of equal protection; and to serve as a national clearinghouse of information relating to the same.

This confirmation hearing provides a critical opportunity for Senators—and the American people—to probe Ms. Kagan’s views on what remain some of the most pressing and controversial issues of our day—issues related to race, equal treatment under the laws, and equality of opportunity. As part of my individual role in furthering the Commission’s clearinghouse function and with the help of my special assistant, I have analyzed the available evidence regarding Solicitor General Kagan’s views and actions on civil rights issues. Ms. Kagan’s nomination differs from that of other nominations in the recent past in that she has no record of judicial opinions to indicate her approach towards civil rights issues, nor has civil rights been a focus of her academic pursuits. Her private practice experience, limited to two years, is similarly unrevealing. As such, my analysis focuses on the work she performed and the

views she expressed during her career as a law clerk, White House counsel and policy advisor, law school dean and Solicitor General.

Although Ms. Kagan's record on civil rights is not as fully developed as some might prefer for a nominee to the nation's highest court, it is not wholly without guidance as to how she might approach these important issues as an Associate Justice. For example, her views and comments in a number of key cases in which she has been involved during her career indicate that Ms. Kagan has an active interest in, and strong policy preferences regarding, the permissible uses of race in the education and employment contexts. Her views are out-of-step with both the color-blind values of the American people and with the views of at least four, and sometimes five, members of the current Supreme Court, whose jurisprudence in these areas continues to reflect a discomfort with divisive racial bean counting. Taken together with comments Ms. Kagan has made that appear to embrace a more activist judicial philosophy,¹ her approach in these cases raises serious questions about whether a Justice Kagan would sanction the use of race as a basis upon which to bestow benefits and burdens on Americans and whether she would allow her policy preferences on these matters to influence her judging.

During her time at the White House, Ms. Kagan had occasion to influence both the legal and policy landscapes surrounding the issue of affirmative action. Her White House records show that she was enthusiastic about the endeavor, at one point volunteering to take the lead for coordinating the Administration's positions on the issue. For example, in a 1995 email to Abner Mikva, her boss and White House counsel under President Clinton, Kagan lobbied to be put in

¹ For example, in a 1995 law journal article, Ms. Kagan wrote that Justices' experiences and "conceptions of value" play key roles in their decision-making. In her graduate thesis, she criticized suggestions that it is "wrong or invalid" for judges to "mold and steer the law in order to promote certain ethical values and achieve certain social ends." Her perception of the Court's institutional role is similarly troubling. In comments praising the approach of her former boss, Justice Thurgood Marshall, she suggested that rather than interpret and apply the law absent bias or preference for the litigants before it, the court's primary mission is to "safeguard the interests of people who had no other champion."

charge of affirmative action upon the departure of presidential race adviser Christopher Edley. “Is there a need for someone to keep on top of the affirmative action issue—for example, by working with Justice on its review of all affirmative action programs? *I know the issue well (because I teach it) and care about it a lot; if there’s stuff to do here, I’d love to do it.*”²

Her views on one particular case—*Piscataway Board of Education v. Taxman*³—should be of particular concern to this committee. The central issue in *Taxman*, one that has never been resolved by the Supreme Court, was whether Title VII of the Civil Rights Act of 1964 allows employment discrimination in the name of the nonremedial interest of promoting diversity in an educational environment. The case involved the Piscataway school board’s decision to eliminate a position in the Business Department of its high school. Two teachers with the least seniority were candidates for the layoff—one black (Williams), the other white (Taxman). Williams was the only black teacher in that Department. Both had started the same year and thus had equal seniority. They also had similar qualifications and were considered equally qualified by the Board. While the Board had used random selection in the past to decide between its layoff candidates in such circumstances, this was the first time it had to decide between a white and a black employee. As a result, it invoked its voluntary affirmative action policy and used race as the deciding factor in laying off Taxman instead of Williams, citing a need to maintain racial diversity among the faculty of the Business Education Department.

Taxman filed a charge of employment discrimination with the Equal Employment Opportunity Commission, but attempts at conciliation were unsuccessful.⁴ The United States under the Bush Administration sued the school district in federal court, alleging that Taxman had been discriminated against under Title VII on account of her race. The trial court granted

² E-mail from Elena Kagan to Abner Mikva (July 25, 1995) (on file in E-mails Box 010, Folder 001).

³ 91 F.3d 1547 (3d Cir. 1996).

⁴ *Id.* at 1552.

summary judgment finding the district liable under both Title VII and a New Jersey state anti-discrimination law. By the time the trial proceeded on the issue of damages, Taxman had already been rehired, so reinstatement was not an issue. She was awarded damages for full back-pay, fringe benefits and pre-judgment interest, and under the state statute, an additional \$10,000 for emotional suffering. The Board appealed the district court's finding of liability and, in the alternative, its monetary award. At this point in the litigation, there was a change in presidential administrations. Though the previous administration had supported Taxman, the Clinton Administration subsequently sought leave to file an amicus brief in the case in support of the Board for reversal of the judgment, effectively switching sides. The Third Circuit denied the request, but permitted the United States to withdraw from the case.

Sitting en banc, the Third Circuit subsequently struck down the Board's action on the ground that to be legal under Title VII, an affirmative action plan must have a remedial purpose. For authority, it relied on the Supreme Court's decisions in *United Steelworkers v. Weber*,⁵ which set forth the test for permissible private, voluntary affirmative action plans in employment and *Johnson v. Transportation Agency, Santa Clara County*,⁶ which applied the *Weber* test to voluntary affirmative action plans undertaken by public entities where prior discrimination was based on gender, not race. Under those precedents, an affirmative action plan is legal if it mirrors the remedial purposes of Title VII to eradicate discrimination and its effects from the workplace, does not necessarily infringe upon the interests of non-minority employees and is used as a temporary measure only to eliminate a manifest racial imbalance, not to maintain racial balance.⁷

⁵ 443 U.S. 193 (1979).

⁶ 480 U.S. 616 (1987) (Stevens, J., concurring).

⁷ *Weber*, 443 U.S. at 208.

The Third Circuit held that the Piscataway School Board's affirmative action plan failed the first-prong of the *Weber* test.⁸ Specifically, it could not locate any "congressional recognition of diversity as a Title VII objective requiring accommodation."⁹ Importing the Supreme Court's reasoning in its Equal Protection line of cases, which the Board claimed did recognize nonremedial uses of race, to the Title VII context would not help the Board, either, the Third Circuit reasoned. The circuit court read one of those cases—*Wygant v. Jackson Board of Education*,¹⁰—to stand for the proposition that societal discrimination alone could not justify the use of a racial classification. Instead, an employer must have a strong basis in evidence that these measures are necessary before employing such classifications.¹¹ Here, the Board admitted it was not acting to remedy the effects of past employment discrimination or any underrepresentation of black teachers that may have resulted from it. In fact, blacks were not underrepresented at all in the teaching workforce as a whole, or in Piscataway High School.¹² They were actually overrepresented.¹³ The only stated justification for the plan was to obtain the educational benefits of a diverse faculty.¹⁴

The circuit court further found that the policy violated *Weber*'s second prong because it would "unnecessarily trammel [nonminority] interests" given its lack of definition and structure, and lack of clarity over the circumstances in which it would apply. The court also found significant to the second prong analysis the fact that a firing decision (rather than a hiring decision) was at issue here, adopting the plurality in *Wygant*'s position that "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious

⁸ *Taxman*, 91 F.3d at 1557.

⁹ *Id.* at 1558.

¹⁰ 476 U.S. 267 (1986).

¹¹ *Taxman*, 91 F.3d at 1560-61 (summarizing the reach of Court's opinion in *Wygant*, 476 U.S. at 270-78 (O'Connor, J., concurring in part and concurring in the Court's judgment)).

¹² *Id.* at 1563.

¹³ *Id.* at 1550-51.

¹⁴ *Id.* at 1563.

disruption to their lives. That burden is too intrusive.”¹⁵ It also upheld Taxman’s monetary award.

The Board petitioned for a writ of certiorari and the Court asked the United States to express its views on whether the petition should be granted. The court granted certiorari over the United States’ recommendation against doing so. The United States then found itself in the uncomfortable position of filing an amicus brief in the case. To members of the Clinton Administration, the case was the wrong vehicle for analyzing the critical question of whether Title VII permitted the voluntary use of race in employment decisions for nonremedial purposes, and they were concerned that Third Circuit’s opinion stood a strong chance of being affirmed by at least five members of the Court.¹⁶

In a memo from Walter Dellinger to the Attorney General, reviewed by Ms. Kagan, among others in the White House and at the Department of Justice, Mr. Dellinger devised a strategy that involved filing a brief on the narrowest grounds possible—arguing that the monetary award to Taxman should be affirmed because the Board did not adequately defend or provide justification for its race-based layoff decision. Mr. Dellinger’s hope was that the Court would sidestep the central question at issue in the case, but the Department would compose a brief that nonetheless argued strongly for the court to uphold the use of nonremedial racial preferences in employment.¹⁷ The memo also shows that the strategy was coordinated with representatives of traditional civil rights litigation groups, who agreed that the Board’s decision in this case could not be defended. In a hand-written note in the margin of the Dellinger memo,

¹⁵ *Id.* at 1564 (citing *Wygant*, 476 U.S. at 283).

¹⁶ Memorandum from Walter Dellinger to the Attorney General 2 (July 29, 1997) (on file in DPC Box 038, Folder 002 – Race – Affirmative Action).

¹⁷ *Id.* at 3.

which Ms. Kagan forwarded to Bruce Reed, she writes of Dellinger's strategy, "I think this is exactly the right position—as a legal matter, as a policy matter and as a political matter."

Ms. Kagan's statement is prima facie evidence that she is a proponent of voluntary, nonremedial uses of race in the employment context. Recognizing the potentially damaging impact of an adverse decision on their ability to use race for social engineering purposes, members of prominent civil rights groups met and agreed on a strategy to raise the requisite amount of funding needed to settle the case. And settle it they did—to much criticism—only days before the Supreme Court was set to hear oral arguments in the case. Taxman received a settlement of \$433,500, some \$308,500 of which was raised by the civil rights groups.¹⁸

Ms. Kagan's position on *Taxman* is consistent with some troublesome views she advocated in an education case that came before the Court while Kagan served as a law clerk for Justice Thurgood Marshall. *Citizens for Better Educ. v. Goose Creek Consolidated Independent School District*¹⁹ concerned the question of whether, absent a showing of prior de jure or de facto segregation, a school district could voluntarily adopt a race-based rezoning plan so as to achieve racial balancing of its two district high schools. In the weeks leading up to this hearing, I have heard this case described on a number of occasions as a "desegregation" case. But that label is highly misleading. At the time it adopted its plan, the Goose Creek school district was not under an order to desegregate; in fact, it had *never* operated legally segregated schools. Both parties in the case agreed that there was no discernable difference in its two high schools' facilities or resources, or in the quality of education both schools provided. In adopting the plan, the district was instead attempting to stay one step ahead of changing demographic and residential patterns

¹⁸ Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and its Lessons About Interest Group Path Manipulation*, 9 GEO MAS. U. CIV. RTS. L.J. 207, 217 (1999).

¹⁹ 719 S.W.2d 350 (Tex. Ct. App., 1st Dist., Aug. 28, 1986).

that were beginning to have an impact on the ethnic make-up of its schools. In other words, its sole purpose for adopting the plan was outright racial and ethnic balancing.

Rather than apply the strict scrutiny standard to the race-based actions of the public school district, the First District Court of Appeals of Texas applied only rational basis review in the case, defending its use of the less rigorous standard by noting that, “[t]hough race is generally considered a suspect classification, it was used in this case to promote integration, i.e., to extend benefits rather than to deny them.”²⁰ The Texas court noted that even if it had applied strict scrutiny, the district’s race-based rezoning plan would still be upheld because of the government’s compelling interest in “providing an integrated education.”²¹ It cited as precedent *Brown v. Board of Education*,²² and a number of the Supreme Court’s other desegregation cases. In so doing, it failed to note the critical distinction between the Court’s desegregation line of cases and the case at hand. The Court allowed the use of race-based remedies by state actors in the former set of cases to remedy the effects of those entities’ own maintenance of a system of unlawful racial classification through their segregated schools. Goose Creek had no such history of state-enforced racial separation of its schools, nor could it be said to be segregated on the basis of race or ethnicity at the time the school board adopted its racial balancing plan.

In her recommendation to Justice Marshall regarding whether the Court should grant a petition for certiorari in this case, Ms. Kagan called the racial-balancing plan at issue “amazingly sensible” and praised the school district for its “good sense” for taking what she perceived to be proactive measures to prevent housing patterns from changing the existing racial and ethnic make-up of the district schools.²³ The Texas court’s decision stemmed from its recognition of,

²⁰ *Id.* at 352.

²¹ *Id.* at 353.

²² 347 U.S. 483 (1954).

²³ Memo from Elena Kagan to Justice Thurgood Marshall (Aug. 6, 1987).

in Kagan's words, the "fairmindedness of the rezoning plan."²⁴ Such comments are probative of Ms. Kagan's willingness to permit highly suspect racial engineering to orchestrate a desired social outcome.

If some aspects of this 1987 case sound strikingly familiar, it may be because many of the same issues implicated in *Goose Creek* emerged in two cases decided jointly by the Supreme Court in 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*.²⁵ In those cases, two separate school districts—one which had never operated legally segregated schools, the other which had achieved unitary status years earlier—classified their K through 12 students by race and relied on those classifications to make school assignments. Like the school district in *Goose Creek*, the Seattle school district defended its plan on the grounds that its racial assignments system was necessary to address the consequences of racially-identifiable housing patterns. The Jefferson County, Kentucky, school district cited a desire to educate its students in a racially integrated environment. Both argued that they had a compelling interest in promoting the educational and social benefits that purportedly flow from racially diverse classrooms and in avoiding the harms that result from racially isolated schools.

Applying strict scrutiny analysis, the Court in a 5-4 decision found that the districts had not met their heavy burden of showing that their articulated interests justified discrimination in school assignments on the basis of race. Unlike the classification of applicants by race upheld by the Court in *Grutter v. Bollinger*,²⁶ where race was only a part of a "highly individualized, holistic review,"²⁷ in this case, race was "not simply one factor weighed with others in reaching

²⁴ *Id.*

²⁵ 551 U.S. 701 (2007).

²⁶ 539 U.S. 306 (2003).

²⁷ *Parents Involved*, 551 U.S. at 723 (majority opinion of Roberts, C.J.) (citing *Grutter*, 539 U.S. at 337)).

a decision, . . . ; it [wa]s *the* factor.”²⁸ Like the plan the Court struck in *Gratz v. Bollinger*,²⁹ the racial classifications here were relied upon by the districts in a “nonindividualized, mechanical way.”³⁰ Importantly, Justice Roberts’ majority opinion noted that the “present cases are not governed by *Grutter*.”³¹ In so doing, it limited the nonremedial state interest of diversity to the unique context of higher education.³²

Contrast this approach with Ms. Kagan’s views on *Taxman* and her endorsement of Goose Creek’s racial rezoning plan. Her position in those cases signals clearly that she is not an adherent to the idea of the color-blind Constitution. Taken together, *Taxman* and *Goose Creek* permit a few other observations about Ms. Kagan’s likely approach towards the propriety of using race-conscious measures generally, as well as in specific cases, that should concern members of this committee.

First, Ms. Kagan would expand the application of race-conscious measures to circumstances beyond those where there is evidence of past discrimination. This is a flat rejection of Chief Justice Roberts’ admonition in *Parents Involved*, that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³³ Instead, *Taxman* and *Goose Creek* are reliable indicators that Ms. Kagan supports the notion that government (and likely private entities as well) can voluntarily utilize race-conscious means to pursue perhaps well-intentioned, but amorphous objectives such as promoting diversity and racial inclusion or as was the case in *Goose Creek*, even racial and ethnic balancing to remedy

²⁸ *Id.*

²⁹ 539 U.S. 244 (2003).

³⁰ *Parents Involved*, 551 U.S. at 723 (majority opinion of Roberts, C.J.) (citing *Gratz*, 539 U.S. at 275)).

³¹ *Id.* at 725.

³² *Id.*

³³ *Id.* at 748 (plurality opinion of Roberts, C.J.).

generalized societal discrimination.³⁴ Prior to the Supreme Court's decisions in *Grutter* and *Gratz*, only national security (including some elements of law enforcement) and the remediation of actual discrimination qualified as compelling state interests.

Relatedly, Ms. Kagan's opinion of the rezoning plan in *Goose Creek* suggests that she might blur the legally relevant distinction between segregation by state action and racial imbalance caused by other factors, a distinction that Chief Justice Roberts, in *Parents Involved*, called "central to our jurisprudence in this area for generations."³⁵ Assertions of the need to remedy the effects of generalized societal discrimination not traceable to the government's own actions, such as the consequences of racially-identifiable housing patterns Kagan found troublesome in *Goose Creek*, continue to be frowned upon by at least four members of the Court, who have held this rationale to be "plainly insufficient."³⁶ Yet Kagan's stance in *Goose Creek* indicates she might approve a rezoning plan motivated only by the desire to alleviate racial and ethnic imbalances in schools that result from private choices, such as housing patterns.

Second, where those racial classifications are deemed benign or for beneficent purposes, her recommendation regarding *Goose Creek*'s zoning plan and her support of the posture in *Taxman* indicate that she, like Justice Breyer in his dissent in *Parents Involved*, might feel comfortable applying a less searching standard of review, despite the fact that the Court's cases "clearly reject the argument that motives affect the strict scrutiny analysis."³⁷ This view would

³⁴ *Id.* at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").

³⁵ *Id.* at 736 (citing *Milliken v. Bradley*, 433 U.S. 267, 280, n.14 (1977) and *Freeman v. Pitts*, 503 U.S. 467, 495-96 (1992) ("Where segregation is not the product of state action, but of private choices, it does not have constitutional implications.")).

³⁶ *Id.* at 755 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. at 499 (1989); *Wygant*, 476 U.S. at 274).

³⁷ *Id.* at 741-42 (citing *Johnson*, 480 U.S. at 505 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (rejecting idea that "benign" racial classifications may be held to "different standard"); and *Croson*, 488 U.S. at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"))).

place the Court in the position of making policy judgments about which proffered motives are benign and which are not, which is beyond its constitutionally-mandated role and for which it is ill-equipped. As the Court has previously admonished, “[h]istory should teach greater humility.”³⁸

Finally, with respect to specific cases that might come before the Court, a Justice Kagan could provide a critical fifth vote that would expand the limited use of race the court permitted in *Grutter* in the higher education context to apply at other educational levels as well. In fact very recently, she signed off on a Department of Justice brief filed in the Fifth Circuit by the Obama Administration appealing the lower court’s decision in *Fisher v. University of Texas*,³⁹ which deals with a change to the University’s race-neutral admissions policy in the aftermath of *Grutter* that would allow each school in the system to decide whether to consider an applicant’s race in admissions.⁴⁰ In its brief, the Administration pushed the boundaries of the Court’s decision in *Grutter*, endorsing the use of racial preferences in all educational institutions—K through 12, undergraduate and graduate—to further the nonremedial goal of diversity as a compelling interest.

Ms. Kagan might also provide a crucial fifth vote on the question of whether voluntary, race-conscious drawing of school attendance boundaries by a school district that had never operated a discriminatory dual school system to achieve racial or ethnic balance is permissible

³⁸ *Id.* at 742 (citing *Metro Broadcasting*, 497 U.S. at 609-10 (O’Connor, J., dissenting) (“The Court’s emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. . . . [B]enign’ carries with it no independent meaning, but reflects only acceptance of the current generation’s conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.”)).

³⁹ 645 F. Supp. 2d 587 (W.D. Tex. 2009).

⁴⁰ Pre-*Grutter*, the University operated a race-neutral “top ten percent” admissions policy, whereby every student who graduated in the top ten percent of a Texas high school was guaranteed admission at one of UT’s campuses. The race-neutral policy had a positive effect on minority enrollment. Nonetheless, after the Court’s decision in *Grutter*, which allowed race to be used as a criteria for admission as long as it was but one of many factors, the Regents of the UT system modified its admissions policy, authorizing each school to decide whether to consider an applicant’s race.

under the Equal Protection Clause. Parents Involved expressly left this question open,⁴¹ but Justice Kennedy indicated in his concurrence that he might permit it.⁴² Additionally, the decisiveness of her comments regarding *Taxman* leave little room for interpretation regarding how a Justice Kagan might vote if the question presented there were to make its way back to the Supreme Court for adjudication.

Of course, the law has developed and changed in the years since Ms. Kagan served as a law clerk for Justice Marshall and as a domestic policy advisor in the White House, and no one can say with absolute certainty how a Justice Kagan will vote on the pressing issues of the day. But her record does afford us with the ability to make some educated guesses. Regrettably, that record points not forward in the battle against discrimination, but backwards, to the use of more racial preferences instead of less, and is out-of-step with the views of the American people. Ms. Kagan's does not appear to be the vision of a post-racial America that President Obama spoke so eloquently about when he burst onto the political scene with his 2004 speech at the Democratic National Convention and admonished that "there is not a black America and a white America and Latino America and Asian America—there is the United States of America."⁴³

If the nation's past experience with matters of race teaches us one thing, it is that:

[R]acial decisions by the state remain unique in their capacity to demean. To squeeze human beings of varying talents, interests, and backgrounds into an undifferentiated category of race is to submerge what should matter most about us under what should matter least. To seize upon this one proven odious criterion for

⁴¹ *Id.* at 738-39 (. . . [R]ace-consciousness in drawing school attendance boundaries [is] an issue well beyond the scope of the question presented in these cases," albeit one in which even the dissent recognized must be decided under strict scrutiny and not rational basis review).

⁴² *Id.* at 788-89 (opinion of Kennedy, J., concurring in part and concurring in judgment).

⁴³ Barack Obama, "The Audacity of Hope," Speech Delivered at the 2004 Democratic National Convention (July 27, 2004).

judgment as the basis for preferential treatment of some and disfavor of others, and as a potential determinant of the destiny of all is, to commit this country to the perpetuation of means employed in the darkest hours of its history. From this, the Fourteenth Amendment was supposed to be the instrument of deliverance.⁴⁴

Accordingly, it is respectfully submitted that Ms. Kagan's interpretive doctrine should be evaluated for whether it would be likely to produce results contrary to the color-blind ideal and thus produce a legal regime that—over 45 years after the passage of the Civil Rights Act—would increasingly subdivide and judge Americans on the basis of race.

⁴⁴ J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There is No Other Way*, 121 HARV. L. REV. 158, 163-64 (2007).

Statement of

The Honorable Amy Klobuchar

United States Senator
Minnesota
June 28, 2010

SENATOR AMY KLOBUCHAR
OPENING STATEMENT
SUPREME COURT CONFIRMATION HEARING FOR SOLICITOR GENERAL ELENA
KAGAN

Welcome, Solicitor General Kagan.

I know you have family and friends with you today, supporting you during this important hearing, and we welcome them too. I wish your parents could have lived to see their daughter nominated to the Supreme Court, but I know you know there are so many others who wish you well today.

We've heard a lot today about your work experience, as we should. But when I think about your broad range of legal work, and the practical real-world experience you've had, I'm reminded of the famous speech President Teddy Roosevelt gave 100 years ago this year. To paraphrase President Roosevelt:

It is not the critic who counts?. The credit belongs to the [one] who is actually in the arena. . . who strive[s] to do the deeds ? who spends [themselves] in a worthy cause; who at the best knows in the end the triumph of high achievement . . .and [whose] place shall never be with those cold and timid souls who neither know victory nor defeat.

Solicitor General Kagan, there are always a lot of critics on the sidelines, but you have actually been in the arena . . . as a manager, as a teacher, as an advisor, as a consensus-builder and as a lawyer. In every job you've had, you've worked very hard and done very well. That is why you are before us today, being considered – in the words of Teddy Roosevelt – for this "high achievement."

Your work on the front lines tells me that you have practical experience thinking about the impact of laws and policies on the lives of ordinary Americans.

When you're involved in considering the nitty-gritty details of different policies? when you're actually in the game as a decisionmaker ? You have to figure out when to compromise and when to hold firm on a piece of legislation. You have to know exactly what the consequences of your recommendations will be. You have to think about the lives that will be impacted.

You were the first woman Dean of Harvard Law School. There, you were widely credited with bringing together a faculty that was rife with division.

Whether you were helping recruit talented professors to Harvard from across the political spectrum, or later, when you were working with senators from both parties on anti-tobacco legislation, you forged coalitions and found resolution between seemingly intractable parties.

It strikes me that it takes a pretty extraordinary person who, after working in the Clinton Administration, can still gets a standing ovation from the Federalist Society? who inspires a group of 600 law school students to show up for a rally wearing "I love Elena" t-shirts? who is widely credited with calming the factionalism that had previously roiled your law school. In several different jobs now, you have successfully managed lawyers, and worse yet, law professors – a group that can certainly be described as "fearless in the face of supervision"!

In sum, you've had a lot of practical experience reaching out to people who hold very different beliefs, and that's increasingly important on a very divided Supreme Court. That must be, by the way, why you have all the previous Solicitors General from the past 25 years – under both Democratic and Republican administrations – supporting you for this job.

You also spent years teaching students as a law professor. You understand how law school allows students to dig deep into the details of a case and to see the shades of gray.

I think those of us in Congress would do well to recall the spirit of law school more frequently?. To remember a time when it was our job to think through both sides of an argument and to give credence to the legitimate points for the other side. I believe that in government today, people need to engage, rather than retreat to the opposite corners of the boxing ring.

This brings me to a story about my fellow Minnesotan, Justice Harry Blackmun. His oldest daughter gave him a copy of Scott Turow's classic book *One L* for his 70th birthday. As you know, it is a book about the first year of law school.

After reading the book, Justice Blackmun wrote a note to Scott Turow. He wrote, "Surely there is a way to teach law, strict and demanding though it might be, with some glimpse of its humaneness and basic good?. You so properly point out that there is room for flexibility and different answers, and that not all is black or white. If I ever learned anything on the bench," Justice Blackmun said, "it is that."

It seems to me, General Kagan, that in all the jobs you've had, you have carried this spirit of law school with you – the spirit of constant engagement and good-faith efforts to reconcile different views. We would welcome such traits on our Supreme Court.

I also see in you someone like your mentor and former boss, Thurgood Marshall – someone who thinks that the law is more than just an academic exercise.

I, for one, would like to see someone who thinks very deeply about the consequences that legal

choices and legal decisions have on regular people.

For me, I would welcome a Justice who, in the Lilly Ledbetter employment discrimination case, would raise – like Justice Ginsburg did – some real-world points, like: "What was Lilly supposed to do to file her complaint on time? Run around asking male employees what they were making? Sneak into their desks to see their paychecks?"

I would also welcome a Justice who, in the Exxon-Valdez case, would have thought – as Justice Stevens did – about the real-world impacts of slashing the damages that the jury had awarded to the 32,000 fisherman whose livelihoods were tragically impacted by the Exxon Valdez oil spill of 1989.

While I do not know what you would have done in these cases, your practical experience leads me to believe you may have considered such things.

Now, even with the variety of legal experiences that you have had, questions have been raised as to whether it is appropriate to nominate someone to be a Supreme Court Justice who has never been a judge before.

As you know, more than one-third of all Supreme Court Justices throughout history didn't have prior judicial experience, including Chief Justice Rehnquist and Justices Brandeis and Frankfurter.

In an acknowledgement of the importance of your real world experience, Justice Scalia said recently that he was "happy to see that this latest nominee is not a federal judge – and not a judge at all."

I think your practical experience will be helpful should you be confirmed to the Supreme Court, and I look forward to asking you more about that.

As a former prosecutor, I'm particularly interested in your approach to criminal law cases. When I was the Hennepin County Attorney, I saw firsthand how the law can impact the lives of real people – whether it's crime victims and their families, or defendants, or the neighborhoods where people live and work. Of course, criminal justice cases that reach the Supreme Court involve complicated tradeoffs between competing values – safety, privacy, and liberty. I'd like to know more about how you expect to evaluate these issues.

And in criminal cases as well as civil cases, I'd like to know how you would balance the text of statutes and the Constitution with pragmatic considerations based on your real-world experience.

I often get concerned that pragmatic experiences are missing in judicial decision-making – such as when I looked at last year's Supreme Court decision in *Melendez-Diaz* where a majority broadly interpreted the Confrontation Clause to include crime lab workers, creating potentially unwieldy and unnecessary requirements for prosecutors. I understand that during your tenure as Solicitor General, you filed a brief in a separate case with the Supreme Court that attempted to limit the holding of *Melendez-Diaz*, and I want to ask you about that.

Finally, I want to ask you about some First Amendment issues you've written about, like the New York Times v. Sullivan standard in libel cases.

As I consider your nomination, I also want to reflect on how far we've come: When Sandra Day O'Connor graduated from law school more than 50 years ago, the only offer she got from a law firm was for a position as a legal secretary.

Justice Ginsburg faced similar obstacles. When she entered Harvard in the 1950s, she was only one of nine women in a class of more than 500 and one professor actually asked her to justify taking a place that could have gone to a man.

I know you're well aware of the strides that women have made. In a 2005 speech, quoting Justice Ginsburg, you described a 1911 student resolution at the University of Pennsylvania Law School. This resolution would have introduced a 25¢-per-week penalty on all students without mustaches!

The women who came before you to be considered by this Committee helped blaze a trail. And although your record stands on its own, you are also – to borrow a line from Isaac Newton – "standing on the shoulders of giants."

In the course of more than two centuries, 111 justices have served on the Supreme Court. Only three have been women. If you are confirmed, you will be the fourth, and for the first time in its history, three women would take their places on the bench when arguments are heard in the fall.

Last year, at the confirmation hearings for Justice Sotomayor, I said I was looking for three things in a Supreme Court Justice: Good judgment, humility, and the ability to apply the law without fear or favor.

I'd like to add one additional consideration to the three standards I mentioned last year: I'd like to see a Supreme Court Justice who is able to go into the back room when the Justices meet – and when no "ordinary citizens" are present – and bring some real-world perspective to the room.

I'd like to see someone who wouldn't expect the victim in an employment discrimination case to go rifling through her male coworkers' desks to see what their pay stubs said. I'd like to see someone who wouldn't expect prosecutors to bring a crime lab analyst to every trial, even when the crime lab's findings aren't disputed.

This will be my focus at the hearing. I am hopeful that your background and experiences – to use the words of Teddy Roosevelt, the experiences of someone who has "actually [been] in the arena" – will help you be that person. I am hopeful that you will use your great skills and abilities to bring that commonsense perspective to the Court, and remember that the cases you hear involve real people – with real problems – looking for real remedies.

Thank you.

Statement of

The Honorable Herb Kohl

United States Senator
Wisconsin
June 28, 2010

Senator Kohl's Opening Statement on the Supreme Court Confirmation Hearing of
Solicitor General Elena Kagan
June 28, 2010

Good morning Solicitor General Kagan. We welcome you today to the Committee and extend our congratulations to you on your nomination.

If confirmed, you will bring to the court an impeccable resume and a formidable track record of accomplishments. And, you will bring a new perspective to the bench, as each new justice does, based on your life and your career. You come before us today not from the halls of our judicial monastery, but with the insight of a scholar and a teacher, and the political, policy and legal acumen of a White House aide, law school dean and the Solicitor General of the United States.

Your encounters with the law— from its technical intricacies to its emotional controversies — have formed the lens through which you will judge the dilemmas of our democracy and the constitutional questions we face. At this hearing, we will try to learn from you how that lens will affect your judgment on the Court.

Should you be confirmed, your decisions will impact our pocketbooks and our livelihoods, and determine the scope of our most cherished rights. From the right to privacy to the right to equal education, employment and pay; From the right to an attorney and a fair trial for the accused to the right to speak and worship freely.

In these difficult economic times, in the wake of what could be the most horrific environmental crisis in our nation's history, and as we continue our fight against terrorism, we are mindful of the great influence you will have on the issues and cases that wash up on the shores of our courts. The questions you will confront are not only concepts for lawyers and courts to contemplate. Behind the volumes of legal briefs are real people with real problems. And beyond the individual parties to each case will stand the rest of us who will feel either the brunt or the bounty of your decisions.

We hear the over-used platitudes from every nominee, that he or she will apply the facts to the law and faithfully follow the Constitution. But, deciding Supreme Court cases is not merely a mechanical application of the law. There will be few easy decisions and many cases will be decided by narrow margins.

You will not merely be calling balls and strikes. If that was the case then Supreme Court nominations and our hearings would not be the high stakes events they are today. But all of these things do matter and we care deeply about the Supreme Court precisely because it rules on only the toughest and most challenging problems. We can all agree that your decisions will impact society long after you have left the court. Justice Oliver Wendell Holmes put it plainly, "Presidents come and go, but the Supreme Court goes on forever."

That is why it is so important for us to know who you are, Solicitor General Kagan -- what is in your heart and what is in your mind. We can gain some insight from your work for President Clinton and Justice Thurgood Marshall. But we have less evidence about what sort of judge you will be than on any nominee in recent memory. Your judicial philosophy is almost invisible to us.

We don't have a right to know in advance how you will decide cases, but we do have a right to understand your judicial philosophy and what you think about fundamental issues that will come before the court. As you said in your own critique of these hearings in 1995, it is an "embarrassment" that Senators do not insist that a nominee reveal what kind of Justice she would make, by disclosing her views on important legal issues.

The President has his vetting process and we in the Senate have our vetting process. But this hearing is the only opportunity for the American public to learn who you are. They deserve to learn about your views and motivations before you don the black robes of a Justice for a lifetime appointment.

For each Supreme Court nomination in which I have participated, I have put each nominee to a test of judicial excellence and your nomination will be no different.

First, a nominee must demonstrate that she has the competence, character, integrity, and temperament necessary for any judge or justice. And that she will have an open mind—not only willing to hear cases with an open mind, but also willing to decide cases with an open mind.

I also look for a nominee to have the sense of values and judicial philosophy that are within the mainstream of legal thought in our country. No one, including the President, has the right to require ideological purity from a member of the Supreme Court. But we do have a right to require that the nominee accept both the basic principles of the Constitution and its core values implanted in society.

Finally, we want a nominee with a sense of compassion. Compassion does not mean bias or lack of impartiality. It is meant to remind us that the law is more than a mental exercise or an intellectual feast. It is about the real problems that will shape the fabric of American life for generations to come.

The great dilemmas of our democracy invite us to engage in a robust debate and my hope is that we can engage in a substantive and candid dialogue that will benefit not only those here on the Committee, but also the public. The American people want and deserve a process that is more than what you characterized as a "vapid and hollow charade" and which so frustrated you 15 years ago.

In a tribute to Justice Marshall, you said that the stories he told to his law clerks served the purpose of reminding you that "behind the law there are stories – stories of people's lives as shaped by the law, [and] stories of people's lives as might be changed by the law." We are gathered here today to hear your stories – how your life has been shaped by the law and how our lives might be changed by the law when you are on the Court.
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**Confirmation Hearings for the
Appointment of Elena Kagan to the
Supreme Court of the
United States of America**

**Hearings before the Judiciary Committee
of the United States Senate
July 1, 2010**

**Testimony on Second Amendment
and Related Issues**

Written Testimony of David B. Kopel

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&

Stephen P. Halbrook

Attorney at Law, Fairfax, Virginia. Formerly Assistant Professor of Philosophy at George Mason University, Howard University, & the Tuskegee Institute. Attorney for the prevailing party in the following Supreme Court cases: *McDonald v. Chicago* (2010)(for NRA), *Small v. United States* (2005)(on brief), *Castillo v. United States* (2000), *Printz v. United States* (1997), *United States v. Thompson/Center Arms Co.* (1992). Author of *Securing Civil Rights: Freedmen, the Fourteenth Amendment, & the Right to Bear Arms*; *The Founder's Second Amendment*; and *Firearms Law Deskbook*. www.stephenhalbrook.com.

In regard to Second Amendment issues, Senators should carefully consider whether Elena Kagan will be a Supreme Court Justice like Hugo Black. In other words, can the Justice overcome a prejudiced background and

professional record in order to become a Justice who will fully protect constitutional rights?

Justice Black certainly did so. In Alabama, he had joined the Ku Klux Klan, and was elected to the U.S. Senate as the Klan's candidate. As a practicing attorney, he had engaged in vicious race-baiting in the courtroom against people of color.¹ Yet on the Supreme Court, Justice Black vigorously enforced the constitutional rules, such as the Equal Protection clause, against treating people of color as second-class citizens. He likewise staunchly defended the free speech, free press, assembly, and association right of civil rights organizations such as the NAACP. Today he is rightly remembered as a great Supreme Court Justice.

As we will detail, there are many items in Ms. Kagan's twentieth century legal record which raise very troubling concerns that she would not fully protect the Second Amendment rights of Americans, but instead would be willing to stretch the law in order to promote oppressive anti-gun laws and gun bans.

However, her record in the twenty-first century at least suggests the possibility of a more open-minded attitude. Alexander "Sasha" Volokh is an Assistant Professor at Emory Law School. He attended Harvard Law School while Ms. Kagan was there. He recalls:

In particular — and despite her presumably pro-gun-control views (see the [David Kopel post below](#)), she was a good friend of the HLS Target Shooting Club, which I founded in Fall 2001 and was the president of for two years.²

There are plenty of law schools where the Dean would not be “a good friend” of a Target Shooting Club. While this one piece of evidence about Dean Kagan is not conclusive, it does suggest that Senators that there is at least a possibility that her attitude towards gun owners, firearms organizations, and the Second Amendment has changed since the twentieth century.

¹ STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION (2005).

² Sasha Volokh, *My own Kagan experience*, THE VOLOKH CONSPIRACY weblog, May 11, 2010, 4:43 pm, <http://volokh.com/2010/05/11/my-own-kagan-experience/>. He also notes that Kagan, before becoming Dean, served as a cordial moderator for a gun control debate held at Harvard Law School.

If and only if her attitude as a Justice were dramatically different from her earlier record on gun issues—as Deputy White House Counsel and as a Supreme Court clerk, would there be reason to hope that as a Supreme Court Justice, she would fulfill her duty to respect and protect Second Amendment rights.

The unfortunate lesson of the confirmation of Justice Sotomayor is that Senators who care about the Second Amendment cannot rely on platitudes about “settled law” or even direct promises to abide by *Heller*. Before this Committee, Ms. Sotomayor declared, “I understand the individual right fully that the Supreme Court recognized in *Heller*.” And, “I understand how important the right to bear arms is to many, many Americans.”

To the Senate Judiciary Committee, Justice Sotomayor repeatedly averred that *Heller* is “settled law.” The Associated Press reported that Sen. Mark Udall “said Sotomayor told him during a private meeting that she considers the 2008 ruling that struck down a Washington, D.C., handgun ban as settled law that would guide her decisions in future cases.”³

Yet on June 28, 2010, Justice Sotomayor joined Justice Breyer’s dissenting opinion in *McDonald v. Chicago*, and announced that *Heller* was wrongly decided and should be over-ruled. Apparently her true belief was not what she told this Committee, but instead: “In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self defense.”⁴

So by “settled law,” nominee Sotomayor seems to have meant “not settled; should be overturned immediately.”

Accordingly, statements from Ms. Kagan about *Heller* being “settled law” provide not an iota of assurance that as a Justice she would support *Heller*, rather than attempt to eliminate it.

Evidence of a hostile attitude towards the Second Amendment can be found starting at the beginning of her legal career.

Adding to concerns is that her answer to this Committee on June 29 about the infamous NRA/KKK comparison was incomplete and somewhat misleading.

“Not sympathetic” to Second Amendment claim. *Sandridge v. United States*, 520 A.2d 1057 (D.C. 1987), *cert. denied*, 484 U.S. 193 (1987), held that the Second Amendment only protects “collective” rights and not individual

³ Julie Hirschfeld Davis, *Sotomayor’s stance on gun rights prompts questions*, ASSOCIATED PRESS, June 12, 2009.

⁴ *McDonald v. Chicago*, 561 U.S. ___, slip op. at 31 (2010) (Breyer, J., dissenting).

rights, and upheld D.C.'s handgun ban. As clerk for Justice Thurgood Marshall, Kagan recommended against Supreme Court review with the comment: "Petitioner's sole contention is that the District of Columbia's firearms statutes violate his constitutional right to 'keep and bear Arms.' I'm not sympathetic."

District of Columbia v. Heller, 128 S. Ct. 2783 (2008), resolved that the right is indeed individual and invalidated the District's handgun ban. The dissents in that case reflect the continued lack of sympathy by some for the view that "the right of the people to keep and bear arms" refers, as do the First and Fourth Amendments, to a right of all individual American's.

Obviously the phrase "I'm not sympathetic" expressed Kagan's personal views. It cannot be brushed off as a clerk expressing her Justice's views.

Unfortunately, evidence of prejudice also appears much later in Ms. Kagan's career.

Comparing the NRA and the KKK as "Bad guy orgs." In a March 1996 document on the proposed Volunteer Protection Act, Kagan expressed concern to Justice Department Attorney Fran Allegra that "Bad guy orgs" like the National Rifle Association and the Ku Klux Klan might be protected from lawsuits.⁵ Allegra assured Kagan that the NRA and KKK would not qualify, since they are not on the IRS list of non-profits; Allegra added: "We probably need to be careful about suggesting 'bad' organizations will qualify for the provision bill as it would suggest we are allowing 'bad' organizations to qualify for tax-exempt status."⁶

The comparison is outrageous and malicious. There is all the difference in the world between a civil rights group that is a political opponent of the current president—and an organization created for terrorism and racial oppression

The White House explanation of the statement was implausible. According to the *Washington Post*:

Here's the White House version of events. At the time, two separate things were going on simultaneously. First, Clinton officials were concerned that the proposal would make it tougher for victims of gun violence to pursue liability claims. Officials viewed the bill as a major giveaway to the gun industry and the NRA. As part of analyzing the

⁵ Box 70, Folder 6, p. 4. References are to <http://www.clintonlibrary.gov/textual-KaganDPC.htm>.

⁶ *Id.* at 19.

impact in this area, Clinton lawyers looked at how it would benefit the NRA.

In a second, separate development, Democratic members of Congress were worried that the act could protect the KKK and other hate groups from liability. Senator Patrick Leahy branded it the “KKK protection act.” That prompted Clinton lawyers to analyze how it would impact such groups -- the KKK included.⁷

If we hypothesize that this explanation is truthful, it would reveal legal incompetence. The Volunteer Protection Act was to protect volunteers. It obviously had nothing to do with “the gun industry”—which like other industries, uses paid employees, not volunteers.⁸

Accordingly, the 2010 White House explanation about Kagan’s comment is not credible. Ms. Kagan is obviously intelligent enough to know the difference that a volunteer protection bill (which might protect the NRA, since the NRA has many volunteers) would not protect “the gun industry.”

Before this Committee, Ms. Kagan provided an entirely different answer. The very existence of shifting explanations raises serious concerns about veracity.

She told Senator Kyl that the NRA and KKK line was merely her notation of something that someone had told her on the telephone. This could perhaps be true for one specific document. But a different document, from Ms. Allegra,

⁷ Greg Sargent, *The Plum Line*, *Washington Post* online, June 18, 2010; 3:21 PM ET, http://voices.washingtonpost.com/plum-line/2010/06/latest_attack_on_kagan_she_com.html.

⁸ Several years later, there was a bill introduced which actually was criticized “as a major giveaway to the gun industry and the NRA.” That bill protect the gun industry from lawsuits which had been filed some big-city mayors, starting in late 1998. Eventually, that bill was enacted as the 2005 Protection of Lawful Commerce in Arms Act. Because some municipalities had sued firearms trade associations, like the National Shooting Sports Foundation, the bill included lawsuit protection for firearms business associations, arguably including the NRA.

We know that Kagan’s comments could not be about the PLCAA, which as of 1996 had not even been introduced.

As of 1996, Congress was considering a broad product liability reform bill (Gorton-Rockefeller). Conceivably, that bill might have been criticized as benefitting the gun industry, but it would not have benefited the NRA.

The current White House spin makes no sense, since the subject line of the Allegra memo itself is “Charities Bill,” and the charitable volunteer bill is the only draft that is included in the folder. Kagan had separate, extensive files on product liability legislation.

makes it clear that it was Kagan who was instructing Allegra specifically to look up the non-profit status of the KKK and the NRA.⁹

It appears that neither the White House version nor the Kagan version of the story provides a full and credible explanation of what happened. Thus, it may be reasonable consider the remark according to the natural meaning of the words: reflecting a narrow-minded, mean-spirited, and very prejudiced animosity towards America's oldest civil rights organization.

It is unfortunately true that a person whose entire life has been spent in Manhattan, Cambridge, Chicago, and Washington may have a very parochial and ill-informed view of the NRA. Just as a person who in the first half of the twentieth century had only lived in Clinton, Mississippi; Hattiesburg, Mississippi; Clinton, Alabama; and Muscle Shoals, Mississippi, might have a very inaccurate and prejudiced view of the NAACP.

Some judges overcome a narrow background, but some do not.

It is worth noting that Kagan's twinning of the NRA and the KKK reflects a profound ignorance of some important parts of our nation's history.

The President who decimated the first Ku Klux Klan was Ulysses S. Grant. He signed the Anti-Ku Klux Klan Act in 1871 (parts of which survive today as 42 U.S.C. §§ 1983 and 1985-86). In a report to Congress the following year, President Grant described parts of the South as

under the sway of powerful combinations popularly known as "Ku-Klux Klans," the objects of which were, by force and terror, to prevent all political action not in accord with the views of the members, *to deprive colored citizens of the right to bear arms* and of the right to a free ballot, to suppress schools in which colored citizens were taught, and to reduce the colored people to a condition closely akin to that of slavery¹⁰

Carrying out his constitutional duty to see that the laws be faithfully executed, President Grant devoted substantial federal resources—including the military—to suppressing the domestic terrorist organization.

After having been twice elected President of the United States, Ulysses Grant was later elected President of the National Rifle Association, serving in 1883 as the NRA's eighth President.

⁹ Fran Allegra to Elena Kagan, March 27, 1996, KCL 0090586 ("For now, I think we need to be cautious in picking examples of organizations. If you have other names you want me to run down in the Cumulative List, I would be glad to check them out.")

¹⁰ Ex. Doc. No. 268, 42nd Cong., 2d Sess. 2 (April 19, 1872) (emphasis added).

From the NRA's founding in 1871, nine of the NRA's first ten presidents were high-ranking Union officers during the Civil War.

The NRA has always stood up for civil rights, including the right to keep and bear arms without regard to race, color, or creed. The historic role of the KKK was to deprive African Americans of this right.

The cofounder of the NRA was General Ambrose Everett Burnside, who had recently finished two terms as Governor of Rhode Island. As a Union General, he had been a leader at integrating the freedmen into combat roles. As the *Providence Journal* later put it, Burnside was "One of the first of the regular army officers to approve heartily of Mr. Lincoln's emancipation policy, he was also one of the first to favor the arming of black troops, and one of the most successful in training them for action."¹¹

After founding the NRA, Burnside was elected Senator from Rhode Island. He fought against racial segregation in the military, and proposed that West Point adopt an affirmative action admissions plan for blacks.

The sixth NRA President, General Winfield Scott Hancock, was nationally extolled as "the hero of Gettysburg." As Democratic nominee for U.S. President in 1880, he had lost the popular vote by less than 10,000 votes, and if he had won the swing state of New York, he would have won the electoral vote. Hancock was remarkable for his time, always treating black people as equals, even before the Civil War. In 1880, Hancock led a national campaign to vindicate a black cadet at West Point who had been attacked by some white cadets, but whom the West Point administration claimed had injured himself.

The NRA's Articles of Incorporation omitted something that was common for other sporting organizations at the time: a racial exclusion clause. In contrast to many other organizations and clubs created in the late 19th and early 20th centuries—such as the U.S. Lawn Tennis Association, the Professional Golf Association, the New York Athletic Club (for track and field), and the Amateur Athletic Union (same), the NRA welcomed members and athletes of every race.

The NRA was the governing body for the sport of rifle shooting, and eventually became the governing body for almost all the shooting sports. In this way, the NRA set a good example of racial integration and equality for the millions of Americans who participated in the shooting sports. Even

¹¹ Quoted in BEN PERLEY POORE, *THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE: CITIZEN, SOLDIER, STATESMAN* 265 (Providence: J.A. & R.A. Reid, 1882) (available on GoogleBooks).

during the worst of Jim Crow, a NRA match was one place where blacks and whites were exactly equal, and where skin color did not matter.

In the very segregated Washington, D.C., of the 1930s and 1940s, the shooting range at NRA National Headquarters was the only integrated place where a young black man could go and feel fully welcome. At least that was the experience of Richard Atkinson, a black man who grew up in the District during those years, and who was later elected a director of the National Rifle Association.

The NRA's contribution to America are not limited to racial equality. The NRA has instructed millions of Americans how to handle guns safely and responsibly. Since the 1980s, the NRAs "Eddie Eagle" program has taught over ten million children that if they see a gun, "Stop! Don't touch! Leave the area. Tell an adult." The NRA has trained much of the nation's police, and many of the nation's police trainers. Eight U.S. Presidents have been NRA members—probably more than of any other civic organization in the United States.¹²

After World War II, President Harry S. Truman thanked the NRA:

During the war just ended, the contributions of the Association in the matter of small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to Government civilian agencies aiding in the prosecution of the war—all contributed freely and without expense to the Government—have materially aided our war effort.¹³

Vilely equating the National Rifle Association of America and the Ku Klux Klan might be fashionable in the bigoted confines of an Upper West Side cocktail party in Manhattan. But no one who presently holds such beliefs could be fit to serve on the Supreme Court. Nor could someone who equated other honorable civic organizations (such the NAACP, ACLU, AFL-CIO) to the Klan.

¹² With the exception of the Boy Scouts, who automatically make the current U.S. President into the Honorary Boy Scouts President.

¹³ Reprinted in *Federal Firearms Legislation: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, United States Senate, 90th Cong. 484 (1968).

Does narrow-mindedness have legal consequences? The record shows that it does.

Drafting Clinton's 1997 order banning import of rifles that had been considered "sporting" and importable since 1968.

In 1994, Congress enacted a temporary (10-year) ban on so-called "assault weapons." The manufacture and import of new "assault weapons" was banned.¹⁴ In 1990, Congress had enacted a different statute to prevent the domestic assembly from foreign parts of guns that President Bush had banned from importation in 1989. Thus, Congress had clearly defined what was a non-importable "assault weapon."

However, a more general law, the Gun Control Act of 1968 requires that to be importable, firearms must be "particularly suitable for or readily adaptable to sporting purposes."¹⁵

When the Bureau of Alcohol, Tobacco and Firearms was created in 1968, it took up the duty of determining which guns were importable. Under the BATF criteria, the import of many sporting rifles was allowed. Although some rifles have a cosmetic military appearance, the BATF criteria focused on the guns' function.

Dissatisfied that firearms importers were strictly complying with the 1990 and 1994 statutory definitions of "assault weapons," President Clinton wished to ban more gun imports. So he sidestepped Congress, decreed a suspension of import permits, and ordered a new study by BATF with the foregone conclusion that the targeted firearms would no longer be considered "sporting" and hence not importable.¹⁶

Democratic Senator Pat Leahy, who was then the ranking member of the Senate Judiciary Committee, wrote to President Clinton that he "strongly believes that using a Presidential directive to avoid the normal legislative process regarding any changes to the assault weapons ban is the wrong way to go."¹⁷

In response to question from Senator Russ Feingold on June 29, Ms. Kagan said that her gun control work with President Clinton "actually bipartisan support here in Congress." At least in regard to the import ban, this was not accurate. The very reason for imposing the ban

¹⁴ 18 U.S.C. §§ 921(a)(30) (definition), 922(v) (prohibition).

¹⁵ 18 U.S.C. § 925(d)(3).

¹⁶ President Clinton's Memorandum for the Secretary of the Treasury, Subject: Importation of Modified Semiautomatic Assault-Type Rifles, Nov. 14, 1997.

¹⁷ <http://rpc.senate.gov/releases/1998/importban-kf.htm>.

administratively—for evading what Senator Leahy called “the normal legislative process”—was the absence of congressional support.

As requested by Clinton, Charles F.C. Ruff and Elena Kagan worked on drafting the ban directive.¹⁸

The directive is filled with exaggerated rhetoric about what it mischaracterized as “Assault-Type Rifles.” (Under the proper technical definition, an “assault rifle” is a selective-fire weapon capable of full automatic fire.¹⁹) The Kagan-Ruff directive states: “A recent letter from Senator Dianne Feinstein emphasized again that weapons of this type are designed not for sporting purposes but for the commission of crime.”²⁰

This was patent nonsense. It might be seriously believed by someone who had no experience with America’s broad culture of hunting and target shooting. But every one of the 58 banned guns was used in target competitions. Some had names like “Hunter” or “Sporter.”

The notion that respectable European sporting gun companies, some of which have been in business for centuries, were catering to a supposed American market of criminals by selling them expensive rifles was ridiculous.

This kind of rhetoric defames the millions of law-abiding Americans who purchased and own such rifles for lawful purposes.

To Senator Feingold, Ms. Kagan said that her White House work was “to keep guns out of the hands of criminals, to keep guns out of the hands of insane people.” Not so, in regards to the rifle ban. The ban was not directed to improving background checks, or cracking down on the black market. The ban kept guns out of the hands of law-abiding American citizens.

As directed, BATF claimed that the rifles had become, overnight, no longer “particularly suitable for or readily adaptable to sporting purposes.” The basis for this new assertion was that BATF solicited comments from hunting guides, and found that the guns were rarely recommended for

¹⁸ Memorandum for the President, Nov. 13, 1997. (Box 9, folder 3, p. 70.) References are to <http://www.clintonlibrary.gov/textual-KaganDPC.htm>.

¹⁹ “Assault rifles are short, compact, selective-fire weapons Assault rifles . . . are capable of delivering effective full automatic fire” HAROLD E. JOHNSON, SMALL ARMS IDENTIFICATION & OPERATION GUIDE – EURASIAN COMMUNIST COUNTRIES 105 (Defense Intelligence Agency 1980).

²⁰ So-called assault weapons “were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%. Most of the AWs used in crime are assault pistols rather than assault rifles.” Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (Report to the National Institute of Justice, U.S. Dep’t. of Justice 2004), at 2. The firearms at issue here were not even defined as “assault weapons.”

hunting trips.²¹ As if the only gun that is a “sporting” gun is one used by people who can afford to take trips with a professional guide. This is economic snobbery in the extreme—rather like claiming that the only foods permissible for human consumption are those which are the favorites of professional chefs.

In a minority of states, hunting is not allowed with magazines holding more than ten rounds.²² So therefore Kagan and the Clinton administration claimed that rifles which accept detachable clips that can hold more than ten rounds are not “sporting.”

But in fact, magazines of more than ten rounds are commonly used for many target shooting sports and competitions, and are required in some, as extensive evidence showed.

Besides, even if we presume that hunting according to the restrictive rules in a minority of states is the one and only firearms sport, the statute says: “particularly suitable for or readily adaptable to” sporting purposes.²³

A legal challenge was brought,²⁴ but ATF’s newly-minted application of the sporting criteria was upheld under the doctrine of “deference” to agency expertise. *Springfield, Inc. v. Buckles*, 292 F.3d 813 (D.C. Cir. 2002). The court rejected the importer’s contention that “even if its rifles are not ‘particularly suitable for’ ‘sporting purposes,’ they are ‘readily adaptable to’ that end because they can accept small magazines,” and accepted ATF’s view that “‘particularly suitable for or readily adaptable to’ meant ‘particularly

²¹ *Department of the Treasury Study on the Importability of Modified Semiautomatic Assault Rifles* (April 1998), <http://www.atf.gov/publications/download/treas/treas-study-on-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>.

²² For example, for deer hunting with a rifle, the following 13 states have a magazine capacity restriction of 10 or less: Arizona, Colorado, Florida, Maine, Maryland, Mississippi, Nevada, New Hampshire, New York, Oklahoma, Oregon, South Dakota, Vermont.

²³ Emphasis added. The Firearms Owners’ Protection Act of 1986 amended 18 U.S.C. § 925(d)(3) to state that “the Secretary shall authorize a firearm . . . to be imported if the firearm . . . is generally recognized as particularly suitable or readily adaptable to sporting purposes.” § 105, P.L. 99-308, 100 Stat. 449, 459 (1986). FOPA’s “shall authorize” replaced “may authorize” language from the 1968 GCA. The old GCA had said that “the Secretary may authorize a firearm . . . to be imported . . . if the person importing . . . the firearm . . . establishes to the satisfaction of the Secretary” that the firearm “is generally recognized as particularly suitable or readily adaptable to sporting purposes.” FOPA passed the Senate 79-15, with 30 Democrats in favor and 13 opposed. Among the Democratic senators voting favor were Joe Biden, George Mitchell, John Glenn, and Al Gore. FOPA passed the House 292-130, with Democrats voting 131 in favor and 115 opposed. House Democrats who voted for FOPA included Tom Lantos, Tim Wirth, Lee Hamilton, Dan Glickman, Jim Florio, Mike Synar, Tom Daschle, Tom Foley, and Les Aspin. The lead House sponsor, Harold Volkmer, was a Democrat; he now serves on the NRA Board of Directors.

²⁴ See Brief for Appellant, 2001 WL 36037956, and Reply Brief for Appellant, 2001 WL 36037958. Halbrook was counsel for appellant.

suitable for *and* readily adaptable to” sporting purposes. *Id.* at 818. The court accorded ATF discretion to deem shooting competitions and target shooting as not being “sporting purposes.” *Id.*

When the ban was announced, one of Kagan’s helpers in the White House, Jose Cerda stated, “We are taking the law and bending it as far as we can to capture a whole new class of guns.”²⁵

Mr. Cerda was exactly right. Kagan bent the law to claim that “sporting” gun use does not include formal target shooting competitions, or informal target practice. Kagan bent the law to claim that “or” means “and.” She banned 58 different models of rifles from the hands of law-abiding American citizens.²⁶

Her legal skills were impressive. She had very accurately gauged how much the courts would let her get away with. Which was quite a lot.

A Supreme Court Justice has tremendous power to “bend” the law. Without over-ruling *Heller*, a future Court could bend the law so much that much of the Second Amendment might be eviscerated.

As she accurately told Senator Feingold on June 29, 2010, the Supreme Court will soon have to set a standard of review for Second Amendment cases, and provide more guidance about what types of anti-gun laws are unconstitutional.

Of Ms. Kagan’s activities in the Clinton White House took place before *Heller* was decided, but the idea that the Second Amendment guarantees a meaningful individual right was well-known in the late 1990s.

Specific constitutional provisions aside, one of the most important jobs of the Supreme Court is to stop Executive Branch abuses of power. Ignoring a statute which says “or”—especially when the “or” was inserted for the specific purpose of reducing the government’s ability to ban guns, is itself an abuse of power. So is claiming that the sole standard for “sporting” use of guns is the activity of people who pay for professional guided hunts.

Ms. Kagan’s leading role in the 1997 import ban raises very serious concerns that as a Justice, she could turn a blind eye to Executive Branch abuses of the Second Amendment, and perhaps of other rights.

To her credit, on another import issue, Kagan did stick to the plain language of the law. The 1994 Crime Act banned magazines holding more

²⁵ Steve Berry, *Clinton Moves to Limit Import of Assault Guns*, LOS ANGELES TIMES, Oct. 22, 1997.

²⁶ The list of banned guns is available at BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FEDERAL FIREARMS REGULATIONS GUIDE 2005 (ATF pub. 5300.4, Sept. 2005), p. 167. <http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf>.

than ten rounds, but only those “manufactured after the date of enactment” in 1994.²⁷ Despite that clear language, BATF sought to apply the ban to *all* imported magazines. “The Department of Justice found that this [BATF’s] interpretation, which was challenged in two lawsuits, was not supportable as a matter of law.”²⁸

The Clinton archives include a BATF memo arguing that the law prohibited import of the magazines “regardless of the date of manufacture.” Kagan wrote: “Plain language, guys.”²⁹ Indeed, the language was so plain that government counsel would not argue otherwise in litigation.

Suggestion of a Presidential decree criminalizing handgun sales if the Supreme Court invalidated the federal mandate that State and local law enforcement conduct background checks.

Printz v. United States, 521 U.S. 898 (1997), held that Congress could not commandeer State and local Chief Law Enforcement Officers (CLEOs) to conduct federal background checks on handgun purchasers. The provision of the Brady Act so requiring, 18 U.S.C. § 922(s)(2), was thus invalidated based on principles of Federalism and the Tenth Amendment.

After oral argument but before the decision was handed down, the following memo appeared: “Based on Elena’s suggestion, I have also asked both Treasury and Justice to give us options on what POTUS [President of the United States] could do by executive action – for example, could he, by executive order, prohibit a FFL [Federal Firearms Licensee] from selling a handgun w/o a CLEO certification.”³⁰

Yet the Brady Act was very clear that the only obligation of an FFL to a CLEO was to provide notice and a copy of a handgun transferee’s intent to receive a handgun. The FFL could then sell gun after either: 1. Receiving authorization from the CLEO, or 2. After five business days had passed. 18 U.S.C. § 922(s)(1)(A).

The Brady Act was written in this way for the specific purposes of allowing the handgun sale if the CLEO had not acted within five business days.

²⁷ 18 U.S.C. § 921(a)(31)(A).

²⁸ “Importation of Large Capacity Ammunition Feeding Devices,” undated. (Box 9, Folder 2, p. 11.)

²⁹ Box 6, Folder 12, p. 20.

³⁰ Dennis K. Burke 03/17/97 11:02:31 AM, Box 9, Folder 14, p. 27.

To suggest that the President might forbid the gun sale even after five business days had passed was flagrantly contrary to the direct and clear language of the Brady Act itself.³¹

The best interpretation of the Kagan memo was that—flouting the law which Congress had enacted specifically to set the rules for handgun sales—Kagan was asking for a search for some other law which might be bent or stretched so that the President could claim the unilateral authority to ban handgun sales. And such a presidential order really would have been a ban, since in many jurisdictions (including the entire state of Ohio) local law enforcement chose to not perform background checks.

In some jurisdictions, law enforcement had no capability to perform the checks, even if they wanted to. For example, Sheriff Printz was responsible for a Montana county the size of Rhode Island. At any given time, there were only three sheriff's department officers on duty, including the Sheriff himself. Stretched thin, they had no time to conduct investigations of all the handgun purchasers in the county.

At the worst, the Kagan query seems to assume an extraordinary power of the President to make law. The Supreme Court noted in the *Steel Mills Seizure Cases*: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States'"³² Within minutes of the ruling, President Truman complied by returning the mills to their owners.

In contrast, as Ms. Kagan anticipated the *Printz* decision, she began searching for ways to evade the Court's decision, and the plain language of the law enacted by Congress.

First Amendment

It has been often and accurately said that the Second Amendment cannot long endure without a robust First Amendment. Other witnesses will testify

³¹ In *Printz*, the Supreme Court not only invalidated the federal command to CLEOs, but added that the sheriff was "prohibited from taking on these federal responsibilities under state law." *Printz*, 521 U.S. at 934 n.18. Nonetheless, President Clinton wrote an open letter to CLEOs nationwide urging them to continue to conduct the checks. As counsel for Sheriff Printz, Stephen Halbrook wrote to President Clinton and Attorney General Reno urging them to state that they were not suggesting that CLEOs violate their own State laws. (See Box 9, Folder 10, p. 48.) A response was drafted arguing that the CLEO checks would be justified as type of joint federal-state criminal investigation. The draft was circulated to Kagan and others but never sent. (Box 9, Folder 10, p. 46-47.)

³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952).

about Ms. Kagan's record on the First Amendment, which is much more extensive than her Second Amendment record.

It is clear enough, however, that not since Robert Bork has the Senate Judiciary Committee held hearings on a Supreme Court nominee with a well-established record of favoring substantial contraction of existing First Amendment rights.

Conclusion

McDonald v. Chicago was not the end of the Second Amendment story, but the beginning of an important new chapter. With guidance from the Supreme Court, lower courts all over the country will face many new questions under the Second Amendment. Is it constitutional that Illinois provides *no* legal way for a citizen to carry a firearm in public for lawful protection? That Maryland has a system for granting handgun carry permits, but that in practice almost no-one except the politically influential is granted a permit? That New York City takes many months to process applications to possess a handgun in the home? That some Massachusetts permits require that a gun in the home never be loaded, even in self-defense? That in New Jersey, it is a major felony to take your unloaded gun to a friend's home, and allow him to examine the gun while you watch? That some jurisdictions ban guns because of cosmetic factors? That a 1971 conviction for marijuana possession prohibits a woman in 2010 from possessing any firearm, even if she has led an exemplary life since 1971? That federal law only allows sporting gun imports, but not imports of guns which are well-suited for lawful self-defense?

If some of these laws seem to Senators to be obviously unconstitutional, it must be remembered that the law can be bent and stretched; if a straightforward statute can be stretched beyond its plain meaning so as to allow an executive order banning 58 models of rifles, the more general language of the Second Amendment could be far easier to bend.

Hugo Black showed that despite a nominee's background, it is sometimes appropriate to hope for the best rather than to fear the worst. Please consider each possibility carefully for Ms. Kagan.

June 7, 2010

Senator Patrick Leahy
 Senator Jeff Sessions
 United States Senate
 Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear Senators Leahy and Sessions:

We are writing in support of Solicitor General Elena Kagan's nomination to become an Associate Justice of the United States Supreme Court. While speaking as individuals and not on behalf of our schools, we write from the unique vantage point of deans at U.S. law schools. From that perspective we observed General Kagan's work and accomplishments at Harvard. Many of us also know her academic work well. And, in the interest of full disclosure, we should add that some of us are personal friends of the nominee.

Elena Kagan excels along all relevant dimensions desired in a Supreme Court Justice. Her knowledge of law and 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. In terms of intelligence and intellectual ability, she is superbly qualified to sit on the United States Supreme Court.

As Dean of the Harvard Law School, General Kagan demonstrated a number of other attributes that could be considered key to serving as an Associate Justice. She was a superb and successful dean, among other reasons, because of her willingness to listen to diverse viewpoints and give them all serious consideration. She revealed a strong and consistent aptitude for forging coalitions that achieved smart and sensible solutions, often in the face of seemingly insoluble conflict. She was, at the same time, able to make decisions and lead when and where decision-making and leadership were essential. This ability to hear opinions from strongly opposed sides and to find resolutions that all can accept, and that even those who disagree can respect, are exactly what we should want in a collegial body like the Court. Elena Kagan has, over the course of her career, consistently exhibited patience, a willingness to listen, and an ability to lead, alongside enormous intelligence. The same qualities that enabled her to unify what some described as a fractious campus will serve the nation, and the Constitution, well.

Finally, Elena Kagan is known to us as a person of unimpeachable integrity. She will inspire those around her to pursue law and justice in a way that makes us proud.

Sincerely yours,



Larry D. Kramer
 Dean and Richard E. Lang Professor of Law
 Stanford Law School

On behalf of the following Law School Deans

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Dean, Widener University School of Law

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Interim Dean and Paul Regis Dean Professor of Law, Georgetown University Law Center

Hannah R. Arterian
Dean and Professor of Law, Syracuse University

John Charles Boger
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THE ETHICS & RELIGIOUS LIBERTY COMMISSION

OF THE SOUTHERN BAPTIST CONVENTION



Richard Land, D.Phil. (Oxon.), President

June 25, 2010

The Honorable Patrick J. Leahy, Chairman
Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
United States Senate
326 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

Next week, the Senate Judiciary Committee will begin its confirmation hearings for Ms. Elena Kagan. Her record causes many reasons for alarm. Even as she lacks any judicial experience, her views expressed on such critical issues as, among other things, the First Amendment, the role of the judiciary, the sanctity of human life, and homosexuality greatly concern us.

Throughout her career, Kagan has been very outspoken on her lack of respect for First Amendment rights. Kagan believes that speech may be regulated if the government's motives are pure. This was clearly demonstrated in her oral arguments before the Supreme Court in *Citizens United v. Federal Election Commission* that the government has a right to limit interest group involvement in campaign finance. We are very concerned about the potential impact of this view.

Additionally, she has made it clear through associations and writings that she admires activist judges. We are deeply alarmed that she considers former Israeli Supreme Court Justice Aharon Barak to be her judicial hero. He is well-known for his extreme views on judicial activism, even stating that "the constitution thus becomes a living norm and not a fossil, preventing the enslavement of the present to the past."

We are also concerned with Kagan's lack of respect for unborn children. As revealed in a memo she co-authored to then-President Clinton while serving as his legal advisor, Kagan was instrumental in delaying enactment of a ban on the heinous practice of partial-birth abortion for several years, urging the president to support a Senate strategy that would advance a phony ban. Kagan also has criticized the Supreme Court's decision in *Rust v. Sullivan* upholding a law allowing the federal government to bar funding from health clinics that promote and encourage abortion as a method of family planning. Further, she has agreed with a National Bioethics Advisory Commission report on cloning which found that creating embryos solely for research purposes was ethical.

Kagan has also advocated, at times very strongly, for the expansion of homosexual rights. As dean of the Harvard School of Law, she barred military recruiters from campus in response to her personal objections with the military's "Don't Ask, Don't Tell" policy. She called the policy a "moral injustice of the first order." She also has provided a weak defense of the Defense of Marriage Act while Solicitor General.

This record is very disconcerting. As the Judiciary Committee soon begins confirmation hearings on Elena Kagan as the next Supreme Court justice, we urge you to do all you can to bring out all the facts on these matters, and if these troubling issues remain, to vote against her confirmation.

Sincerely,

Richard D. Land

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June 23, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

We write in support of Elena Kagan's nomination to become an Associate Justice of the Supreme Court of the United States. Each of us served as a law clerk to a Justice of the Supreme Court during 1987-88, when Elena was a law clerk to Justice Thurgood Marshall. Many of us have had the opportunity to work with Elena, or observe her work, during the ensuing years. All of us believe that Elena would be an outstanding Justice.

As was evident during our clerkship year, and borne out by her many remarkable accomplishments since then, Elena is an extraordinarily able lawyer. She has a superb legal mind and a rich knowledge of constitutional and administrative law. She also works hard, writes well, and is a very quick study. Her legal and intellectual qualifications to serve on the Supreme Court are exceptional.

Each of us came to recognize during our clerkship year that apart from her surpassing legal ability, Elena is remarkably fair-minded and intellectually honest. As a group we had – and continue to have – different views from each other on a number of issues. Regardless of whether any given one of us agreed or disagreed with Elena on a particular issue, however, we came to appreciate her approach in those situations. She always has had a wonderful temperament, and is an extraordinary listener who is genuinely interested in what other people think. Elena is able to advance, and at times adjust, her positions while maintaining respect for and openness to other views. It is no surprise that in her tenure as Harvard Dean, she gained a reputation for consensus-building and openness to diverse viewpoints. We expect her ability to be a great colleague would serve the Court well if she is confirmed.

Collectively we clerked for ten justices who each employed his or her clerks in different ways. We all understood, however, that our role as clerks was to serve the Justice, not to seek to impose our personal views. In discharging our duties as clerks, each of us attempted to be mindful of our individual Justice's approach to legal questions, and we believe Elena did as well.

The Honorable Patrick J. Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
June 23, 2010

In sum, based on our experience working with Elena while serving all of the Justices of the Supreme Court, we believe that she is exceptionally well-qualified to serve on the Court.

Respectfully,

Sharon L. Beckman
Law Clerk, OT 1987
Associate Justice Sandra Day O'Connor

Richard D. Bernstein
Law Clerk, OT 1987
Associate Justice Antonin Scalia

Albert J. Boro, Jr.
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The Honorable Patrick J. Leahy, Chairman
 The Honorable Jeff Sessions, Ranking Member
 June 23, 2010

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The Honorable Patrick J. Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
June 23, 2010

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Hon. Patrick J. Leahy
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433 Russell Senate Office Building
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Hon. Jefferson B. Sessions
Ranking Member, U.S. Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

We the undersigned professors of law write in support of the confirmation of Elena Kagan as an Associate Justice of the United States Supreme Court.

Solicitor General Elena Kagan has distinguished herself as an exceptionally intelligent, knowledgeable, and fair-minded lawyer who would serve the Court with deep respect for the rule of law. She has extensive knowledge of the Court and its role in American society. After clerking for Judge Abner Mikva, she worked at the Supreme Court as a clerk for Justice Thurgood Marshall. For the past year, she has represented the United States before the Court as the nation's first female Solicitor General. For many years as a scholar at the University of Chicago School of Law and Harvard Law School, she studied and wrote about the Court and our other branches of government. She also worked in both the White House and Congress and, therefore, has a first-hand understanding of the work of the Court and its interactions with the executive and legislature.

Ms. Kagan's stellar academic record at Princeton, Oxford, and Harvard Law School is a testament to her intellect and extraordinary work ethic. That she went on to serve in government as senior counsel to then-Senator Joe Biden, who was chair of the Senate Judiciary Committee, and as President Bill Clinton's Associate White House Counsel, deputy assistant to the President for Domestic Policy, and deputy director of the Domestic Policy Council speaks volumes about her commitment to public service and our country. When not working in government, Ms. Kagan was helping to strengthen the profession by educating young minds as a professor at the University of Chicago School of Law and as the first female dean of Harvard Law School.

Ms. Kagan is uniformly described as a brilliant lawyer by colleagues, but she has also demonstrated her deep understanding of people and institutions, most notably in her leadership of Harvard Law School. She is widely credited with making peace among a divided faculty while, at the same time, winning strong reviews from a student body whose depth and diversity increased during her tenure.

Ms. Kagan will bring to the Supreme Court years of study of the law, a keen intellect, and experience as a law clerk, academic, presidential advisor, and the nation's chief litigator. She is exceptionally well qualified to take her place on the Court as an Associate Justice. We urge her speedy confirmation.

Sincerely,

William	Andreen	AL	University of Alabama School of Law ¹
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Scott	England	AL	University of Alabama School of Law
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Peggy Cooper	Davis	NY	New York University School of Law
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David	Garland	NY	New York University School of Law
Stephen	Gillers	NY	New York University School of Law
Randy	Hertz	NY	New York University School of Law
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Jeffrey	Miller	NY	Pace Law School
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Ann	Powers	NY	Pace Law School
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Robert	Lawry	OH	Case Western Reserve University
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Rosalind	Simson	OH	Case Western Reserve University

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Mark	Anderson	PA	Temple University Beasley School of Law
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Andrew	Horwitz	RI	Roger Williams University
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Cinnamon	Carlane	SC	University of South Carolina School of Law
Thomas	Crocker	SC	University of South Carolina School of Law
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Nathan	Cortez	TX	Southern Methodist University Dedman School of Law
Linda	Eads	TX	Southern Methodist University Dedman School of Law
John S.	Lowe	TX	Southern Methodist University Dedman School of Law
Joseph	Norton	TX	Southern Methodist University Dedman School of Law
Daniel	Shuman	TX	Southern Methodist University Dedman School of Law
Jenia	Turner	TX	Southern Methodist University Dedman School of Law
Peter	Winship	TX	Southern Methodist University Dedman School of Law
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John	Teeter	TX	St. Mary's University
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Frederic	White, Jr.	TX	Texas Wesleyan University School of Law
Kevin	Dubose	TX	University of Houston Law Center
Stephen	Huber	TX	University of Houston Law Center
Peter	Linzer	TX	University of Houston Law Center
Norma	Cantu	TX	University of Texas at Austin
Michael	Churgin	TX	University of Texas at Austin
Jeff	Civins	TX	University of Texas at Austin
Julius	Getman	TX	University of Texas at Austin
Barbara	Hines	TX	University of Texas at Austin
Susan	Klein	TX	University of Texas at Austin
Maurie	Levin	TX	University of Texas at Austin
Sanford	Levinson	TX	University of Texas at Austin
Jeana	Lungwitz	TX	University of Texas at Austin
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Robert	Peroni	TX	University of Texas at Austin
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Mildred	Robinson	VA	University of Virginia School of Law
George	Rutherglen	VA	University of Virginia School of Law
Richard C.	Schragger	VA	University of Virginia School of Law
Molly Bishop	Shadel	VA	University of Virginia School of Law
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David M.	Skover	WA	Seattle University School of Law
Robert T.	Anderson	WA	University of Washington School of Law
Robert	Aronson	WA	University of Washington School of Law
Roland	Hjorth	WA	University of Washington School of Law
Yong-Sung	Kang	WA	University of Washington School of Law
Anna	Mastroianni	WA	University of Washington School of Law
Paul Steven	Miller	WA	University of Washington School of Law
Kellye	Testy	WA	University of Washington School of Law
Lea	Vaughn	WA	University of Washington School of Law
Paul	Secunda	WI	Marquette University Law School
Steven M.	Barkan	WI	University of Wisconsin Law School
R. Alta	Charo	WI	University of Wisconsin Law School
Keith	Findley	WI	University of Wisconsin Law School
Ted	Finman	WI	University of Wisconsin Law School
Neil K.	Komesar	WI	University of Wisconsin Law School
Marsha	Mansfield	WI	University of Wisconsin Law School
Pilar N.	Ossorio	WI	University of Wisconsin Law School
Tamara B.	Packard	WI	University of Wisconsin Law School
Robert A.	Schnur	WI; NY	University of Wisconsin Law School (& Cornell Law School)
David	Schwartz	WI	University of Wisconsin Law School
Alan Jay	Weisbard	WI	University of Wisconsin Law School
June M.	Weisberger	WI	University of Wisconsin Law School
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David	Janes	WV	West Virginia University College of Law
Anne Marie	Lofaso	WV	West Virginia University College of Law
John E.	Taylor	WV	West Virginia University College of Law
Paul	Virtue	WV	West Virginia University College of Law
Valorie K.	Vojdik	WV	West Virginia University College of Law
Robert S.	Whitehill	WV	West Virginia University College of Law
Michael C.	Duff	WY	University of Wyoming College of Law
Stephen M.	Feldman	WY	University of Wyoming College of Law
Timothy	Kearley	WY	University of Wyoming College of Law
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June 25, 2010

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Sessions:

Each of us served as a lawyer in the Solicitor General's office; we all retain a keen interest in the work of the Supreme Court and many of us continue to devote a significant part of our legal practice or academic research to matters before the Court. Although we hold a broad range of political, policy, and jurisprudential views, we are united in our strong support of the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States. We urge the Judiciary Committee and the Senate as a whole to act favorably on her nomination.

Solicitor General Kagan is a person of extraordinary intellect. Those of us who have had the opportunity to work with her—in private practice, in academia, and during her government service in the White House and as Solicitor General—have seen her impressive ability to distill the essential question underlying a complex legal issue and proceed to identify appropriate solutions to that question.

We all know first-hand the enormous quantity and diversity of legal topics that a Solicitor General is called upon to address, ranging throughout the entire body of federal statutory and constitutional law and mirroring more than any other job the diversity of legal issues that come before the Court. It therefore is not surprising that Solicitor General Kagan's nomination follows in a distinguished line of Solicitors General, and other alumni of the Solicitor General's office, who have gone on to serve with distinction on the Court, including Chief Justices Taft and Roberts; and Justices Reed, Jackson, Marshall, and Alito.

To the parties that appear before a court, and to fellow judges, a prospective judge's temperament can be as important an attribute as legal skill. Solicitor General Kagan's demonstrated willingness to reach out to colleagues regardless of legal perspective, and her focus on decisionmaking through consensus-building rather than fiat, are important qualities for a Supreme Court Justice.

In sum, Solicitor General Kagan's intellectual ability, integrity and independence, personal skills, and broad experience promise to make her an outstanding Supreme Court Justice. She should be confirmed by the Senate.

Thank you for your consideration of our views.

Donald B. Ayer

Principal Deputy Solicitor General, 1986-1988

Lisa Blatt

Assistant to the Solicitor General, 1996-2009

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The Leadership Conference
on Civil and Human Rights

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10th Floor 202.466.3435 fax
Washington, DC www.civilrights.org
20006



July 19, 2010

The Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of The Leadership Conference on Civil and Human Rights, we write to express our support for the nomination of Solicitor General Elena Kagan to be Associate Justice of the United States Supreme Court. In every step of her career, Elena Kagan has distinguished herself through her outstanding intellectual credentials, her independence of thought, and her strong respect for the rule of law, establishing herself beyond question as qualified and ready to serve on the Court. We look forward to the Senate Judiciary Committee hearings this week on Kagan's nomination, and we urge Senators to explore her views on the highly important civil and human rights issues that are facing our nation.

As evidenced by her academic background and distinguished legal career, Elena Kagan will be an impartial, thoughtful, and highly-respected addition to the Supreme Court. After graduating with distinction from Princeton University and Harvard Law School, Kagan served as a law clerk for two of the giants of the 20th century judiciary, Judge Abner Mikva of the D.C. Circuit and Justice Thurgood Marshall of the Supreme Court. Since that time, she has devoted her career largely to academia and public service, quickly excelling in both – including as the first woman to become Dean of Harvard Law School and, most recently, as the first woman to become U.S. Solicitor General.

Given her stellar record and her reputation for fairness, Kagan has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, academia, and legal profession who know her best. For example, Jack Goldsmith, former head of the U.S. Department of Justice Office of Legal Counsel during the Bush Administration, noted her reputation for “listening to all sides, engaging colleagues frankly and empathetically, patiently seeking consensus and exercising judgment openly and with good reasons,” and argued that “these qualities will serve the nation well on a court that adjudicates our most contentious and divisive legal issues.” Former Judge Abner Mikva described her as “one of the best clerks I ever had.” He added that her not previously serving as a judge is “a real plus” because she would bring “an important viewpoint to the United States Supreme Court that unfortunately is missing when you have nine judges,” a point echoed by Justice Antonin Scalia and former Justice Sandra Day O'Connor. Ten former Solicitors General from both parties, among them Kenneth W. Starr and Drew S. Days, praised her “breadth of experience and a history of great accomplishment in the law,” adding that her “most recent experience as Solicitor General will serve her well as she wrestles with the difficult questions that come before the Court.”



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We also urge Senators not to be swayed by a small number of ideological extremists who stand at odds with the mainstream legal community, and have been trying to characterize Kagan as having an ideological agenda. Certainly in the hundreds of thousands of pages of records that have been made publicly available, from throughout the course of her career, we have not been able to find one. What we have found, however, is compelling evidence of Kagan's commitment to equal justice and civil rights for all, and a clear dedication to upholding our nation's constitutional values.

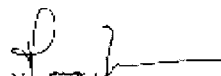
While we urge the Committee to thoroughly question Elena Kagan about her views on the pressing legal issues of our day, it is abundantly clear to us that Elena Kagan is a consensus-builder with a rich diversity of experience who will play an important role in healing a fractured Court and in protecting the rights of all Americans. Because of this, we are pleased to support her nomination, and we urge the Senate to promptly move forward with her confirmation.

Thank you for your consideration of our views. If you have any questions, please feel free to contact Senior Counsel Rob Randhava at (202) 466-6058.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Executive Vice President

Organizations in Support of Elena Kagan's Nomination

Advocates for the West
 AFJ
AFL-CIO
 Alaska Center for the Environment
 Alaska Wildlife Alliance
 All Indian Pueblo Council
Alliance for Justice
American Association of University Women
American Federation of Teachers
 Americans for Democratic Action, Inc.
 Audubon
 Audubon Society of Rhode Island
 Bazelon Center for Mental Health Law
 Californians for Alternatives to Toxics
 Campaign for America's Future
 Center for American Progress Action Fund
 Citizens for Public Resources
 Conservation Northwest
Constitutional Accountability Center
 Defenders of Wildlife
EarthJustice
 Endangered Habitats League
 Endangered Species Coalition
 Equal Justice Works
 Feminist Majority
 Friends of Blackwater
 Friends of the Earth
 Great Old Broads for Wilderness
 Green Delaware
 Greenpeace USA
 Gulf Restoration Network
Hispanic Federation
Hispanic National Bar Association
 Human Rights Campaign
 Idaho Conservation League
 Idaho Rivers United
 Kentucky Resources Council, Inc.
Leadership Conference on Civil and Human Rights
League of Conservation Voters
 Magic
 McKenzie Guardians
 Midwest Environmental Advocates

Montana Environmental Information Center

NAACP

NAACP-LDF

National Asian Pacific American Bar Association

National Association of Social Workers

National Association of Women Judges

National Association Of Women Lawyers

National Congress of American Indians

National Council of Jewish Women

National District Attorneys Association

National Jewish Democratic Council

National LGBT Bar Association

National Minority Law Group

National Partnership for Women & Families

National Senior Citizens Law Center

National Women's Chamber of Commerce

National Women's Law Center

NCAI

New America Alliance

NJDC

Northwest Environmental Advocates

National Organization for Women

Older Women's League

Oregon Wild

People for the American Way

PFAW

Public Lands Without Livestock

SEIU

Sierra Club

Soda Mountain Wilderness Council

The Wilderness Society

The Xerces Society for Invertebrate Conservation

United South and Eastern Tribes

Waterwatch of Oregon

White House Project

Wildearth Guardians

Women and Families

Women's Bar Association of the District of Columbia

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
June 28, 2010

Opening Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Confirmation Hearing On The Nomination Of Solicitor General Elena Kagan
To Be An Associate Justice Of The Supreme Court Of The United States
June 28, 2010

We meet today to consider President Obama's nomination of Elena Kagan for a lifetime appointment to the Supreme Court of the United States. Just last year, this Committee and the Senate reviewed her record, and a bipartisan majority voted to confirm her to be the Solicitor General, the top lawyer representing the United States before the Supreme Court. With her confirmation, Solicitor General Kagan became the first woman in America's history to serve in that position, often referred to as the "Tenth Justice." She was nominated to be Solicitor General while serving as Dean of Harvard Law School, the first woman to hold that position in the school's 193-year history.

There have been 111 Justices in the Supreme Court of the United States. Only three have been women. If she is confirmed, Solicitor General Kagan will bring the Supreme Court to an historical high-water mark, with three women concurrently serving as Justices. Sandra Day O'Connor, who was the first woman nominated and confirmed to the Supreme Court 29 years ago, resigned in 2006. Just one year ago Justice Ginsburg was the sole woman serving on the Court. Justice Sotomayor, who also made history as the first Hispanic Justice, has been a welcome addition to the Supreme Court. Now we are poised to make more progress.

Elena Kagan earned her place at the top of the legal profession. Her legal qualifications are unassailable. As a student, she excelled at Princeton, Oxford and Harvard Law School. She was a law clerk to the great Supreme Court Justice, Thurgood Marshall; worked in private practice and briefly for then-Senator Biden on this Committee; taught law at two of the Nation's most respected law schools; counseled President Clinton on a wide variety of issues; served as Dean of Harvard Law School; and is now the Solicitor General of the United States. We are a better country for the fact that the path of excellence Elena Kagan has taken in her career is one now open to both men and women.

The Constitutional Tradition of Forming a More Perfect Union

It was not until 1920, after a long struggle and the ratification of the 19th Amendment to the Constitution, that women were guaranteed the right to vote. This amendment is part of our great tradition to further the Constitution's purpose of forming a more perfect Union. We inherited this tradition from the Founders, who, in crafting the Constitution did not presume to have answers for every question that might face future Americans. Had they done so, the Constitution that emerged from the political clamor and compromises of the Founders' time would have been so rigid that it would have bound the hands of later generations from solving the problems of their own time. However, as Chief Justice John Marshall wrote, our Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." He and our other great Justices have recognized that the broadly-worded guarantees and powers granted in the Constitution adapt to changing circumstances.

Consequently, our Constitution has withstood the test of time. The genius of our Founders was to establish a Constitution firm enough to enshrine freedom and the rule of law as guiding principles, yet flexible enough to sustain a young Nation that was destined to grow into the greatest, richest and most powerful Nation on earth.

Our country's historic progress to greater freedom, equality and security for all is an enduring and defining feature of our history. When the Constitution was written, "We the People" did not include African-American slaves or Native Americans but only a narrow band of what were then known as "free Persons." It took more than four score years and a Civil War that claimed the lives of hundreds of thousands to end the enslavement of African Americans and include as citizens "all persons born or naturalized in the United States." Through the Civil War amendments that followed, we transformed the Constitution into one that more fully embraced equal rights and human dignity. The country and our democracy were stronger for it. But the job was not complete. It was halfway through the last century that racial discrimination was dealt a blow by the Supreme Court in the modern landmark case of *Brown v. Board of Education*, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and America began to provide a fuller measure of equality to those who were held back for so long because of the color of their skin.

Our path to a more perfect Union also included the rejection 75 years ago of conservative judicial activism by the Supreme Court and our establishing a social safety net for all Americans. It began with our outlawing child labor and guaranteeing a minimum wage. Through Social Security, Medicare and Medicaid, Congress ensured that growing old no longer means growing poor, and that being older or poor no longer means being without medical care. That progress continues today. All of us are the better for it.

Judicial Philosophy vs. Ideological Litmus Tests

The 100 of us who serve in the United States Senate stand in the shoes of more than 300 million Americans as we discharge our constitutional duty with respect to this nomination. I urge the nominee to engage with this Committee and through these proceedings with the American people in a constitutional conversation about the role of courts and the meaning of our Constitution. We should ask serious questions but in a civil manner befitting the Senate's

tradition.

I am no newcomer to the belief that a nominee's judicial philosophy is an important factor in his or her confirmation. I intend to ask Solicitor General Kagan about her judicial philosophy. I intend to ask, in her words, about her "understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values." That is what I have done through the course of a dozen Supreme Court nominations hearings.

When we discuss the Constitution's commerce clause or spending power, we are talking about congressional authority to pass laws to ensure protection of our communities from natural and man-made disasters, to encourage clean air and water, to provide health care for all Americans, to ensure safe food and drugs, to protect equal rights, to enforce safe workplaces and to provide a safety net for seniors. This hearing is, accordingly, about the fundamental freedoms of all Americans.

The constitutional discussion I hope we will have is part of our great democracy set in motion by the Founders. Like the Founders, we do not know what legal questions will be before the Supreme Court in the decades to come. No Senator should seek to impose an ideological litmus test or to secure promises of specific outcomes in cases coming before the Supreme Court.

I reject the ideological litmus test that some would apply to Supreme Court nominees. I expect judges to look to the legislative intent of our laws and to consider the consequences of their decisions, to use common sense and to follow the law. In my view a Supreme Court Justice needs to exercise judgment, should appreciate the proper role of the courts in our democracy, and should consider the consequences of decisions on the fundamental purposes of the law and in the lives of Americans.

Understanding how the law affects Americans is important because it reflects an understanding of why the law matters. I expect that Elena Kagan learned that lesson early in her legal career when she clerked for Justice Marshall. Constitutional values that need to be applied and cases often involve competing constitutional values. In the hard cases that come before the Supreme Court in the real world, we want – and need – Justices who have the good sense to appreciate the significance of the facts in the cases in front of them as well the real-world ramifications of their decisions.

I urge Solicitor General Kagan to be open and responsive and to share with us and the American people her judicial philosophy and indicate her judicial independence. I believe that fair-minded people will find her judicial philosophy well within the legal mainstream. I welcome questions to Solicitor General Kagan about judicial independence, but let us be fair. Let us listen to her answers. There is no basis to question her integrity and no one should presume that this intelligent woman, who has excelled during every part of her varied and distinguished career, lacks independence.

It is essential that judicial nominees understand that, as judges, they are not members of an administration. The courts are not subsidiaries of any political party or interest group, and our judges should not be partisans. That is why the Supreme Court's intervention in the 2000

presidential election in *Bush v. Gore* was so jarring and wrong. That is why the Supreme Court's recent decision in *Citizens United*, in which five conservative Justices rejected the Court's own precedent, the bipartisan law enacted by Congress, and 100 years of legal developments in order to open the door for massive corporate spending on elections, was such a jolt to the system.

Based on my review of Solicitor General Kagan's record, I expect that she and I will not always agree. I do not agree with every decision that Justice Stevens has written, but I have great respect for his judgment. I did not always agree with Justice O'Connor or with Justice Souter, but I never regretted my vote in favor of each of their confirmations. I respect their efforts to uphold the Constitution and the rule of law for all Americans. They looked to the express purpose and legislative intent of our laws, respected precedent, and considered the real-world consequences of their decisions.

The American people live in a real world of great challenges. The Supreme Court needs to function in that real world consistent with our Constitution. Vermont did not vote to join the Union until the year the Bill of Rights was ratified. Those of us from the Green Mountain State are protective of our fundamental liberties. Vermonters understand the importance the Constitution, and its amendments, have had in expanding individual liberties over the last 220 years.

I hope that Elena Kagan will demonstrate through this hearing that she will be the kind of independent Justice who will keep faith with these principles and with the words inscribed in Vermont marble over the front doors to the Supreme Court, "Equal Justice Under Law."

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**ORAL STATEMENT OF LILLY LEDBETTER
BEFORE THE SENATE JUDICIARY COMMITTEE ON
JULY 1, 2010**

Thank you, Mr. Chairman and members of the Committee. My name is Lilly Ledbetter. It is an honor to be here today. I am not a lawyer, but I do know two things: I know that the Supreme Court's decisions have a profound effect on everyday Americans. And I've learned that *who* is on the Supreme Court makes all the difference.

I never in a million years would have thought that one day I would end having my fate decided by the Supreme Court, but I did. It all started in 1979, when Goodyear hired me to work as a supervisor in their tire plant in Gadsden, Alabama. I worked hard and I was good at my job, but Goodyear did not make it easy.

I was one of only a few female supervisors, and I faced discrimination and sexual harassment by people who didn't want women working there. At the end of my career, someone left an anonymous note in my mailbox at work, showing how much I got paid compared with the male managers. I was actually earning twenty percent less than the lowest paid male supervisor in the same position. On my next day off, I filed a complaint with the EEOC.

Goodyear tried to say I was a poor worker and that's why they had given me smaller raises than the men. But after hearing all the evidence, the jury didn't believe them. It found that Goodyear had discriminated against me because I was a woman.

That was a good moment. The jury wasn't going to stand for a national corporation paying me less than others just because of my sex.

But then, by a single vote, the Supreme Court took it all away. Five of the

Justices said I should have complained after the first time I was paid less than the men, even though I didn't know what the men were getting paid and had no way to prove that the pay was discriminatory. The Court said that once 180 days passed, the smaller paychecks no longer counted as discrimination. But it sure feels like discrimination when you are on the receiving end of that smaller paycheck and trying to support your family with less money than the men are getting for the same job. And Goodyear continues to treat me like a second-class worker because my pension and social security is based on the amount I earned. Goodyear gets to keep my extra pension as a reward for breaking the law!

Justice Ginsburg hit the nail on the head when she said that the majority's decision didn't make sense in the real world. People can't go around asking their coworkers how much money they're making; in lots of places, that could get you fired. Plus, even if you know some people are getting paid more than you, that's no reason to suspect discrimination right away. You want to believe that your employer is doing the right thing and that it will all even out down the road. And anyway, it's hard to fight over a small amount of money early on.

But the majority didn't understand that, or didn't care. How it could have thought Congress would have intended the law to be so unfair, I'll never know. So Congress had to pass a new law to make sure that what happened to me wouldn't happen to others in the future.

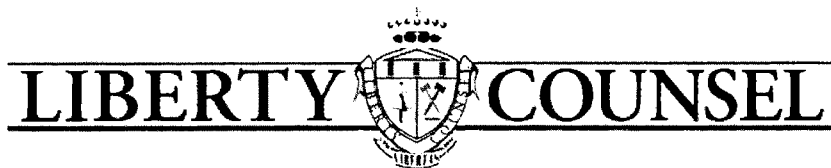
My case shows that who gets appointed to the Supreme Court really makes a difference. If one more person like Justice Ginsburg or Justice Stevens were on the

Court – one more person who understands what it’s like for ordinary people living in the real world – then my case would have turned out differently.

Since my case, I’ve talked to a lot of people around the country. Most can’t believe what happened to me and want to make sure that something like it doesn’t happen again. They don’t care if the Justices are Democrats or Republicans, or which President appointed them, or which Senators voted for them. They want a Supreme Court that makes decisions that make sense.

That’s why the hearings here are so important. We need Justices who understand that law must serve regular people who are just trying to work hard, do right, and make a good life for their families. And when the law isn’t clear, Justices need to use some common sense and keep in mind that the people who write laws are usually trying to make a law that’s fair and sensible. This isn’t a game. Real people’s lives are at stake. We need Supreme Court justices who understand that.

Thank you.



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June 25, 2010

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Ranking Member Sessions,

Liberty Counsel is a nonprofit litigation, education, and policy organization with offices in Florida, Virginia, and Washington, DC, and hundreds of affiliate attorneys across the nation. As an organization that defends the Constitution, Liberty Counsel represents the concerns of hundreds of thousands of our members and supporters who are alarmed about increasing political activism in the judicial branch.

As you know, President Barack Obama recently nominated Elena Kagan for a position on the Supreme Court. The Senate Judiciary Committee hearing on her nomination is scheduled to begin June 28, 2010. As you prepare to engage in these proceedings, Liberty Counsel encourages you to consider Kagan's inexperience, ideology, and judicial philosophy. Liberty Counsel is certain that after doing so, you will agree that, like Harriet Miers, Kagan is not qualified for a position on the High Court.

Although we understand that it is not necessary for a United States Supreme Court Justice to have served on the bench of a lower court, it is very important for her to be conversant with legal practice. Kagan has only three years of practice experience, two of those serving only as a junior attorney. Most of her experience has involved work in partisan politics and academia.

June 25, 2010

Re: Nomination of Elena Kagan

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Because of Kagan's role in advocating for partisan positions, we are concerned that she lacks the ability to interpret the law without invoking her own personal experiences and prejudices.

She banned the military from Harvard's campus because the military would not accept members who openly engaged in homosexual conduct;¹ she encouraged President Clinton to sign cloning laws, providing that the cloned embryo was killed prior to live birth;² she stated that a ban on assisted suicide was a terrible idea;³ she expressed an affinity for socialism in her senior thesis;⁴ and she expressed hostility towards faith-based organizations and protectors of innocent human life.⁵

It is because of these hostilities and prejudices that Liberty Counsel is also concerned about Kagan's judicial philosophy. The Constitution is the foundation of this nation. In order to maintain a just and orderly society, Supreme Court Justices must strictly interpret the Constitution. Kagan has consistently demonstrated an admiration, not for the strict interpretation of the Constitution, but for judicial activism and those who engage in activism.

Kagan demonstrated her activist philosophy when she argued before the Court in *Citizens United v. Federal Election Commission*, where she attempted to convince the Justices to undercut previous decisions by applying unrelated case precedent, causing Chief Justice Roberts and Justice Kennedy to question her on the subject during oral argument.⁶ Additionally, while Dean at Harvard Law School, Kagan removed Constitutional Law from the list of required courses and replaced it with International Law, embracing what Harvard deemed the "transnational nature" of law.⁷ Kagan even stated that foreign law could be used to interpret the laws of the United States of America.⁸

Kagan's philosophy is not only apparent based on what she has said but also based on whom she admires. Her hero is Aharon Barak, an Israeli justice who claimed that a judge can

¹ Written Questions for Chairman Patrick Leahy For Elena Kagan: Nominee to be Solicitor General of the United States, Submitted February 10, 2009 at 9, available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf> (last visited June 25, 2010); see also, Frank J. Gaffney, Jr., *Kagan: Shill for Shariah?*, Big Government, May 19, 2010.

² Steven Ertelt, *Kagan Files from Clinton Administration Show Her Backing Human Cloning*, LifeNews.com, June 10, 2010, <http://www.lifenews.com/bio3114.html> 2010.

³ The Associated Press, *Kagan Called Assisted Suicide Ban "Terrible Idea"*, ABCNews, June 4, 2010, <http://abcnews.go.com/Politics/wireStory?id=10829103>.

⁴ Mike Allen and Josh Gerstein, *White House to Release Kagan Theses*, Politico, May 17, 2010, <http://www.politico.com/news/stories/0510/37343.html#ixzz0oUA32ctP>.

⁵ Elena Kagan, *Nov. 10, 1980: Fear and Loathing in Brooklyn*, The Princetonian, Nov. 10, 1980, <http://www.dailyprincetonian.com/2010/05/03/26082/>.

⁶ Transcript of Oral Argument at 64, *Citizens United*, 556 U.S. __ (no. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf (last visited June 25, 2010).

⁷ Jeri Zeder, *At Home in the World*, Harvard Law Bulletin, available at http://www.law.harvard.edu/news/bulletin/2008/winter/feature_3.php (last visited June 25, 2010).

⁸ Written Questions for Chairman Patrick Leahy For Elena Kagan: Nominee to be Solicitor General of the United States, Submitted February 10, 2009 at 4, available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf> (last visited June 25, 2010).

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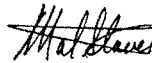
"give a statute a new meaning."⁹ Kagan also clerked for and greatly admired Justice Thurgood Marshall, for whom she wrote a law review article in which she agreed with his statements that the Constitution was "defective" and contained "outdated notions" as originally drafted.¹⁰ It is our fear that Kagan will continue her liberal heroes' crusade of judicial activism, in part because she has indicated a propensity to do so by stating that "... judges will have opinions, prejudices, [and] values. Perhaps most important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not wrong or invalid. The law, after all, is a human instrument – an instrument designed to meet men's needs."¹¹

We disagree with Kagan. It is not the role of the Court to mold and steer the law; that is the role of the legislative branch. It is the role of the Court to interpret the laws that the legislature creates, in accordance with the Constitution.

In Federalist Number 76, Alexander Hamilton stated that it is the purpose of the Senate to ensure a person is not esteemed to the highest court in the land when she has "no other merit than that of coming from the same State to which [the President] particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."¹²

A vote to confirm a Supreme Court nominee is one of the most important and lasting votes a senator can make. Likewise, to prevent an individual like Elena Kagan from legislating from the bench is a key purpose of the "advice and consent" process and the duty of the Senate Judiciary Committee. As the Committee considers Kagan's inexperience, ideology, and judicial philosophy, we urge you to consider not only Kagan's responses to the Committee's questions during the hearing, but also her history. It has become apparent that confirmation conversions to originalist perspectives are not lasting.

Respectfully,



Mathew D. Staver
 Founder and Chairman,
 Liberty Counsel
 Dean and Professor of Law,
 Liberty University School of Law

MDS/mc

⁹ *Solicitor General Elena Kagan's Judicial Hero*, Americans United for Life, May 12, 2010, <http://catholicexchange.com/2010/05/12/130230/>

¹⁰ Elena Kagan, *For Justice Marshall*, 71 Tex. L. Rev. 1125, 1125 (1993).

¹¹ Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, p. 120 (April 20, 1983) (unpublished M.P.P. thesis, Oxford University) (http://www.fed-soc.org/docLib/20100518_OxfordThesis.pdf).

¹² Alexander Hamilton, Federalist No. 76: The Appointing Power of the Executive.

Michael W. McConnell
Richard and Frances Mallory
Professor of Law
Director, Constitutional Law Center

Down Quadrangle
559 Redman Abbott Way
Stanford, CA 94305-5013

June 25, 2010

The Hon. Patrick Leahy
Chair of the Senate Judiciary Committee
The Hon. Jeff Sessions
Ranking Member of the Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510.

Dear Senators:

I write in support of Elena Kagan's nomination as Associate Justice of the United States Supreme Court. I have known Dean Kagan for twenty years, ever since she and I were colleagues and friends on the faculty of the University of Chicago Law School. We have talked about legal and constitutional subjects dozens of times over the years, giving me insight into her intellectual and jurisprudential approach. I have also read all of her scholarly work. Based on my personal experience as well as her public statements and writings, she deserves not a grudging acquiescence but an enthusiastic confirmation as an Associate Justice of the United States Supreme Court. Obviously, Senators must carefully examine the record and her own testimony before the Judiciary Committee. She has invited such close questioning herself. But unless there are important unexpected developments, she should be confirmed.

I address my comments especially to those who adhere to a generally conservative understanding of the role of the Supreme Court in interpreting the Constitution and laws of the United States. Obviously, any nominee of this Administration will reflect the progressive political outlook of the President; one of the prerogatives of the President under our Constitution is nominating Justices who share his views. Much in Elena Kagan's record demonstrates that outlook. But this must not be exaggerated. On a significant number of important and controversial matters, Elena Kagan has taken positions associated with the conservative side of the legal academy. This demonstrates an openness to a diversity of ideas, as well as a lack of partisanship, that bodes well for service on the Court. No one can foresee the future, but I would not be surprised to find that Elena Kagan, as a Justice, serves more as a bridge between the factions on the Court than as a reliably progressive ideological vote. In short, I think she will be more conservative than liberals hope, and less liberal than conservatives fear.

It is all too easy to speak of nominees in airy generalities, so let me be specific. I will comment on her work on freedom of speech, freedom of

religion, and executive power, as well as her role as Dean of the Harvard Law School in attracting a more ideologically diverse faculty. I will also offer a comment on what I regard as the only serious blemish on her record: her participation in Harvard's refusal to allow students who wished to interview for careers in the military the ability to use the ordinary facilities of career services.

Freedom of Speech

Freedom of speech was one of Professor Kagan's two principal fields of scholarly work. Her writings on this subject have been thoughtful, insightful, and of high academic quality, and on many if not most points congruent with conservative civil libertarian thinking on these issues. I would call particular attention to her article entitled *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29. The *R.A.V.* case was difficult and controversial, involving a hate speech prosecution based on an ugly cross-burning incident in St. Paul, Minnesota. There were three opinions. One, by Justice Antonin Scalia, applied the strong protections for freedom of speech that have been characteristic of conservative free speech jurisprudence over the past generation. It held that the local ordinance under which the defendant had been prosecuted was viewpoint discriminatory and hence unconstitutional. Another opinion, by Justice John Paul Stevens, described Justice Scalia's position as "absolutist" and maintained that even "selective, subject-matter regulation on proscribable speech is constitutional." In her article on the case, Professor Kagan wrote that "Justice Scalia seems to me to have the upper hand," and that Justice Stevens's position "cannot be right as a general matter."

It bears mention that the principle of viewpoint neutrality has been central to free speech victories on the part of dissidents from leftwing orthodoxy on campus, including most conspicuously *Rosenberger v University of Virginia*. It thus appears that conservative defenders of freedom of speech will have an additional ally on the Court. Notably, Professor Kagan wrote her *R.A.V.* article at a time when hate speech codes were supported by many left-leaning members of the legal academy. Thus, her article demonstrates not only that her constitutional principles on this matter lean more toward the conservative position, but that she has the courage and independence to take sides at odds with the tide of opinion among her ostensible political allies.

Some conservative free speech supporters have criticized Solicitor General Kagan's defense of the Bipartisan Campaign Reform Act (BCRA) in

the *Citizens United* case, and her decision to argue the case personally. Speaking as a former lawyer in the Solicitor General's office, I regard this criticism as specious: it is the job of the Solicitor General to defend the constitutionality of statutes. Every Solicitor General defends statutes with which he or she does not agree. (Certainly that was true of the Solicitors General under whom I served, Rex E. Lee and Charles Fried.) More importantly, these critics fail to give proper weight to the nature of the arguments General Kagan made, and did not make, in the case. Although she defended BCRA on the basis of anti-corruption and stockholder-protection rationales, she conspicuously failed to put forward the most common, but troubling, rationale for restricting corporate political speech: that to allow great aggregations of wealth to participate in campaign-related speech would distort the marketplace of ideas.

General Kagan's decision not to defend the law on this basis was surprising, because the Supreme Court had previously embraced that rationale in *Austin v. Michigan Chamber of Commerce*. According to Justice Thurgood Marshall's opinion in *Austin*, the ability of corporations to use "resources amassed in the economic marketplace" would give them "an unfair advantage in the political marketplace." The government thus has a "compelling interest" in preventing "the corrosive and distorting effects of immense aggregations of wealth" on the democratic process. Because one of the questions posed in *Citizens United* was whether *Austin* should be overruled, and General Kagan was defending *Austin*, it would have been standard practice to present and defend all the rationales on which *Austin* rested.

We can be nearly certain that the reason General Kagan did not present the "anti-distortion" rationale is that she does not agree with it. In *The Changing Faces of First Amendment Neutrality*, she wrote that giving the government the power "to decide what ideas are overrepresented or underrepresented in the market" would be "dangerous." It would be dangerous because the playing field of speech and political advocacy is inherently filled with inequality, and if the government may choose which inequalities to "correct" by suppressing some speakers and not others, it would have a powerful instrument for suppression of speech, going far beyond the context of corporations.

General Kagan's decision to omit the anti-distortion argument is all the more remarkable because this rationale has been embraced by the President who nominated her, as well as the Justice whom she has been nominated to replace. In his speech announcing the nomination, President Obama stated that he was nominating a Justice "who, like Justice Stevens, knows that in a democracy, powerful interests must not be allowed to drown out the voices of

ordinary citizens.” That may be true of Justice Stevens, who embraced the anti-distortion argument in his dissent in *Citizens United*. But General Kagan declined to make any such argument. Whether Senators agree with Elena Kagan on this point or not, the fact that she was willing to adhere to her civil libertarian principles under these circumstances demonstrates remarkable independence.

Freedom of Religion

Although Elena Kagan did not write on the subject of religious freedom as an academic, what is known about her views is highly encouraging to those of us who interpret the Free Exercise and Establishment Clauses as permitting, and sometimes even requiring, accommodation of religious conscience. She will be replacing Justice John Paul Stevens, who opposed constitutional accommodation of minority religious views (siding with conservatives in cases like *Employment Division v. Smith*) and opposed neutral access to public benefits (siding with liberals in cases like *Zelman v. Simmons-Harris*). Justice Kagan could bring about significant changes in this important area of constitutional law.

To be sure, the evidence about her views on these issues is not extensive, but it accords with my impressions about her approach to Free Exercise and Establishment Clause questions. We know, for example, from the released documents regarding her service in the Clinton White House in 1995-96, that she supported federal participation in California litigation on behalf of a Christian landlord with religious convictions against unmarried cohabitation who was forced to rent to an unmarried couple. The California Supreme Court upheld this imposition on the ground that the landlord was free to seek alternative employment. Kagan criticized that rationale and supported the landlord’s religious freedom claim, which was brought under the Religious Freedom Restoration Act.

Elena Kagan’s position in this matter is important for three reasons. Most obviously, it showed a commitment to enforcing free exercise rights under the Religious Freedom Restoration Act. Justice Stevens voted with the majority to strike down the Act, as applied to state and local government. Second, the clash between religious conscience and expansive applications of nondiscrimination laws is an increasingly common and serious arena of religious freedom controversy. Third, her rejection of the California Supreme Court’s rationale indicates that she understands that religious freedom can be burdened in ways other than by strict criminal prohibition. This generous understanding of religious freedom has been an important part of the Supreme

Court's jurisprudence for nearly fifty years, but it has recently been challenged by parties who prefer to give a narrow compass to First Amendment rights.

A second important piece of evidence is Kagan's testimony during her confirmation hearings for the position of Solicitor General, when she was questioned about comments she made in a memo to Justice Thurgood Marshall, as a law clerk, in connection with *Bowen v. Kendrick*, which addressed the constitutionality of allowing religiously affiliated organizations to serve as grantees under the Adolescent Family Life Act. That decision was an important precursor for Congress's legislation on charitable choice, 42 U.S.C. §604A, and President Bush's Faith-Based Initiative. (I should note for the record that I was counsel for the successful intervenor-petitioners in that case, and argued *Kendrick* before the Supreme Court.) In her memo to Justice Marshall, Elena Kagan wrote that religious groups should be excluded as grantees in federal programs related to their religious concerns because they might inject religious teaching into their performance of the grant. In her hearing, however, Kagan described that position as "the dumbest thing I ever read." She went on to testify: "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."

This is significant for two reasons. First, the participation of religious organizations in publicly funded programs has been, and continues to be, one of the major areas of controversy under the First Amendment. That Elena Kagan now agrees with the conservative majority in *Bowen v. Kendrick*, and not with the dissent signed by Justices Blackmun, Brennan, Marshall, and Stevens, suggests that her views on the Establishment Clause are animated not by exclusion of religion but by neutrality toward it. Second, and more generally, her testimony indicates that she does not hesitate to rethink positions that she took in her younger years, and to diverge from positions taken by her former employer, Justice Marshall. Elena Kagan is a person who thinks for herself, and is not afraid to rethink her views.

A third important piece of evidence is Elena Kagan's October 18, 1996 memo urging President Clinton to issue an executive order protecting religious expression by federal employees in the workplace. The text of this order was negotiated among a diverse group of religious and civil liberties organizations, but according to Kagan's memo, the Clinton Justice Department was "quite negative about the order." She explained that "DOJ believes the document conveys a tone that is too permissive of employee religious expression." President Clinton issued the order in 1997. Ms. Kagan's memo is important

not only because it indicates her position regarding the rights of religious expression, but also because she was willing to defend that position in the face of opposition from lawyers elsewhere in the administration. Evidently, this is a matter of conviction.

Taken together, her views on these three matters suggest that a Justice Kagan may take a strong affirmative position on religious freedom, encompassing both accommodation of individual religious conscience and a right of equal participation in the public arena, essentially the reverse of Justice Stevens on these issues.

Executive Power

On her return to academia after serving in the Clinton Administration, Professor Kagan turned primary attention to the question of executive power under administrative and constitutional law. Significantly, she defended the legitimacy and utility of direct presidential control over the regulatory agencies of the federal government. As she explains in an article entitled *Presidential Administration*, this degree of presidential control originated in modern times under President Reagan, but was extended under President Clinton. Although she distinguishes her position from strict notions of a constitutional unitary executive, in effect she reaches the same end through statutory analysis.

Professor Kagan's writings on executive power are neither path-breaking nor particularly controversial, but their political context is noteworthy. She was writing during the early days of the presidency of President George W. Bush. It is one thing to defend executive power when the administration is politically congenial, and quite another to do so when the presidency is held by a reviled member of the other political party. That Professor Kagan was willing to write in defense of broad presidential authority at the time she did, and in the teeth of an anti-executive turn by many of her political friends, demonstrates that her constitutional positions are driven by principle rather than political convenience. Whatever one's views of the executive, that kind of integrity is a judicial virtue.

Dean Kagan's Administration at Harvard

By universal acclaim, across the political spectrum and among both students and faculty, Elena Kagan was an exemplary Dean of Harvard Law School. As an occasional visiting professor there, I witnessed the significant improvements in morale, collegiality, intellectuality, and ideological diversity that she brought to the institution. Two aspects of her administration seem especially relevant to her nomination to the Supreme Court: her exclusion of

military recruiters from the ordinary channels of career services at Harvard, and her support for diversification of the faculty by hiring scholars known to be of a conservative persuasion. I will not dwell on the facts regarding these decisions: they are well known.

I regard as dreadful Harvard's decision to deny law students who wished to interview with the military the ordinary courtesies extended to others: wrong on the law, bad for students, harmful to our country. Whatever one might think of Congress's "don't ask, don't tell" policy, military service is among the most honorable of callings. American institutions of higher education should do everything they can to facilitate military service. The fact that the Supreme Court rejected Harvard's legal position by a vote of nine to zero shows that, as a legal position, it was contrived at best. None of this speaks well for Dean Kagan. But Dean Kagan was just one of dozens of law deans who took precisely the same position. It would have been admirable for Dean Kagan to stand up to her faculty and politically active students on this subject, and she would have paid a price; but not having done so should not disqualify her from further office.

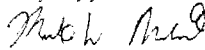
It was on the second dimension, the ideological diversification of faculty hiring, where Dean Kagan did depart from the norm. It is no secret that American law school faculties, including the most elite, are lopsidedly leftwing in their political orientation. This is one of the most serious problems in modern higher education. In a politically diverse nation, students should be exposed to arguments from both sides of the spectrum. Dean Kagan was one of the few leaders in American academia to recognize this problem and strive to correct it. She recruited, and then persuaded her faculty to accept, leading figures from the center-right, and defended them when they came under political attack. More than that, by actively supporting the activities of the Federalist Society and like organizations at Harvard Law School, Dean Kagan fostered the kind of diverse intellectual exchange that is lacking at all too many institutions of higher education.

These actions demonstrate qualities of mind and character that are directly relevant to being a Justice on the Supreme Court: respect for opposing argument, fair-mindedness, and willingness to reach across ideological divides, independence, and courage to buck the norm. It is a tribute to Elena Kagan that the faculty and students who know her best are her strongest supporters, even those whose politics diverge from her own.

Conclusion

One of the most enduring questions about law and judging is whether it is anything more than politics. In her service in the executive branch and her time as Dean, Elena Kagan has skillfully navigated political waters. But she has also demonstrated another quality. Publicly and privately, in her scholarly work and in her arguments on behalf of the United States, Elena Kagan has demonstrated a fidelity to legal principle even when it means crossing her political and ideological allies. This is an admirable and essential quality in a judge. Barring unexpected developments during the confirmation hearings, I urge you to confirm Elena Kagan to be an Associate Justice of the Supreme Court.

Very truly yours,



Michael W. McConnell
Richard & Frances Mallery Professor of Law
Director, Constitutional Law Center
Stanford Law School



June 25, 2010

Senator Patrick Leahy
Chairman
Senate Judiciary Committee
433 Russell Senate Office Building
Washington D.C., 20510

Senator Jeff Sessions
Ranking Member
Senate Judiciary Committee
335 Russell Senate Office Building
Washington D.C., 20510

Dear Chairman Leahy and Senator Sessions,

On behalf of the thousands of military families represented by Military Families United, I am writing to express our views concerning Supreme Court nominee Elena Kagan and the controversy surrounding her decision to strip military recruiters of their institutional access to the Harvard Law School.

As you know, Harvard and other academic institutions obstructed military recruitment in protest of the implementation of the "Don't Ask, Don't Tell" policy of the Clinton Administration. The problem persisted until 1995 when Congress passed the Solomon Amendment, which required universities to provide equal access to military recruiters or risk losing public funding. Unfortunately, Harvard chose to ignore the law and continued blocking access to military recruiters until 2002 when the Department of Defense threatened to eliminate Harvard's public funding.

In 2004 Ms. Kagan, as Dean of Harvard Law School, decided to block access to military recruiters. While we recognize that she vehemently disagreed with "Don't Ask, Don't Tell," and believed it to be in violation of Harvard's anti-discrimination policies, her actions were in direct violation of federal law as stated in the Solomon Amendment. Further, those actions were, in our estimation, discriminatory towards the Department of Defense for a policy and law it didn't write or enact.

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In closing, we find Ms. Kagan's failure to offer support to our military in a time of war and her willingness to defy federal law as troubling and appalling. While Military Families United is taking no official position on her confirmation, we are extremely concerned with Ms. Kagan's perceived anti-military bias as well as her failure to comply with federal law in this regard. We are hopeful that the Senate Judiciary Committee will fairly and vigorously question her motivation and reasoning on this matter. Thousands of military families, if not all Americans, deserve to hear an explanation of her actions.

Sincerely,



Robert Jackson
Director of Governmental Affairs

MILITARYFAMILIESUNITED

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Testimony of Thomas N. Moe, Colonel USAF (ret)**United States Senate Committee on Judiciary****Regarding the Nomination of Solicitor General Elena Kagan
to the Supreme Court of the United States
July 1, 2010**

Thank you Chairman Leahy and Senator Sessions for the opportunity to testify before this committee regarding the nomination of Solicitor General Elena Kagan to become an Associate Justice of the Supreme Court.

I appear today, as a military veteran with over 33 years service, to express my concern regarding this nomination for the following reasons.

Ms. Kagan has demonstrated a strong bias against the military, while Dean of the Harvard Law School, largely over policies concerning the eligibility of homosexuals to serve in the military. I believe this bias would color her judgment regarding cases involving the military that she would review. My concern goes beyond the fact that Ms. Kagan has never been a judge or practiced for any length of time as an attorney, but would nevertheless move directly to our highest court to review cases of the utmost importance to our country.

The issue is objectivity--any nominee for the high court should have experience or a record that demonstrates his or her capacity for objectivity. On the contrary, in the various positions of authority that she has held, Ms. Kagan has shown a troubling **lack** of objectivity, at least regarding the military. By her actions, Solicitor General Kagan has shown disregard, if not defiance of laws concerning the military. Her discrimination and disapproval was misdirected against those who, though charged with following those laws, had no say in policy or law making.

Ms. Kagan knowingly defied a particular law, the Solomon Amendment, which concerns military recruitment. During the time that she was Dean of the Harvard Law School, Ms. Kagan treated military recruiters as second-class citizens—with the effect of “shooting the messenger.” She has even called on her students to verbally criticize military personnel, while on other occasions she expressed support for uniformed individuals. Her superficial gestures did not mitigate official actions that were an affront to our military.

The one particular policy that she has championed, to allow homosexuals to serve openly in the military, has been the basis of her actions against military regulations and Federal law. Her position in this regard is most questionable in light of her complete absence of experience with or understanding of military policy and operations. It is unfortunate that in time of war she has presumed for herself the wisdom to demand a policy requiring the military to accept professed homosexuals in the military. Ms. Kagan

seems unaware that she has neither the experience on which to base that wisdom nor the responsibility to deal with the consequences of her convictions.

How can our warriors look at such people when they are poised at the tip of the sword, ready to sacrifice everything for their country, while a cloistered clique in ivory towers eats away at their institutions for the sake of narrow ideological interests? I can personally attest to the corrosive effect such people had on me as I suffered untold tortures at the hands of North Vietnamese Communists while our citizens at home attacked military veterans, committed violence against military facilities in the name of "peace," and took political advantage of a nation at war to advance their own political careers.

I have voluntarily stood in the face of our country's enemies--resolute and determined to suffer whatever personal consequences might be the price for the sake of our nation's security. I support lawful rights of free speech, but I never could stomach critics within our borders who effectively attacked our backs while we faced enemies we believed to be a threat to our nation, our community and our family. Perhaps my brief testimony today reveals in part my concern for those whose attitudes toward the preservation of our nation and its people are manifest in political subterfuge instead of active, courageous and direct personal involvement that truly supports our military with actions, not just words.

As you know, in 1993 Congress passed and President Clinton signed Title 10 USC, Section 654, which codified long-standing Department of Defense regulations stating that homosexuals are not eligible for military service. The law also provided that the administration could omit from military regulations the requirement that persons joining the military make any reference to their sexual orientation. Prior to this administrative change, which is referred to as "Don't Ask, Don't Tell," a person joining the military was required to answer a routine question about homosexuality on his or her induction form. (The Secretary of Defense may reestablish the former policy if deemed necessary.)

In 1995 Ms. Kagan joined the Clinton administration as Associate Counsel, Deputy Domestic Policy Advisor, but I know of no stand that she took against "Don't Ask, Don't Tell" during her tenure with Mr. Clinton.

When she was appointed Dean of the Harvard Law School in 2003, the United States Military enjoyed full and open access to the campus Career Services Office to recruit students to join the military. Yet she began to loudly condemn the law and policy, calling what in fact amounted to a more permissive treatment of homosexuals by the military "a profound wrong" and "a moral injustice of the first order." Writing to the entire law school in October 2003, Kagan denounced the military's recruiting policy as discriminatory and "abhorrent," disregarding the fact that the 1993 law **was approved by strong, bi-partisan majorities in Congress.**

Her position was the cornerstone for her negative actions against the military. If Dean Kagan really wanted to stand on principle, she could have pressured Harvard to decline federal funds, or she could have resigned.

For many years Harvard Law School *had* banned the military from recruiting on campus, because in its view the military “discriminated” against homosexuals. When Congress saw that Harvard and other elite universities were excluding the military from recruiting on campus, it passed a law in 1994 that required universities and colleges to give the military equal access with other agencies to recruit on their campuses or face the loss of federal funds.

That law—called the Solomon Amendment after its originator Congressman Gerald Solomon—was repeatedly strengthened by Congress over the next ten years as some universities, including Harvard, continued to search for ways to continue to obstruct military recruiting. Specifically, the amended Solomon Amendment barred funding from any university that “prohibits, or in effect prevents” military recruiters from enjoying “access to students on campuses, for purposes of military recruiting in a manner that is **at least equal in quality and scope** to the access to campuses and to students that is provided to any other employer.”

Thus, in 2002, the Defense Department had threatened to cut off all federal funds for Harvard University unless its law school agreed to allow the military to recruit openly on campus through the Career Services Office. Faced with the loss of millions of taxpayer dollars, Harvard had acquiesced and lifted its restrictions.

Unfortunately, a little more than a year after Ms. Kagan assumed the position of Dean, and in spite of the DOD’s finding and Harvard’s acceptance of those findings, **she took it upon herself** to ban military recruiters from on-campus recruiting on an equal basis. She was apparently motivated by a ruling in November 2004 by the 3rd Circuit Court of Appeals finding the Solomon amendment was likely unconstitutional. But the 3rd Circuit Court **suspended its own ruling** pending review by the US Supreme Court. As a side note, the 3rd Circuit Court has appellate authority over certain states and territories but **not** Massachusetts, the home of Harvard University.

Nevertheless, in violation of the law, Ms. Kagan continued to use the 3rd Circuit Court’s opinion as an excuse to restrict military recruiters at the Harvard Law School even though there was no court order in place suspending enforcement of Solomon. Ms. Kagan has assured this committee that she would show “restraint” if she is confirmed as an Associate Justice. Her actions at Harvard suggest an inclination toward activism, not restraint or deference to laws affecting the military.

As a sop, she tried to direct military recruiters to work with the Harvard Law Student Veterans Association, a decision that violated the “equal treatment” requirement of Solomon. By any measure, the Veterans Association was not equipped to take the place of the full-time staff in the Career Services Office. Ms. Kagan’s decision, therefore, placed military recruiters at a clear disadvantage compared to nonmilitary

recruiters. She denied the military the ability to advertise through the normal recruiting channels, she barred them from even posting a job notice with the Career Services Office, and she prevented the military from collecting resumes or scheduling interviews as a participant in the school's regular interview season.

According to an Air Force email dated February 20, 2005, recruiters were reporting that Kagan's administration was "playing games" and "slow rolling" recruiters' requests for regular campus support in order to block them from recruiting on campus. The Army reported the same. In the words of an Army officer in charge of recruiting, "The Army was stonewalled at Harvard." Ironically, perhaps motivated by the recalcitrance of the dean, the military recruited five members in the spring of 2005--more than any other year during that decade according to the assistant dean of career services. Their success did not change the fact that the DOD had every right to threaten Harvard with the loss of federal funds in the summer of 2005. Accordingly, Ms. Kagan allowed recruiters equal access to the campus.

At the same time, she continued to denounce loudly what she called "the military's discriminatory recruitment policy," ignoring the fact that the military was merely following federal law. She also suggested that any military presence on campus felt "alienating" to Harvard Law students and staff.

In September 2005, Ms. Kagan escalated from hostile words to legal activism. She joined a number of other Harvard law professors in a "Friend of the Court" argument to the Supreme Court, claiming that Harvard Law could, without violating the Solomon Amendment, bar military recruiters, because it barred **all** recruiters who "discriminated" against homosexuals. In March, 2006 this argument, along with the "suspended" 3rd Circuit Court ruling was struck down by the Supreme Court **unanimously** in "Rumsfeld vs. FAIR (The Forum for Academic and Institutional Rights, which had filed a law suit on behalf of laws schools opposed to "Don't Ask, Don't Tell").

Even the most liberal-minded Justices rejected Ms. Kagan's position with a stinging rebuke that her theories were "rather clearly *not* what Congress had in mind" when it amended and strengthened the Solomon Amendment. She later acknowledged that the 3rd Circuit Court's decision did not justify her actions, but said **she acted anyway** in the "hope" that the Department of Defense "would choose not to enforce" the law. In every instance that her policies were reviewed, including by the Supreme Court, Dean Kagan was found in violation of the law.

I find Ms. Kagan's actions deeply troubling on a number of levels. As a citizen, I cannot support the appointment of justices who would pick and choose which laws they wish to follow, or choose to interpret laws to suit their political views or policy preferences or violate a law in hopes that the law would not be enforced. As a veteran, I am even more troubled by a potential activist justice who would not **defer to the other branches of government, particularly the Congress**, which the Supreme Court has, to date, recognized as **more qualified** to act on issues concerning the military.

Ms. Kagan has stated that she only wants all citizens to be able to serve in the military in order to have an equal chance to defend their country. In light of her antimilitary record in general, I find such a statement inconsistent with her actions. Anecdotal stories of Ms. Kagan inviting military members to Law School social events seem contrived and patronizing in light of her public stance including calls to incite public opposition to military recruiters. I refer to emails she sent campus wide, which have been cited in the Harvard Crimson, which called on students to demonstrate and speak against the presence of recruiters "clearly and forcefully."

And what evidence is there that Ms. Kagan has shown an appreciation or even an **understanding** of the position of the Defense Department regarding homosexuals in the military? The policy has served the military in defense of our freedom and security, including Ms. Kagan's right to challenge it lawfully, with the solid support of the US Congress and the Supreme Court.

We do not know whether former Dean Kagan had even reviewed the 15 findings that Congress incorporated in the 1993 law (Title 10 USC section 654) which state why homosexual activity in the military is harmful to its mission. As stated prominently in these findings, **the military is a specialized society, that is subject to special laws that would not apply to the citizenry at large.** These findings are based on the long, distinguished and successful history of our armed forces, pointing out that

--"military life is fundamentally different from civilian life;
 --"the military's standards of conduct apply to members of the armed forces at all times, whether or not that individual is physically on or off a military installation;
 --"unit cohesion, that is, the bonds of trust among individual service members" is critical to "combat effectiveness" and
 --"the prohibition against homosexual conduct is a **longstanding element of military law** that continues to be necessary in the unique circumstances of military service."

I believe that people who do not understand the special nature of the military are, first of all, ignorant of the demanding, not to mention life-threatening, role that military members understand and willingly accept. Secondly, critics are in denial of the vital role that our armed forces have played for two centuries to ensure the survival of our nation—a nation where each citizen has the right to speak openly against those same armed forces and even to belittle their role in our nation's history. **Those in our society who don't recognize much less understand the special nature of the military should not be handed authority to make important decisions that affect it.**

There are a *number* of eligibility requirements that people must meet to join the military that could be seen in the civilian world as discriminatory. These requirements include issues of age, fitness, weight, visual acuity, intelligence, certain levels of education and standards of behavior to include personal financial responsibility and even responsibility toward one's driving record. What is more, the requirements themselves

are not applied evenly, since they vary from one level to the next with the highest standards being applied to those with the most responsibility.

And I question whether Dean Kagan **consistently** applied her stated principles with regard to the issue of discrimination against homosexuals. Were she committed to this principle, she would have protested the presence of **any agency** or organization on campus that discriminated against homosexuals. Some Islamic extremist groups, for example, not only discriminate, they execute homosexuals under Sharia law.

Her principles did not seem to come in to play in 2005 when Prince Alwaleed Bin Tala established the Center of Islamic studies program at Harvard with a large gift. This was at a time when Ms. Kagan was dean of the Law School and was actively fighting against military recruiters because of the law and policy regarding homosexuals. Harvard's president, Mr. Summers, accepted the gift with lavish praise and gratitude, saying that the "program will enable us to **recruit additional faculty** of the highest caliber, adding to our strong team of professors who are focusing on this important area of scholarship."

Although the program was not part of the law school, Ms. Kagan could have applied her professed principles consistently and protested the group's presence on campus. Ms. Kagan apparently did not feel compelled to point out to Mr. Summers that the University had a policy prohibiting organizations that discriminate against homosexuals.

At the same time, Harvard and Ms. Kagan found no problem knowingly discriminating against military officer development programs such as ROTC on campus and denying equal access for military recruiters seeking to speak to campus students. This in spite of Ms. Kagan's professed "appreciation" of the military.

I find Ms. Kagan's actions deeply offensive as a veteran of the United States Armed Forces. Ms. Kagan claims that she only wanted all her students to have an equal chance to defend their country. But she would delay that day with actions that discouraged students from serving in the military.

Her defenders tell stories of Ms. Kagan inviting military veterans to parties and that she has specifically voiced her support of strong ties between the military and the law. Indeed on October 17, 2007, she addressed cadets at the United States Military Academy at West Point saying, "I would regret still more if ... disagreement created any broader chasm between law schools and the military. ... It must not because of what we, like all Americans, owe to you. And it must not because of what I am going to talk with you about tonight--because of **the deep, the fundamental, the necessary connection between military leadership and law**. That connection makes it imperative that we--military leaders and legal educators--join hands and be partners."

But whatever her professed tolerance for individual soldiers and veterans, the plain fact remains that she was all-too-willing to condemn the military as an institution for policies she dislikes.

Ms. Kagan served as a close advisor to President Clinton, who signed the 1993 statute into law that resulted in "Don't Ask, Don't Tell," but she has never criticized him for that action even though she had ample opportunity after she left his administration. President Clinton spoke at Harvard's graduation while she was dean in 2007, but she never called for students to protest against him. Ms. Kagan has written letters to Congress objecting to certain legislation dealing with the War on Terror, but I found no record that she has ever written to Congress to object to Don't Ask, Don't Tell.

Ms. Kagan was willing to give the benefit of the doubt to President Clinton and Members of Congress, but she would not extend the same courtesy to the officers of our nation's military who wanted to recruit her students to serve as lawyers in the Armed Forces and thereby serve their country. Instead, she repeatedly condemned the military for policies created by civilian lawmakers and carried out by the Executive Branch--policies that military members are sworn to uphold.

One of the proudest traditions of our military is its absolute commitment to civilian control. Congress and the civilian leadership at the Defense Department set the rules under which they operate, and our men and women in uniform accept those rules and execute their mission with vigor, even when they sometimes disagree with or don't like the rules the political branches set. Should they not, they are dismissed.

I cannot understand how Ms. Kagan could believe that interfering with the military's mission--frustrating its efforts to recruit talented lawyers to advise commanders and represent individual soldiers--would do anything to change the Don't Ask, Don't Tell policy she so abhorred. Indeed, it defies all logic to think that she would make more progress toward overturning Don't Ask Don't Tell by obstructing the work of junior military officers sent to recruit on university campuses than by protesting to the high public officials and Members of Congress who actually have the **authority** to change the policy.

Perhaps Ms. Kagan believed her actions were "symbolic"--that she had to at least pretend to "take a stand" according to the fashionable view in academia that seems passionately opposed to many things about the military. But her actions were *not* merely "symbolic" to the recruiting officers who had to work around the obstacles she put in their paths. They certainly were more than "symbolic" to the students who had served in the Armed Forces or who were hoping to join the military after graduation. It did not help that they had to watch their dean target the military for policies over which they had no control. They had to listen to their dean suggest that their classmates were justified in feeling "alienated" by the presence on campus of military officers.

It may have been “symbolic” and politically expedient to her. But I fear it is also symbolic--more than that: revealing--of the attitudes that she would take with her to the Supreme Court.

It is ironic that Ms. Kagan has been nominated to replace Justice John Paul Stevens, a decorated veteran of the US Navy in WWII. I respect the brief military service of Justices Alito and Kennedy, but upon Justice Stevens’s retirement there will not be a veteran on the court with more than a modicum of active duty experience. In an interview Justice Stevens himself reportedly stated that he believes that there should be at least one veteran on the court. Much is said of the need for “diversity” in our institutions. In my view this is as much a consideration of diversity on the court as any other.

I compare that to a situation in my personal life when I was hired to be a research fellow at the Joan Kroc Peace Institute at Notre Dame, because the director at that time determined that for all the researchers in the Institute working on issues of world peace, not a single one of them had any professional military experience. How could the Institute resolve any of the vexing questions regarding war and peace when it did not have any military expertise to leaven its research?

Lastly, I would think that a person so opposed to existing rules governing the military as Ms. Kagan would *encourage* rather than block the participation of the product of her law school, its graduates, so that **they may be part of the composition of the military’s leadership and thus have the opportunity to influence military policy**. On the contrary, I see such vitriol against the military as expressed by those such as Ms. Kagan as evidence that they **don’t** seek to understand or influence military policy according to normal processes but instead to undermine military effectiveness, readiness and cohesion. This may not be their **intent**, but it is their **effect**.

I again thank the chairman and the committee for allowing me this opportunity to testify.

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June 25, 2010

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
Room 224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Elena Kagan to the U.S. Supreme Court

Dear Chairman Leahy:

On behalf of the NAACP Legal Defense & Educational Fund, Inc., I am enclosing our report in support of the nomination of Elena Kagan to the United States Supreme Court.

If possible, please include our report in the record on this nomination.

Thank you for your attention to this matter.

Sincerely yours,

John Payton
Director Counsel & President
NAACP Legal Defense & Educational Fund, Inc.

Enclosure

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

REPORT ON
THE NOMINATION OF
ELENA KAGAN
TO THE SUPREME COURT
OF THE UNITED STATES



NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

June 24, 2010

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INTRODUCTION

On May 10, 2010, President Barack Obama nominated Elena Kagan to become the 112th Justice on the United States Supreme Court. Kagan has had an extraordinary legal career, marked by notable “firsts” – the first female dean of Harvard Law School and the first female Solicitor General. Her nomination to the Supreme Court is also historic. If confirmed, Kagan would be the fourth woman confirmed to the Court since Sandra Day O’Connor became the first almost three decades ago. More remarkably, Kagan would join the two female justices currently on the Court, making the Court one-third female for the first time ever. Kagan would be the youngest member of the Court and the first justice born in the 1960s. She would be the first Solicitor General confirmed to the Court since 1967 when Thurgood Marshall, who had previously served as the first Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF), was appointed.

Importantly, Elena Kagan would replace Justice John Paul Stevens, who occupied this seat on the Court for thirty-five years. When Justice Stevens announced his retirement, LDF described him as “a stalwart in his protection of civil rights and civil liberties.” Appointed by President Gerald Ford in 1975, Stevens’ role on the Supreme Court evolved over time. For example, he expressed skepticism about race-conscious university admissions policies in *Regents of the University of California v. Bakke*,¹ but he ended up strongly supporting diversity in higher education in *Grutter v. Bollinger*.² Justice Stevens attributed the shift to the Court’s own evolution, noting that during his tenure each justice who retired was replaced by one with more conservative views.³ Since he announced his retirement, Justice Stevens has been properly lionized as a strong force for protecting ordinary Americans against powerful interests. But he will also be known in history for his ability to forge consensus to safeguard civil rights despite an increasingly conservative Court. He used his influence and intellect to garner majority decisions in many groundbreaking areas. As the *New York Times* aptly editorialized, “The quality of his voice and his persuasive power raise the bar to a high level for his successor.”⁴

Individual justices joining the Supreme Court can change its dynamic in both subtle and dramatic ways. Each nomination is therefore extraordinarily important to the future of our country. For this reason, it is LDF’s practice to review the record of nominees in order to ascertain their views and positions on civil rights issues. We seek to determine whether prospective members of the Court possess the strong commitment to preserving and furthering the progress our nation has made in civil rights that is essential to achieving justice. We share our conclusions because we think it is critical for the Senate to exercise its constitutional role to “advise and consent” with full knowledge of a nominee’s civil rights record.

LDF has conducted a comprehensive review of Kagan’s views and actions on civil rights issues. Kagan’s record does not contain judicial opinions addressing civil rights issues nor are such issues a major subject of her academic writings or speeches.

¹ 438 U.S. 265 (1978).

² 539 U.S. 306 (2003).

³ Robert Barnes, *For Liberals, Replacing the Irreplaceable Justice*, WASH. POST, Apr. 11, 2010, at A1.

⁴ Editorial, *Searching for Elena Kagan*, N.Y. TIMES, May 11, 2010, at A22.

Accordingly, our review focused on the work she performed and views she expressed during her career as law clerk, private practitioner, White House adviser, law professor, dean, and Solicitor General. We are keenly aware, however, that opinions expressed and positions taken are not always those of the individual but are often constrained by institutional role. This is particularly so in the roles of Solicitor General and White House advisor. The Solicitor General is the government's lawyer in the Supreme Court. Positions advocated by the Solicitor General reflect the considered view of the government as an institution and of a particular administration – not necessarily those of the individual holding the office. Similarly, White House advisors often are called upon to give policy advice that best advances an administration's priorities in light of what is then seen as possible. Again, this advice may not be the same as the individual's conclusion about what the law requires or what would be optimal policy.

The nature and extent of Elena Kagan's record on civil rights emphasizes the need for the Senate to explore fully her views in all jurisprudential areas affecting equal opportunity and racial justice during the confirmation hearings. As Kagan herself has suggested, confirmation hearings should serve "as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct."⁵ This should be the case with all nominations; it is particularly so here.

Notwithstanding some concerns detailed in this report, LDF supports Elena Kagan's nomination to be the next Associate Justice of the Supreme Court. Our review of her record leads us to conclude that she has the professional credentials, respect for the institutional roles of all three branches of federal government, intellect and independence of mind, ability to build consensus, and commitment to justice required of one who would serve in this critical role.

GENERAL BACKGROUND

Elena Kagan is a nominee with an impeccable legal biography. She received a B.A. *summa cum laude* from Princeton University in 1981, a M. Phil. from Oxford University in 1983, and a J.D. *magna cum laude* from Harvard Law School in 1986. She clerked for two deeply respected jurists and champions of civil rights – Judge Abner Mikva on the U.S. Court of Appeals for the District of Columbia Circuit and Justice Thurgood Marshall on the Supreme Court. From 1989 to 1991, she was an associate at Williams & Connolly in Washington, D.C. She joined the faculty at the University of Chicago Law School and became a tenured professor. In 1993, she served as special counsel to the Senate Judiciary Committee, and from 1995 until 1999, she worked at the highest levels of the White House during the Clinton Presidency. In July 1999, she became a visiting law professor at Harvard Law School, received tenure and then served as dean for six years. In 2009, she became the nation's first female Solicitor General.

Kagan would bring a set of unique skills and talent to the Court. Because every sitting justice has served as a federal appeals court judge, Kagan's diverse perspective is a

⁵ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995).

positive attribute. Requiring prior judicial experience in all nominees to the Supreme Court is only a recent trend.⁶ History has shown that judicial experience is not a prerequisite for distinguished service on the Court. Of the 111 Supreme Court justices, 40 had no prior judicial experience, including two of the past four chief justices – William Rehnquist and Earl Warren. Some of the most powerful figures on the Court arrived through other professional avenues, including John Marshall, Joseph Story, Robert Jackson, Louis Brandeis, Felix Frankfurter and William O. Douglas. Indeed, the court that decided *Brown v. Board of Education* had only one member (Sherman Minton) who had previously served as a judge.⁷ We appreciate the view of Senate Judiciary Committee Chairman Patrick Leahy who stated in regard to Kagan's nomination, that he was "glad to see somebody from outside the judicial monastery" nominated.⁸ That sentiment was shared by Justice Antonin Scalia who said, "I am happy to see that this latest nominee is not a federal judge – and not a judge at all."⁹

Kagan's biography reveals that she has spent the past two decades immersed in legal theory and application of the law.¹⁰ She began her legal career clerking for Judge Abner Mikva, who thought so highly of Kagan that he later hired her when he became President Clinton's White House Counsel. Kagan next served as a law clerk to Justice Thurgood Marshall, who founded LDF in 1940. Kagan has called Marshall "the most important – and probably the greatest – lawyer of the 20th century."¹¹

Kagan's scholarship as a law professor was primarily in the First Amendment area. She authored articles including comprehensive analyses of the Supreme Court's ruling in a cross-burning case, *R.A.V. v. City of St. Paul*.¹² Her teaching at the University of Chicago included classes in constitutional law, labor law, and civil procedure. At Harvard, she focused on constitutional and administrative law. While a law professor, she authored a book review of Yale Law Professor Stephen Carter's *The Confirmation Mess*, in which she critiqued the judicial confirmation process and suggested that vigorous questioning by the Senate regarding a nominee's judicial philosophy is critically necessary.¹³ As a law professor, Kagan joined letters supporting two of President George W. Bush's judicial nominees: Michael McConnell, who was confirmed to but

⁶ The last non-jurists were appointed in 1971, when President Richard Nixon nominated Lewis Powell, a private practitioner, and William Rehnquist, Assistant Attorney General in the Office of Legal Counsel at the Justice Department.

⁷ See Nina Totenberg, *Should Kagan's Lack of Judicial Experience Matter?*, NPR, May 12, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=126764692>.

⁸ James Rowley & Laura Litvan, *Republicans Plan to Question Kagan's Experience as Judge, Courtroom Lawyer*, BLOOMBERG, May 11, 2010, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aAx50dwKgGuL>.

⁹ Robert Barnes, *Scalia Glad to Have Nominee Who Isn't a Judge*, WASH. POST, May 27, 2010, at A8.

¹⁰ Andrew Cohen, *Supreme Court Choice Perfectly Positioned for Confirmation*, POLITICS DAILY, May 9, 2010, available at <http://www.politicsdaily.com/2010/05/09/elena-kagan-supreme-court-nominee-confirmation>.

¹¹ Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1127 (1993).

¹² See Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873 (1993); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29 (1992).

¹³ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995).

subsequently resigned from the Tenth Circuit, and Peter Keisler, who was not confirmed to the Fourth Circuit.¹⁴

Kagan spent four years working on legal and policy matters in the White House under President William Clinton. From 1995 to 1996, she was Associate Counsel to the President, and from 1997 to 1999, she was Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council (DPC). In the Counsel's office, she served primarily as a lawyer for the policy councils and legislative office. At the DPC, she developed and implemented policy in a number of areas, including tobacco legislation, welfare reform and civil rights, as part of President Clinton's Race Initiative.¹⁵ As commentators have noted, this background provides Kagan with a different perspective on the bench: "firsthand experience in the White House amid the bureaucratic and political constraints in government."¹⁶ Numerous materials from this period have been released from the archives at the Clinton Library. For purposes of our review, it is often difficult to distinguish Kagan's personal opinions from those of the Administration for which she worked. Thus, while her work on civil rights issues during this period is interesting, there is a question concerning what it reveals about her own views on the myriad problems in achieving justice for all Americans.

In January 2009, President Obama nominated Kagan to serve as Solicitor General. Referred to as the Tenth Justice, the Solicitor General represents the federal government in the Supreme Court and oversees all appellate litigation in which the United States is a party. The caseload of the Solicitor General's office is approximately two-thirds civil and one-third criminal.¹⁷ During her tenure, Kagan argued six cases before the Court, including *Citizens United v. FCC*, a pivotal case on political participation that was her first oral argument. Because the Solicitor General is the institutional representative of the government in the Supreme Court and generally defends government actions, it is again difficult to know whether the positions that Kagan has taken as Solicitor General can be attributed to her personally.

From March 19, 2009, when she was confirmed as Solicitor General, to May 14, 2010, when she was nominated to the Supreme Court, Elena Kagan was counsel of record on numerous Supreme Court briefs filed on behalf of the federal government. These Supreme Court briefs can be grouped into two categories. First, there are merits briefs filed after the Supreme Court grants certiorari and agrees to hear oral argument in a case. Kagan signed 29 merits briefs in cases where the government was a party and 37 amicus briefs supporting a particular side in cases where the government was not a party. Second, there are certiorari briefs that urge the Court to grant or deny review. At the certiorari stage, Solicitor General Kagan signed 17 petitions for certiorari, requesting the Supreme Court take a case in which the government was a party, and approximately 700 briefs responding to petitions for certiorari filed by other parties. Also at the certiorari stage, she filed 24 briefs in response to an invitation from the Court to express the government's

¹⁴ Responses by Elena Kagan to Senate Judiciary Committee Questionnaire (May 18, 2010), at 13 [hereinafter QUESTIONNAIRE RESPONSES].

¹⁵ Questionnaire Responses at 71.

¹⁶ Alec MacGillis, *Kagan Would Bring Rare Perspective to Bench*, WASH. POST., May 14, 2010, at A2.

¹⁷ QUESTIONNAIRE RESPONSES at 71.

view on whether to grant a petition for certiorari filed by another party. The Solicitor General's briefs at the certiorari stage are extremely influential. According to a recent study, the Court is 37 times more likely to grant a petition after it calls for the views of the Solicitor General. And the justices follow the recommendation of the Solicitor General to grant or deny a case roughly 80% of the time.¹⁸

Another significant aspect of the work of the Solicitor General's Office is determining the position of the government in the appellate courts. All government attorneys must obtain approval from the Solicitor General in order to file an appeal or even to submit an amicus brief in an appellate court.¹⁹

THE CLINTON ADMINISTRATION'S RACE INITIATIVE

During her legal career, there appears to be only one period when Elena Kagan focused directly and intensively on racial justice issues. In 1997-98, she was part of the DPC team in the Clinton Administration that developed and implemented the one-year project to examine the state of race relations, known as: One America in the 21st Century: The President's Initiative on Race.²⁰ Because this was the time when Kagan appears to have spent sustained professional effort addressing issues of race, we set forth below her involvement in some detail. Our discussion is based upon the documents released by the Clinton Library.

Kagan and Assistant to the President for Domestic Policy and Director of the Domestic Policy Council Bruce Reed initially opposed the idea of a commission format for the Race Initiative for a variety of reasons including that it could cede control over large aspects of the domestic agenda.²¹ Instead, they proposed a major multi-day conference on racial issues, a series of town halls led by the President on race-related issues and a policy development process producing a wide range of actions and proposals. They thought this alternative would "make[] the President central to a second-term effort on racial issues, at the same time as it combines intellectual rigor with an action orientation."²² Rejecting this alternative, President Clinton assembled a seven person advisory board, headed by the preeminent historian, John Hope Franklin. The board's tasks were to: engage diverse communities and industries; foster dialogue on race; study critical substantive areas in which racial disparities were significant, such as education, economic opportunity and housing; better understand the causes of racial tension; and recommend concrete and creative policies to address these critical problems.²³

¹⁸ Marcia Coyle, *Study Shows SG's Influence in Certs Granted*, NAT'L L.J., June 16, 2009.

¹⁹ An appendix to Kagan's Senate Judiciary Committee Questionnaire contains a list of all such actions taken by the Solicitor General's Office during her tenure.

²⁰ *One America: About The Initiative*, available at <http://clinton4.nara.gov/Initiatives/OneAmerica/about.html> (last visited June 23, 2010).

²¹ Memorandum from Elena Kagan & Bruce Reed to Erskine Bowles & Sylvia Mathews (Mar. 20, 1997) (on file in DPC Box 038, Folder 011 - Race Commission [2]).

²² *Id.*

²³ See *One America: Overview*, available at <http://clinton4.nara.gov/Initiatives/OneAmerica/overview.html> (last visited June 23, 2010). All Cabinet agencies also joined in the effort to identify specific ways to address the issue of race relations. *Id.*

Kagan worked with the staff of the Race Initiative and its advisory board. She appears to have been most engaged in developing policy initiatives. Specifically, she helped to coordinate workgroups established by the DPC to develop both administrative and legislative policies in four subject areas: economic and community empowerment, education, administration of justice, and health and family. In July 1997, she and Bruce Reed described the policy development process to President Clinton as follows:

Our goals are (1) to help provide a status report on race relations and racial disparities to inform policy development; (2) to assess and communicate the impact of this Administration's prior initiatives – involving economic growth, education, crime and so forth – on race relations and the status of racial minorities; and (3) to build on this Administration's accomplishments and agenda with new initiatives to announce in the coming year and longer-term policies to incorporate in the final Presidential report. We have a strong base from which to work, and we will attempt to ensure that the policy measures accompanying the Race Initiative will grow out of everything this Administration has done already. Throughout, we will focus on solutions that reflect the common values of the American people (e.g. equal opportunity and shared responsibility), and respond to their common aspirations (e.g., safe streets, good schools, and affordable housing).²⁴

In November 1997, Kagan and Reed updated these themes for President Clinton:

We believe the central focus of the race initiative should be a race-neutral opportunity agenda that reflects these common values and aspirations. Of course, there is still a need for strong civil rights enforcement, narrowly tailored affirmative action programs, and certain other targeted initiatives.... But the best hope for improving race relations and reducing racial disparities over the long term is a set of policies that expand opportunity across race lines, and in doing so, force the recognition of shared interests. These policies – for example, education opportunity zones, university-school mentoring programs, housing vouchers, and community policing and prosecuting initiatives – address the concerns of working people of all races, at the same time as they provide special benefits to racial minorities.

We think you should state explicitly throughout the year that this kind of agenda is the best way to achieve racial progress – to reduce racial inequalities and bridge racial divides. Expanding opportunity for all Americans has been the clear mission of your Presidency, and it should be the clear mission of your race initiative.²⁵

²⁴ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 15, 1997) (on file in DPC Box 051, Folder 002 – Race – Race Initiative Policy: General [2]).

²⁵ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Nov. 11, 1997) (on file in DPC Box 041, Folder 003 – Race – Race Initiative-General [1]). Kagan's notes from a meeting with President Clinton

Kagan chaired the Race Initiative's Administration of Justice group, which included a significant civil rights enforcement component.²⁶ She communicated with agencies about policies and proposals and then assisted in securing funding. In August 1997, she hosted a large meeting with civil rights enforcement agencies and requested they prepare reports describing their structure, fiscal status, programmatic priorities and new funding initiatives that could be pursued as a part of the Initiative.²⁷ Subsequently, several good proposals were developed and successfully implemented across the agencies.

Kagan also worked on many different matters as part of the Race Initiative. In 1996, Department of Agriculture Secretary Dan Glickman established a civil rights structure to investigate complaints of discrimination regarding program participants and employees; the final report set forth 92 recommendations. When Representative Eva Clayton (D-NC) asked the White House to support legislation pertaining to the recommendations, Kagan wrote to an aide: "Please review carefully. We have to plug USDA into our process, and see if we can glean some good ideas from what they've done. (We also have to find out what's happening on this legislation.) Reading this made me think that one of the things we should be working towards is our [Executive Order] addressing discrimination and civil rights enforcement in agencies generally."²⁸ Kagan also worked with the Department of Health and Human Services to identify policies and budgetary issues relating to the Initiative's focus on racial disparities in health and health care access.²⁹ And, Kagan promoted service projects as part of the Race Initiative.³⁰

At the end of the year, Kagan was part of a discussion regarding the Initiative's final report. The documents reflect significant debate about the form of the report, the policies to include, and how bold the vision and ideas should be, although it is difficult to discern Kagan's positions on these issues.³¹ Ultimately, the President's report was never

on the next day summarized the President's comments as: "have to find things that cut across racial lines -- what unites us/what common interests." Notes from Meeting with President Clinton (Nov. 12, 1997) (on file in DPC Box 041, Folder 003 -- Race -- Race Initiative-General [1]).

²⁶ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 15, 1997) (on file in DPC Box 051, Folder 002 -- Race -- Race Initiative Policy: General [2]).

²⁷ Memorandum from Tom Freedman et al. to Elena Kagan (Oct. 5, 1997) (on file in DPC Box 041, Folder 013 -- Race -- Race Initiative Policy -- Civil Rights Enforcement [3]).

²⁸ Memorandum from John Hilley & Andy Blocker to Erskine Bowles (July 23, 1997) (on file in DPC Box 051, Folder 007 -- Race -- Race Initiative Policy: Rural Issues/USDA [1]).

²⁹ Memorandum from Chris Jennings & Sarah Bianchi to Bill Corr (Oct. 3, 1997) (on file in DPC Box 051, Folder 003 -- Race -- Race Initiative Policy: Health).

³⁰ After receiving a memorandum about engaging the Corporation for National Service and Americorps, she responded, "Good Stuff." Memorandum to Elena Kagan (author and date redacted) (on file in DPC Box 051, Folder 009 -- Race -- Race Initiative Policy: Service). In response to a suggestion about service learning opportunities for students, Kagan wrote: "I like the idea of making this connection (service learning to race or, more broadly, service to race). What do -- or should -- we have going on in the service/ed world that we can transform into a race initiative proposal or event?" Memorandum from Susan Anderson to Judith Winston (Oct. 14, 1997) (on file in DPC Box 051, Folder 009 -- Race -- Race Initiative Policy: Service).

³¹ See Documents on file in DPC Box 054, Folder 008 -- Race Initiative Report and Hard Questions [2]).

published. The advisory board released a report entitled, *One America in the 21st Century: Forging a New Future*, presenting its recommendations to President Clinton.³²

POLITICAL PARTICIPATION

The Supreme Court has long played and continues to play a central role in helping secure the rights of African-American voters. Ongoing voting discrimination, even in the wake of the historic 2008 election of our nation's first African-American president, threatens to undermine democratic principles expressed in the Fourteenth and Fifteenth Amendments of the U.S. Constitution.

The Voting Rights Act is widely regarded as our nation's most important and successful federal civil rights law. It contains important provisions that have helped provide minority voters greater access to the political process. Most notably, the preemptive role of the Section 5 preclearance provision has helped block discriminatory changes to voting procedures in those parts of the country where the problems have proven particularly stubborn and intractable. In 2006, Congress conducted extensive hearings to determine whether Section 5 and other expiring provisions of the Act remain necessary. After careful study, Section 5 was reauthorized in 2006 by a vote of 390-33 in the House and 98-0 in the Senate. Since that time, Section 5 has come under attack. In *Northwest Austin Municipal Utility District v. Holder*,³³ a small utility district's constitutional challenge to Section 5 was heard by the Supreme Court during its 2008 Term. Kagan assumed the role of Solicitor General shortly after the Department of Justice (DOJ) filed its responsive pleadings in the case. Nevertheless, her leadership role at that time reflects a commitment to staunch defense of the important preclearance provision.

The only voting rights case in which Kagan was involved during her tenure as Solicitor General was *United States v. Euclid City School Board*, where the United States brought a successful challenge under Section 2 of the Voting Rights Act against the Euclid City, Ohio's school board's at-large method of election. As a remedy for the violation, the federal district court held that the board's limited voting proposal, which would permit voters to vote for fewer candidates than the number of seats that were open, was an appropriate remedy.³⁴ In fashioning this remedy, the court carefully considered a number of factors including that "[m]inority voters in Euclid have historically turned out to vote at only a fraction of the rate of non-minorities, in part due to the longstanding absence of a meaningful opportunity to participate in the political process." DOJ appealed the court's remedial order. Instead of limited voting, DOJ sought single member districts – a remedy that has routinely been ordered in many, though not all, cases finding Section 2 violations. Several months later, however, DOJ reversed course and, with approval from one of Kagan's deputies, moved to voluntarily dismiss its appeal and the court granted that motion.³⁵ While DOJ's reasoning for dismissing the appeal is not available, it could be interpreted as a willingness to consider and analyze remedies for voting

³² Advisory Board of the President's Initiative on Race, *One America in the 21st Century: Forging a New Future*, September 1998, available at <http://clinton2.nara.gov/Initiatives/OneAmerica/P1R.pdf>.

³³ 129 S. Ct. 2504 (2009).

³⁴ *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009).

³⁵ See Order, available at <http://electionlawblog.org/archives/Order%20Dismissing%20Appeal-1.pdf>.

discrimination on a case by case basis. Indeed, there is no “one-size fits all” approach to resolving problems of ongoing discrimination in our political process.

The Supreme Court also has a vital role to play in ensuring that our political process remains open, fair and accessible. This term the Court issued a 5-4 ruling in *Citizens United v. Federal Election Commission* overruling long-standing precedents and invalidating state and federal laws that prevent corporations from using general treasury funds for political spending or otherwise regulating corporate independent electioneering expenditures.³⁶ Kagan’s first of her six oral arguments was her determined but ultimately unsuccessful defense of federal campaign finance laws. This ruling is a recent example of the Court’s over-reaching to reject Congress’ reasoned, considered judgment, based on extensive deliberations, about how to regulate the political process. Civil rights advocates, including former LDF attorney Judith Browne-Dianis, have commented that the decision “ushers in a new, unprecedented era of direct corporate wealth influence in our elections” that “will have a particularly devastating impact on communities of color, which lack comparable resources with which to fund competing ads. This disparity is due, in large measure, to the lingering negative effects that racial discrimination has had in the distribution of property in the United States.”³⁷ As Congress and states consider responses to the *Citizens United* ruling, it is important for the Court to give due deference to those efforts that seek to limit the over-reaching of the ruling.

ECONOMIC JUSTICE

A. Employment Discrimination

Each year, the Supreme Court decides pivotal cases affecting workers’ rights to be protected from race and other forms of discrimination. Recently, the Court has severely restricted the ability of discrimination victims to seek relief under the fair employment laws. For example, in *Ledbetter v. Goodyear Tire & Rubber Co.*,³⁸ the Court held that a pay discrimination claim was untimely because the employee failed to complain at the time of the pay decision, rather than when she learned of it years later; Congress overturned the decision, and this became the first bill President Obama signed into law. While the judiciary’s faithful application of civil rights laws in employment and housing should always be a goal, the recent economic crisis – where minorities have been adversely impacted in unemployment³⁹ and foreclosures⁴⁰ – has highlighted the importance of equal treatment under the law in the economic arena.

³⁶ 130 S. Ct. 876 (2010).

³⁷ *Defining the Future of Campaign Finance in an Age of Supreme Court Activism, Hearing Before the House Committee on Administration, United States House of Representatives*, 111th Cong. 1st Sess. (Feb 3, 2010) (Testimony of Judith Browne-Dianis, Co-Director, Advancement Project) at 2.

³⁸ 550 U.S. 618 (2007).

³⁹ Unemployment is at 15.5% among African Americans, nearly double that among whites. Bureau of Labor Statistics, *The Employment Situation—May 2010*, at 1.

⁴⁰ Renac Merle, *Minorities Hit Harder by Foreclosure Crisis*, WASH. POST., June 19, 2010, at A12 (noting that African Americans and Latinos were more than 70 percent more likely than whites to lose homes to foreclosure between 2007 and 2009).

Early in her career, Elena Kagan authored a student law review note on class actions in employment discrimination cases under Title VII of the Civil Rights Act of 1964. In the note, *Certifying Classes and Subclasses in Title VII Suits*, she addressed the impact of the Supreme Court's decision in *General Telephone Co. v. Falcon*,⁴¹ which restricted across-the-board class actions in Title VII cases. Kagan identified a tension between permitting broad Title VII class actions, which promote effective relief for victims of discrimination, and the goal of ensuring that all class members have adequate representation for their varying interests.⁴² Kagan proposed that courts rely on subclassification schemes in order to protect fully the interests of absent class members.⁴³

Kagan worked on several employment discrimination issues as a Clinton Administration official. When a proposal arose to allow the Equal Employment Opportunity Commission (EEOC) to use paired testers to detect discriminatory treatment, her notes from a meeting reflect that, while testing was "simple in housing," it would be "obviously controversial – especially in employment where there is more subjective evaluation."⁴⁴ In another instance, she indicated she was "not keen on the paired testing proposal" across agencies, because she believed it would encourage opposition to it as an enforcement tool.⁴⁵ However, under her leadership, her office went to considerable lengths to preserve the use of employment testing generally when faced with a proposed appropriations restriction.⁴⁶ Finally, significant components of President Clinton's Race Initiative included: securing a large increase for the EEOC budget to expand its alternative dispute resolution program and reduce the backlog of private complaints;⁴⁷ and overhauling procedures for federal sector cases.⁴⁸

As Solicitor General, Kagan participated in a number of fair employment cases at the Supreme Court and appellate court levels. Here, we highlight several key cases, beginning with Kagan's amicus briefs at the certiorari and merits stage in *Lewis v. City of Chicago*. In *Lewis*, LDF, along with co-counsel, represented a class of African-American applicants for firefighter jobs in Chicago. The issue for the Supreme Court was whether or not the job applicants filed their claims of discrimination within the time frame required by Title VII. A federal district court found that Chicago violated Title VII's disparate-impact provision when it hired more than 1,000 firefighters between 1996 and 2002 using the results of a test in a manner that unjustifiably excluded qualified African-American applicants. Although the City knew this from the outset, it used the test results for the next six years to hire eleven disproportionately white firefighter classes.

⁴¹ 457 U.S. 147 (1982).

⁴² Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 625-33 (1986).

⁴³ *Id.* at 635-39.

⁴⁴ Notes from Civil Rights Enforcement Meeting with EEOC (Oct. 21, 1997) (on file in DPC Box 041, Folder 009 – Race – Race Initiative Policy: Civil Rights – Federal Employees [4]).

⁴⁵ E-mail from Julie Fernandes to Elena Kagan & Bruce Reed (June 1, 1998) (on file in DPC Box 051, Folder 001 – Race – Race Initiative Policy: General [1]).

⁴⁶ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 2, 1998) (on file in WHORM Box 002, Folder 015).

⁴⁷ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Oct. 23, 1998) (on file in WHORM Box 002, Folder 030).

⁴⁸ Letter from Ellen Vargyas to Elena Kagan (Sept. 26, 1997) (on file in DPC Box 041, Folder 006 – Race – Race Initiative Policy: Civil Rights – Federal Employees [1]).

The City did not appeal the federal district court's finding that the City's hiring practice was discriminatory. Instead, the City tried to escape liability by arguing that the plaintiffs' claims were barred because they were not filed within the statutorily mandated 300-day period after the City first announced its hiring plan. Vindicating LDF's arguments, the Supreme Court ruled unanimously, in an opinion authored by Justice Scalia, that the City discriminated each and every time it used a hiring practice that arbitrarily blocked qualified minority applicants from employment.⁴⁹ While the Supreme Court was considering whether to grant certiorari, it called for the views of the Solicitor General. In response, Kagan signed a brief supporting LDF's position.⁵⁰ After the Supreme Court granted certiorari, the Solicitor General's office reasserted the same position in a merits amicus brief⁵¹ and at oral argument, where Kagan's Deputy Neal Katyal shared argument time with LDF Director-Counsel John Payton.

As in *Lewis*, the Supreme Court called for the Solicitor General's views when considering whether to grant certiorari in another employment discrimination case: *Staub v. Proctor Hospital*.⁵² A jury found that Vincent Staub's service as a U.S. Army reservist was a motivating factor in his termination in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵³ But the Seventh Circuit set aside the jury's verdict because the individuals who had manifested a discriminatory animus against Staub were not the ultimate decisionmakers. In the government's amicus brief, Kagan argued that the Seventh Circuit's statutory interpretation of USERRA was excessively narrow. Siding with Staub, Kagan took the position that an employer is liable whenever anti-military animus is a motivating factor for an adverse employment action. Kagan further recommended that the petition for a writ of certiorari be granted, and the Court agreed. Oral argument will be scheduled for fall 2010.⁵⁴ *Staub* could have broad implications because the same issue of the scope of subordinate liability has arisen under Title VII and other federal anti-discrimination statutes.

In two cases, Solicitor General Kagan filed briefs successfully advocating that the Court should deny review of certiorari petitions which sought to limit enforcement of Title VII safeguards against workplace discrimination. First, in *Federal Express Corporation v. EEOC*, Tyrone Merritt claimed, *inter alia*, that the cognitive ability exam that FedEx required as a criteria for promotion had an unjustifiably adverse impact on African-American and Latino employees. As a prerequisite to a Title VII lawsuit, an employee must provide the EEOC an opportunity to investigate by filing a discrimination charge, which Merritt did in November 2004. Almost a year later, the EEOC indicated that it intended to continue its investigation, but it granted Merritt the right to initiate his own suit against FedEx. When the EEOC subsequently subpoenaed records from FedEx, the company refused to comply. A federal district court and the Ninth Circuit rebuffed FedEx's challenge to the EEOC's subpoenas, and in her response to FedEx's petition for

⁴⁹ *Lewis v. City of Chicago*, No. 08-974, __ S. Ct. __, 2010 WL 2025206 (May 24, 2010).

⁵⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, *Lewis v. City of Chicago* (No. 08-974), 2009 WL 4271311.

⁵¹ Brief for the United States as Amicus Curiae, *Lewis v. City of Chicago* (No. 08-974), 2009 WL 3155376.

⁵² Brief for the United States as Amicus Curiae, *Staub v. Proctor Hosp.* (No. 09-400), 2010 WL 942803.

⁵³ 38 U.S.C. 4301 *et seq.* (1996).

⁵⁴ *Staub v. Proctor Hosp.*, 130 S. Ct. 2089.

certiorari, the Solicitor General defended the EEOC's authority.⁵⁵ The Supreme Court denied review.⁵⁶ Second, in *Office of Alaska Governor v. EEOC*, the Solicitor General urged the Court to deny review of Alaska's claim that the Eleventh Amendment immunized the state from a lawsuit to redress sexual harassment and retaliation alleged by two former state employees. The Solicitor General defended the Ninth Circuit's en banc interlocutory ruling that the Government Employee Rights Act of 1991, which extended the protections of Title VII to certain high-level state employees who had been previously excluded from coverage, was a valid exercise of Congress's power to enforce the Fourteenth Amendment.⁵⁷ The Supreme Court denied review.⁵⁸

In contrast, in *Browning v. United States*, the Solicitor General's Office did not act to support the EEOC's consistent approach to jury instructions in discrimination cases. Henrietta Browning, an Internal Revenue Service employee, alleged that she was demoted because of her race and in retaliation for having complained about discrimination. At trial, she relied on evidence that the defendants' explanations for the demotion were untrue. Nevertheless, the district court refused her request to instruct the jury that it could infer the existence of a discriminatory motive from the falsity of a defendant's explanation of its action — an inference that the Supreme Court had previously ruled permissible.⁵⁹ The Solicitor General's brief in opposition to certiorari set forth several reasons why this case was not a good vehicle to address the split among the federal courts of appeals on this issue.⁶⁰ In reply, Browning pointed out significant inconsistencies between the government's rationales and the positions the EEOC had taken in prior cases,⁶¹ but the Supreme Court denied certiorari.⁶² This may well be a case where the Solicitor General's role as attorney for the government had an impact on the position that it advocated. Kagan also signed several other briefs in opposition to petitions for certiorari in which federal government employees unsuccessfully sought Supreme Court review of adverse decisions on discrimination claims.⁶³

Solicitor General Kagan also authorized an appeal to the Second Circuit in *United States v. New York City Board of Education* on grounds that could make it more difficult to obtain meaningful remedies for entrenched workplace discrimination. In 1996, the Clinton Administration's Justice Department filed suit alleging that the New York City

⁵⁵ Brief for Respondent in Opposition, *Federal Express Corp. v. EEOC* (No. 08-1500), 2009 WL 3199656.

⁵⁶ *Federal Express Corp. v. EEOC*, 130 S. Ct. 574 (2009).

⁵⁷ Brief for Respondents in Opposition, *Office of Alaska Governor v. EEOC* (No. 09-384), 2009 WL 4624133.

⁵⁸ *Office of Alaska Governor v. EEOC*, 130 S. Ct. 1054 (2010).

⁵⁹ See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

⁶⁰ Brief for Secretary of Treasury in Opposition, *Browning v. United States* (No. 09-583), 2010 WL 984118.

⁶¹ Reply Brief for Petitioner, *Browning v. United States* (No. 09-583), 2010 WL 1256460.

⁶² *Browning v. United States*, 130 S. Ct. 2090 (2010).

⁶³ See, e.g., *Allmond v. Akal Sec., Inc.*, 130 S. Ct. 1139 (2010); Brief for Federal Respondent in Opposition, *Allmond v. Akal Sec., Inc.* (No. 09-379), 2009 WL 4953023; *Schramm v. LaHood*, 130 S. Ct. 2090 (2010); Brief for Respondent in Opposition, *Schramm v. LaHood* (No. 09-440), 2010 WL 984114; *Stoyanov v. Mabus*, 130 S. Ct. 57 (2009); Brief for Respondents in Opposition, *Stoyanov v. Mabus* (No. 08-1238), 2009 WL 1604423; *Marquardt v. Sebelius*, 130 S.Ct. 361 (2009); Brief for Respondent in Opposition, *Marquardt v. Sebelius* (No. 08-1048), 2009 WL 1763594; *Adam v. Salazar*, 130 S. Ct. 52 (2009); Brief for Respondent in Opposition, *Adam v. Salazar* (No. 08-1097), 2009 WL 1541669.

Board of Education had unjustifiably and disproportionately excluded African Americans, Latinos, Asian Americans, and women from permanent positions as school custodians. A 1999 settlement provided job benefits to minorities and women that they would have received but for the City's illegal practices. The settlement's lawfulness was then challenged by a group of white custodians. After President George W. Bush's appointees took over, the Justice Department proposed revisions to the settlement that threatened to dramatically reduce the remedies it had previously negotiated. At the request of minorities and women who received job benefits pursuant to the settlement, LDF and the ACLU Women's Rights Project intervened. A federal district court upheld key aspects of the settlement. Rather than revive the Clinton Administration's approach to the case, however, Kagan approved a legal strategy for appealing to the Second Circuit that could limit the ability of public employers to implement race-conscious measures to settle discrimination lawsuits.⁶⁴ Oral argument was held earlier this year; a decision is pending.

While working for the Clinton Administration, Kagan had occasion to address the issue of whether Title VII permits employers to take race into account in employment decisions in order to further objectives other than remedying discrimination. In *Piscataway Township Board of Education v. Taxman*, a white teacher challenged a New Jersey school district's decision to retain an African-American teacher who was deemed equally qualified, for the purpose of ensuring educational benefits of a diverse teaching force. The Third Circuit struck down the district's action on the broad ground that Title VII precludes *all* non-remedial, race-conscious employment decisions.⁶⁵ When the school district petitioned the Supreme Court to review the case, the Clinton Administration filed a brief (at the invitation of the Court) characterizing the Third Circuit's ruling as "seriously flawed," but recommending against granting certiorari because deficiencies in the record would make the case an inappropriate one to decide the broad question.⁶⁶

After the Court granted certiorari, the Administration filed another brief in which it argued that, contrary to the Third Circuit's decision, Title VII does not bar race-conscious actions by a public employer that are narrowly tailored to further a compelling, non-remedial interest.⁶⁷ Nevertheless, the Administration urged the Court to affirm the judgment in favor of the white teacher on the "narrow ground that the Board failed to offer or defend an adequate justification for this particular race-based layoff decision."⁶⁸ The brief argued that the Supreme Court therefore did not need to and should not rule on the broader legal question. Kagan approved of this course of action, noting that it was "exactly the right position — as a legal matter, as a policy matter, and as a political matter."⁶⁹ LDF filed a brief that also criticized the Third Circuit's "sweeping, rigid, and

⁶⁴ Brief for the United States as Appellee-Cross-Appellant, *United States v. N.Y. City Bd. of Educ.* (No. 08-5171), available at http://www.justice.gov/crt/briefs/nyc_boe_brief.pdf.

⁶⁵ 91 F.3d 1547 (3d Cir. 1996) (en banc).

⁶⁶ Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. of Educ. v. Taxman* (No. 96-679), 1997 WL 33561365.

⁶⁷ See Brief for the United States as Amicus Curiae Supporting Affirmance, *Piscataway Twp. Bd. of Educ. v. Taxman* (No. 96-679), 1997 WL 523854 at *8-*9, *19-*29.

⁶⁸ Memorandum from Walter Dellinger to the Attorney General (July 29, 1997) (on file in DPC Box 038, Folder 002 – Race – Affirmative Action).

⁶⁹ *Id.* (notes in margin).

unprecedented constructions of Title VII.”⁷⁰ But, unlike the United States, LDF additionally urged that the factual record was inadequate to support even a narrower disposition and suggested the Court remand the case “to the district court for the development of a proper record, the entry of findings on the factual issues, and the determination of any necessary legal questions on an appropriately narrow basis.”⁷¹ Ultimately, the parties reached a settlement prior to the scheduled oral argument, and the writ of certiorari was dismissed by the Supreme Court.⁷²

B. Housing and Lending Discrimination

Working with President Clinton’s DPC, Kagan gained exposure to federal efforts to promote fair housing and fair lending. In reviewing the Department of Housing and Urban Development’s (HUD’s) announcement of upcoming fair housing enforcement efforts in 1997, she commented, “I suspect discrimination is nowhere more prevalent than in the housing area.”⁷³ Indeed, one of the DPC’s primary achievements in civil rights enforcement during that period was to increase the federal budget to support a nationwide paired testing program by HUD to detect housing discrimination.⁷⁴ Kagan also worked on efforts to expand the Community Reinvestment Act to apply to credit unions and thus impose on credit unions an affirmative obligation to meet the financial needs of persons of modest means.⁷⁵ She supported an effort by the Federal Reserve Bank to modify federal regulations to permit lenders to collect information about the race and gender of applicants for non-mortgage credit.⁷⁶

While Kagan was Solicitor General, her office represented the federal government in *Cuomo v. Clearing House Association*,⁷⁷ which was the first opportunity for the Supreme Court to address issues at the root of the current economic crisis. *Cuomo* began in 2005, when the New York Attorney General launched an investigation to determine whether national banks had violated the state’s fair lending laws. Mortgage lending data indicated that the national banks had issued a higher percentage of predatory loans to African-American and Hispanic borrowers than to white borrowers. Such predatory lending has contributed to the surge in foreclosures across the country. The Office of the Comptroller of the Currency, a small agency within the U.S. Treasury Department, and a bankers’ trade association went to court to halt the investigation. In the Supreme Court, Kagan signed the government’s merits brief contending that federal law barred states from

⁷⁰ Brief of the NAACP Legal Defense & Educational Fund, Inc. et al., *Piscataway Township Bd. of Educ. V. Taxman* (No. 96-679), 1997 WL 528600.

⁷¹ *Id.*

⁷² 522 U.S. 1010 (1997).

⁷³ Letter from Andrew Cuomo to Erskine Bowles (May 5, 1997) (on file in DPC Box 030, Folder 021 – Housing General).

⁷⁴ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 2, 1998) (on file in WHORM Box 002, Folder 015).

⁷⁵ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Apr. 8, 1998) (on file in WHORM Box 002, Folder 005).

⁷⁶ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Apr. 17, 1998) (on file in WHORM Box 002, Folder 006).

⁷⁷ *Cuomo v. Clearing House Ass’n.*, 129 S. Ct. 2710 (2009).

enforcing their own fair lending laws against national banks.⁷⁸ Writing for the Court, Justice Scalia rejected the government's attempt "to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws."⁷⁹ As LDF advocated in its amicus brief supporting New York, the Supreme Court's ruling restored the collaborative federal-state regulatory scheme that Congress designed to address the persistence of lending discrimination.⁸⁰

Solicitor General Kagan also signed a brief in *Garcia v. Vilsack*, another lending discrimination case, urging the Supreme Court to deny certiorari, which it did.⁸¹ As a result, it may be more difficult for Hispanic and women farmers to obtain redress for the U.S. Department of Agriculture's denial of equal access to farm credit and benefit programs and its refusal to investigate or remedy farmers' civil rights complaints.⁸² Whereas the government recently announced a settlement of similar claims by African-Americans, Hispanic and women farmers are still fighting to obtain redress.

In *New West, L.P. v. City of Joliet*,⁸³ Kagan as Solicitor General signed a brief that argued the importance of a strong federal role in housing policy, but also urged the Court to deny certiorari, leaving in place a limiting ruling by the Seventh Circuit. In *New West*, HUD approved a plan to preserve and rehabilitate Evergreen Terrace, a federally subsidized housing development in Joliet, Illinois, because of the compelling need for low-income housing in that city. Joliet sought to override HUD's determination by using eminent domain to condemn Evergreen Terrace. New West and tenants of Evergreen Terrace alleged that the condemnation was not only preempted by federal housing laws but was also a racially motivated effort to push out of the community the overwhelmingly low-income African-American households who resided in Evergreen Terrace. Only the preemption question was directly at issue when the case reached the Supreme Court. Because Joliet's actions impeded execution of the purposes of federal housing law, Solicitor General Kagan argued that the Seventh Circuit erred in holding that Joliet's condemnation was not preempted. In the government's view, however, this case did not warrant Supreme Court review because it was the first in which a state or local government had condemned a federally subsidized development that HUD wanted to preserve, and the issue would benefit from consideration by other federal courts.⁸⁴

⁷⁸ Brief for Federal Respondent, *Cuomo v. Clearing House Ass'n.* (No. 08-453), 2009 WL 815241.

⁷⁹ *Cuomo*, 129 S. Ct. at 2720. New York's victory was not complete. The Court sided with New York in holding that OCC's regulatory interpretation of federal law was unreasonable to extent that it prohibited a state from bringing an action against national bank to enforce state law, but it also concluded that New York's threatened issuance of executive subpoenas were not an exercise of state law enforcement power, and therefore violated the National Bank Act. *Id.* at 2721-22.

⁸⁰ Brief of NAACP Legal Defense & Educational Fund, Inc. et al., as Amici Curiae in Support of Petitioner, *Cuomo v. Clearing House Ass'n.* (No. 08-453), 2009 WL 583794.

⁸¹ 130 S. Ct. 1138 (2010).

⁸² Brief for Respondent in Opposition, *Garcia v. Vilsack* (No. 09-333), 2009 WL 4953019.

⁸³ 130 S. Ct. 1503 (2010).

⁸⁴ Brief for Federal Respondent in Opposition, *New West, L.P. v. City of Joliet* (Nos. 09-435, 09-445), 2010 WL 146461.

Instead, the government has pursued an alternative fair housing enforcement strategy: IIUD has begun withholding federal housing funds from Joliet.⁸⁵

While Solicitor General, Kagan acted to preserve the ability to challenge racial discrimination in the pricing of homeowners' insurance in *Ojo v. Farmers Group, Inc.* On behalf of himself and similarly situated African-American homeowners, Patrick Ojo claimed that Farmers Group violated the Fair Housing Act by using credit score factors that had a racially disparate impact on the price of homeowners' insurance. When the Ninth Circuit agreed to rehear the case en banc, Kagan approved a government amicus brief supporting Ojo.⁸⁶

EDUCATION

Access to educational opportunity has long been a key indicator of racial and social justice in the United States. In its landmark 1954 decision in *Brown v. Board of Education*, the Supreme Court underscored that education is "the very foundation of good citizenship" and "must be made available to all on equal terms."⁸⁷ Since *Brown*, the Court has been called upon on numerous occasions to define students' rights and states' obligations with respect to education.⁸⁸ Given the importance of education in an increasingly global economy, the stakes in these cases are high for all Americans. Unless the nation can address ongoing educational inequities, we risk not only the stain of continued injustice, but a failure to remain globally competitive. It is critical that the next Supreme Court justice demonstrate an unwavering commitment to educational equity.

The education system has played a large role in Elena Kagan's life. Her mother and brother were educators; she has spent the majority of her career as a law professor and law school administrator. She was also a member of boards and organizations which promote equal opportunity and public interest fellowships for recent graduates.⁸⁹

As a law clerk for Justice Marshall, Elena Kagan considered an education issue while analyzing petitions for Supreme Court review. Her memoranda are located in Justice Marshall's papers in the Library of Congress. Kagan has said that her analyses were based in large measure on Justice Marshall's perspective and which cases he would want the Court to decide. The school case, *Citizens for Better Education v. Goose Creek*

⁸⁵ National Fair Housing Alliance, *A Step in the Right Direction: 2010 Fair Housing Trends Report*, at 7-8 (May 26, 2010).

⁸⁶ Letter Brief for the United States as Amicus Curiae, *Ojo v. Farmers Group, Inc.* (No. 06-55522) (en banc), available at http://www.justice.gov/crt/briefs/ojo_brief.pdf. Rather than resolving the issue in the first instance, the Ninth Circuit decided to certify a question to the Texas Supreme Court about the intersection of the Fair Housing Act and certain state law provisions potentially pertinent to Ojo's claims. See *Ojo v. Farmers Group, Inc.*, 600 F.3d 1201 (9th Cir. 2010) (en banc).

⁸⁷ 347 U.S. 483, 493 (1954).

⁸⁸ See, e.g., *Horne v. Flores*, 129 S. Ct. 2579 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 551 U.S. 701 (2007).

⁸⁹ QUESTIONNAIRE RESPONSE at 2-3. Kagan has served as: Member, Advisory Board, American Indian Empowerment Fund, 2008-09; Member, Board of Directors, Equal Justice Works, 2008-09; Member, Board of Directors, The Advantage Testing Foundation, 2007-09; Member, Board of Trustees, Skadden Fellowship Foundation, 2003-09; Member, New York State Commission on Higher Education, 2007-08; Member, Board of Directors, Thurgood Marshall Scholarship Fund, 2003-05.

Consolidated Independent School District, involved review of a Texas state court decision upholding a school district's rezoning of high school attendance boundaries in response to changes in residential patterns.⁹⁰ Kagan called the plan "amazingly sensible" and noted that the school district had "refused to wait and watch while new residential trends effectively segregated the schools."⁹¹ The Court ultimately decided not to hear the case.⁹² In the Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, a majority of Justices agreed with Kagan that "drawing attendance zones with general recognition of the demographics of neighborhoods" is an acceptable approach to promoting diversity and preventing racial isolation.⁹³ Even Chief Justice Roberts, whose opinion in *Parents Involved* was generally hostile to school district's voluntary integration efforts, distinguished "race-consciousness in drawing school attendance boundaries" as "an issue well beyond the scope of the question presented."⁹⁴

During her years with the Clinton Administration, Kagan was deeply involved in internal discussions and debates on important education-related issues. She worked on the Administration's controversial initiative to end "social promotions" through amendments to the Elementary and Secondary Education Act (ESEA). High achievement and standards are important and worthy goals. Unfortunately, the proposal under consideration raised serious civil rights concerns because it lacked sufficient supports and interventions for students who had not been afforded a meaningful opportunity to learn. Staff connected with the Race Initiative expressed the civil rights concerns to the Administration;⁹⁵ DPC acknowledged that "[w]e do not doubt that our proposal will be controversial in some quarters, particularly in the civil rights community."⁹⁶ Ultimately, Kagan supported moving forward on the proposal.

Kagan was also a key player in the Clinton Administration's push for a voluntary national testing initiative. Standardized tests have emerged as a key civil rights issue because many school districts misuse diagnostic assessments to make high-stakes decisions on matters such as promotion and graduation. Sole reliance on such tests for high-stakes decision-making is particularly inappropriate where, as is often the case, it has a disparate impact on students of color, lacks any relationship to the curriculum from which students are taught or does not validly measure student performance. Records indicate that during Kagan's tenure, the Administration supported the attachment of high-stakes implications to national tests, even though LDF and others criticized the initiative for not doing enough to make sure students had an equitable opportunity to learn the material to be tested.

⁹⁰ 719 S.W.2d 350 (Tex. App. 1986).

⁹¹ Memorandum of Elena Kagan to Justice Thurgood Marshall, *Citizens for Better Educ. v. Goose Creek Consolidated Indep. Sch. Dist.* (Aug. 6, 1987).

⁹² *Citizens for Better Educ. v. Goose Creek Consolidated Indep. Sch. Dist.*, 484 U.S. 804 (1987).

⁹³ 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 827 (Breyer, J., dissenting).

⁹⁴ *Id.* at 738-39 (plurality op.).

⁹⁵ *See, e.g.*, Memorandum from Christopher Edley, Jr. to President Clinton (Jan. 5, 1999) (on file in DPC Box 040, Folder 015 – Race – Race Initiative: Book [1]).

⁹⁶ Memorandum from Bruce Reed & Mike Cohen to President Clinton, (Jan. 13, 1999) (on file in DPC – Box 040 – Folder 015 – Race – Race Initiative – Book [1]).

Parents and members of the civil rights community have challenged the misuse of standardized tests on numerous occasions. One of the first such challenges was *Erik V. v. Causby*, a North Carolina case in which LDF sued on behalf of students for violation of their rights under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, as well as their right to education under the North Carolina Constitution.⁹⁷ That case challenged a local school district policy requiring students in grades three through eight to attain certain scores on state tests as a precondition to being promoted to the next grade. Like most tests with high-stakes implications, the test at issue had an unjustifiably disproportionately negative impact on African-American students. An August 1997 memorandum from Kagan and DPC head Bruce Reed briefed President Clinton on the lawsuit and indicated that the DPC had “requested a briefing from the Justice Department this week to discuss the appropriateness of filing an amicus brief in support of the school district.”⁹⁸ This step would have been fairly unusual at the district court level, and a brief was never filed. The case settled in the district court after the court denied a preliminary injunction against the school district.⁹⁹

As chair of the Administration of Justice group for the Race Initiative, Kagan monitored challenges to affirmative action, including those involving university admissions.¹⁰⁰ Earlier in the counsel’s office, she had volunteered to work on affirmative action since she had taught the subject and “care[d] about it a lot.”¹⁰¹ In 1996, the Fifth Circuit ruled in *Hopwood v. Texas* that the University of Texas could no longer consider race as a factor in the admission of students.¹⁰² That same year, California voters approved Proposition 209, which banned consideration of race in education, employment and contracting. Records indicate that Kagan was kept apprised of the Administration’s legal and policy responses to these developments. For example, the Administration joined a challenge to the constitutionality of Proposition 209 as amicus curiae. After the Court of Appeals for the Ninth Circuit upheld its constitutionality,¹⁰³ the White House advised against filing an amicus brief in support of a petition for certiorari, on the ground that the case would invite a sweeping attack on affirmative action; Kagan concurred with the recommendation.¹⁰⁴ Kagan also monitored responses to the decision by the University of California Regents to exclude race as a factor in admissions, including a U.S. Department of Education investigation into admissions policies at University of California law schools¹⁰⁵ and the release of federal guidance on affirmative action in higher education.¹⁰⁶

⁹⁷ 977 F.Supp. 384 (E.D.N.C. 1997).

⁹⁸ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Aug. 9, 1997) (on file in WHORM Box 001, Folder 027).

⁹⁹ Order, No. 5:07-CV-587-BO(2) (Aug. 29, 1997).

¹⁰⁰ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 15, 1997) (on file in DPC Box 051, Folder 002, Race – Race Initiative Policy: General [2]).

¹⁰¹ E-mail from Elena Kagan to Abner Mikva (July 25, 1995) (on file in E-mails Box 010, Folder 001).

¹⁰² 78 F.3d 932 (5th Cir. 1996).

¹⁰³ *Coal. for Econ. Equal. v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).

¹⁰⁴ Memorandum from Charles Ruff to President Clinton (Sept. 24, 1997) (on file in DPC Box 040, Folder 010 – Race – Proposition 209 Pleadings).

¹⁰⁵ Memorandum from Thomas Freedman & Mary Smith to Elena Kagan (Aug. 21, 1997) (on file in DPC Box 041, Folder 010 – Race – Federal Employees [5]).

¹⁰⁶ Memorandum from Peter Rundlet to Sylvia Mathews (Feb. 9, 1998) (on file in DPC Box 039, Folder 003 – Race – Minority Enrollment [1]).

Kagan was engaged in developing a host of alternative policy initiatives to promote access to higher education, such as partnership programs between universities and low-income high schools and middle schools.¹⁰⁷

While Kagan was Solicitor General, her office weighed in on several education cases. Kagan approved filing an amicus brief in the Fifth Circuit in *Fisher v. University of Texas at Austin*, defending the University's narrowly tailored, race-conscious admissions policy as falling squarely within the constitutional bounds established by *Grutter v. Bollinger*.¹⁰⁸ *Fisher* is the first challenge to a university admissions program since the Supreme Court's 2003 decision in *Grutter*, which overturned the Fifth Circuit's prior decision in *Hopwood*, discussed above, and held that universities have a compelling interest to use narrowly tailored race-conscious admissions policies to obtain the educational benefits of diversity.¹⁰⁹ A federal district court upheld the University's policy,¹¹⁰ and the Fifth Circuit has scheduled oral argument for August 2010.

Under Kagan, the Solicitor General's Office also sought to protect equal educational opportunity and vindicate the rights of students with disabilities under the Individuals with Disabilities Education Act (IDEA). In *Forest Grove School District v. T.A.*, Kagan signed a merits amicus brief contending that when a child with a disability has been denied a free appropriate public education, IDEA authorizes an award of private-school tuition reimbursement regardless of whether the child previously received public special education.¹¹¹ In a 6-3 decision, the Court reached the same conclusion.¹¹²

Kagan also signed a brief that succeeded in persuading the Justices to deny review in *School District of the City of Pontiac v. Duncan*.¹¹³ In this case, the National Education Association (NEA) and nine school districts in Michigan, Texas, and Vermont challenged the requirements in federal education law that, among other things, aim to reduce stark racial achievement gaps. The NEA and school districts argued that the No Child Left Behind Act (NCLB) – the current version of the ESEA – is an unfunded mandate and thus states and school districts were not required to fulfill NCLB's requirements if federal funds did not cover the full costs of compliance. An *en banc* panel of the Sixth Circuit deadlocked, which resulted in the affirmance of a federal court's 2005 ruling dismissing the case. The Solicitor General argued that NCLB does not, in fact, mandate any particular compliance costs; rather, states retain control over the costs of compliance and Congress requires only that states, if they want to obtain federal funds, must craft a statewide plan that defines accountability standards and make regular assessments of

¹⁰⁷ E-mail from Thomas Freedman to Elena Kagan (Aug. 8, 1997) (on file in DPC Box 040, Folder 008 – Race – Minority Enrollment – University Partnerships); Memorandum from Thomas Freedman et al. to Elena Kagan (Aug. 5, 1997) (on file in DPC Box 039, Folder 005 – Race – Minority Enrollment [3]).

¹⁰⁸ Brief for the United States as Amicus Curiae Supporting Appellees, *Fisher v. Univ. of Tex. at Austin* (No. 09-50822) (5th Cir. Mar. 12, 2010), available at http://www.justice.gov/cv/briefs/fisher_appellee_brief.pdf.

¹⁰⁹ 539 U.S. 306 (2003).

¹¹⁰ *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009).

¹¹¹ Brief for the United States as Amicus Curiae Supporting Respondent, *Forest Grove Sch. Dist. v. T.A.* (No. 08-305), 2009 WL 870018.

¹¹² *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009).

¹¹³ No. 09-852, ___ S. Ct. ___, 2010 WL 182939 (June 7, 2010).

progress toward attaining those standards.¹¹⁴ Indeed, civil rights advocates have criticized NCLB for not going far enough to ensure that states and school districts are held accountable for providing every student with a high-quality education.

RACIAL DIVERSITY AT HARVARD

Elena Kagan's record on hiring law faculty while dean of the Harvard Law School warrants discussion in a review of her civil rights record. This issue received considerable attention at the time of her nomination, and it is appropriate for the Senate to question her about this. According to the *New York Times*, which reported information provided by Harvard Law School officials, Dean Kagan made forty-three permanent, full-time teaching appointments from 2003 to 2009.¹¹⁵ Of these, thirty-two faculty were tenured and tenure-track appointments.¹¹⁶ Twenty-five were white men, six were white women and one was an Asian-American woman. No African-American or Latino professors were hired in tenured or tenure-track positions during this period.¹¹⁷ Eleven other individuals joined the faculty during the Kagan years – six white men, two women, two African-American males and one Indian male – but these persons were not placed in tenured or tenure-track positions.¹¹⁸ While the number of offers extended is not known, these statistics are deeply disappointing.¹¹⁹

Like many of the nation's law schools, Harvard has struggled with promoting diversity within its faculty. Since the 1960s, when famed civil rights lawyer and LDF alumnus Derrick Bell became the first African-American law professor amid student pressure to hire a minority law professor, Harvard has experienced a turbulent history over the issue of faculty diversity, including Bell's 1992 decision to leave the school until it appointed a woman of color to its tenured faculty;¹²⁰ Lani Guinier, an LDF alumna, was hired thereafter. It is true, as one of the African-American clinical professors recruited to Harvard by Kagan said, that "no elite law school has done enough" on hiring minority

¹¹⁴ Brief for Respondent in Opposition, *Sch. Dist. of City of Pontiac v. Duncan* (No. 09-852), 2010 WL 1900682.

¹¹⁵ Katharine Q. Seelye, *Court Pick Scrutinized for Hiring at Harvard*, N.Y. TIMES, May 14, 2010, at A10.

¹¹⁶ *Id.*

¹¹⁷ During the same period, two Harvard faculty members of color obtained tenure – an African-American male and an Indian male. See Charles Ogleetree, *Your Take: Why Elena Kagan is a Good Choice for the Supreme Court*, THE ROOT, May 12, 2010, available at <http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court>.

¹¹⁸ *Id.*

¹¹⁹ It is true that the dean is not exclusively responsible for hiring faculty; the faculty committee bears some responsibility. Yet, as Professor Ronald Sullivan, whom Kagan successfully recruited for a clinical position, has suggested, "The dean's role in the hiring process is critical." Ronald Sullivan, *Black Kagan Recruit Makes the Case for Confirmation*, THE GRIO, May 13, 2010, available at <http://www.thegrio.com/politics/a-black-kagan-recruit-makes-the-case-for-confirmation.php>. Indeed, Professor Sullivan describes the efforts Kagan made to recruit and ultimately persuade him to leave Yale Law School and to come to Harvard, including offering him the opportunity to direct both Harvard's Criminal Justice Clinic and its Trial Advocacy Workshop. He stated: "I can report that Elena Kagan used every bit of her discretionary authority to make the offer to come to Harvard far too attractive to turn down." *Id.*

¹²⁰ See Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of An Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 89 (2002). According to the first chair of the Black Law Students Association, "the issue of getting black professors on the faculty was what led to the organization of BLSA." *Id.* at 54, n. 12.

faculty.¹²¹ Given Harvard's prestige and its turbulent history on the issue of faculty diversity, we would have hoped that Kagan would have been more successful in recruiting a more racially and ethnically diverse group of professors to join Harvard during her tenure. There is no question that a diverse faculty can enrich the quality of education of students in a host of meaningful ways. As Justice Stevens noted in his dissent in *Wygant v. Jackson Board of Education*, "It is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty."¹²²

Dean Kagan did enjoy considerable success when it came to recruiting professors of different *ideological* backgrounds. There is widespread praise about Kagan's aggressive efforts to attract professors with conservative leanings.¹²³ In announcing Kagan's appointment to the Supreme Court, President Obama referred to her recruitment of "prominent conservative scholars" as evidence of Kagan's consensus-building style.¹²⁴ One conservative student praised Kagan: "One of her most important contributions was bringing in people with a lot of different viewpoints and increasing the kinds of perspectives students are exposed to in the classroom."¹²⁵ This success may be applauded, especially given the accounts of the philosophical divisions among the faculty over the years. However, we also believe that a racially diverse faculty is as important as an ideologically-mixed faculty. Just as varied ideological perspectives stimulate debate and promote learning among students, so too is the classroom and campus enriched by the presence and perspective of racially diverse faculty.

Dean Kagan was successful in attracting a diverse student body at Harvard Law School. In *Grutter v. Bollinger*, the Supreme Court recognized the substantial educational benefits associated with a diverse student body, noting that as a training ground for our nation's leaders, law schools should "be visibly open to talented and qualified individuals of every race and ethnicity."¹²⁶ In our letter to the Senate Judiciary Committee supporting Kagan's nomination as Solicitor General, we noted that Harvard underwent "tremendous transformation and development" under Kagan's leadership, including in its diversity.¹²⁷ And the Chair of LDF's Board and Harvard Law School alumnus, Theodore V. Wells, Jr., lauded Kagan's success at promoting diversity among students at the 2005 Harvard Celebration of Black Alumni, which honored then-Senator Barack Obama. Harvard Law Professor Charles Ogletree has stated that the number of African-American students

¹²¹ Katharine Q. Seelye, *Court Pick Scrutinized for Hiring at Harvard*, N.Y. TIMES, May 14, 2010, at A10.

¹²² 476 U.S. 267, 315 (Stevens, J., dissenting).

¹²³ See, e.g., Joan Biskupic & Kathy Kiely, *Obama Aims for 'Tenacity'*, USA TODAY, May 11, 2010, at 1A; Jonathan Saltzman & Tracy Jan, *At Harvard, Dean Eased Faculty Strife*, BOSTON GLOBE, May 11, 2010.

¹²⁴ President Obama and Solicitor General Elena Kagan, Remarks at the Nomination of Solicitor General Elena Kagan to the Supreme Court (May 10, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>).

¹²⁵ Jonathan Saltzman & Tracy Jan, *At Harvard, Dean Eased Faculty Strife*, BOSTON GLOBE, May 11, 2010.

¹²⁶ 539 U.S. 306, 308 (2003).

¹²⁷ *Confirmation Hearings on the Nominations of Thomas Perrelli 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, 111th Cong., 1st Sess.* (Feb. 10, 2009) (Letter from John Payton to The Honorable Patrick Leahy and Arlen Specter, Jan. 23, 2009) at 259.

attending Harvard was at its highest point during Kagan's tenure.¹²⁸ Racial and ethnic minorities comprised 29% of the entering class during Kagan's first year at Harvard; for each year thereafter, the percentage of incoming minority students exceeded that number.¹²⁹ Certainly, that is an accomplishment.¹³⁰

CRIMINAL JUSTICE

Criminal justice cases consistently comprise a significant portion of the Supreme Court's docket. Supreme Court decisions have confirmed the existence of constitutional rights that most now take for granted, including: the continuing duty of prosecutors to disclose all exculpatory and impeachment evidence to the defense in *Brady v. Maryland*;¹³¹ law enforcement's obligation to advise suspects of their right to remain silent and their right to counsel during custodial interrogation in *Miranda v. Arizona*;¹³² the prohibition on intentionally excluding prospective jurors of color because of race in *Batson v. Kentucky*;¹³³ and the right of indigent persons to have an attorney in criminal cases in *Gideon v. Wainwright*.¹³⁴ Given the import of the criminal docket, it is critical that justices approach serious questions of constitutional criminal law with an eye toward ensuring that the justice system performs effectively, accurately and without prejudice. A nominee's perspective is particularly important for racial justice advocates because the criminal justice system's laws and policies disproportionately affect communities of color. Racial biases pervade policing and prosecutorial practices. African-American men bear the brunt of harsh criminal justice laws: one in nine African-American men between the ages of 20 and 34 is now behind bars, and African-American men have a one in three chance of serving time in prison during their lifetime. The collective, mass incarceration of African Americans promotes an underclass that lacks an economic base and access to educational opportunities.

Kagan worked on several criminal justice issues as part of President Clinton's Race Initiative. Kagan was particularly involved in 1997, when President Clinton convened a White House Conference on Hate Crimes, announced law enforcement and educational initiatives to combat hate crimes and endorsed legislation to extend

¹²⁸ Charles Ogletree, *Your Take: Why Elena Kagan is a Good Choice for the Supreme Court*, THE ROOT, May 12, 2010, available at <http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court>.

¹²⁹ *Id.*

¹³⁰ Kagan took other notable acts at Harvard that evidenced a commitment to equal justice. It was a longstanding tradition at Harvard for the dean to also assume the title of the Sir Isaac Royall Professor of Law. Isaac Royall was an early supporter of the law school in the eighteenth century, and sold slaves in Antigua to support it. Kagan declined this professorship and instead asked to become the first Charles Hamilton Houston Professor of Law. See Charles Ogletree, *Your Take: Why Elena Kagan is a Good Choice for the Supreme Court*, THE ROOT, May 12, 2010, <http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court>. To LDF, this is significant. LDF was founded by Thurgood Marshall, but it was Charles Hamilton Houston who conceived of the idea of a law firm devoted to the pursuit of racial justice.

¹³¹ 373 U.S. 83 (1963).

¹³² 384 U.S. 436 (1966).

¹³³ 476 U.S. 79 (1986).

¹³⁴ 372 U.S. 335 (1963).

protections to victims of hate crimes based on sexual orientation, gender or disability.¹³⁵ Additionally, Kagan worked on legislation to reduce the 100:1 disparity in sentencing between crack and powder cocaine, which disproportionately affects African Americans. After the U.S. Sentencing Commission recommended to Congress options for adjusting both powder and crack cocaine penalties, Attorney General Janet Reno and Office of National Drug Control Policy Director Barry McCaffrey recommended to President Clinton that the disparity be adjusted to a single ratio of 10:1 by setting the powder cocaine trigger at 250 grams and the crack cocaine trigger at 25 grams.¹³⁶ Kagan urged President Clinton to adopt a 10:1 ratio: "This recommendation reduces the disparity between crack and powder cocaine sentencing, as well as the perception of injustice and inconsistency that goes with it."¹³⁷ Others within the White House supported a lower ratio, and Kagan was warned that the latest recommendation was not "going to sit well in the base community."¹³⁸ Kagan noted: "The Congressional Black Caucus and others in the African-American community will attack the Administration for failing to go far enough to remove a racial injustice. As you know, many CBC Members favor removing the disparity between crack and powder cocaine entirely – or at least reducing it far more sharply than [recommended]."¹³⁹ She concluded that, precisely because the 10:1 ratio represents the middle position, it provided the best hope of achieving progress. Clinton adopted the recommendation, but the compromise failed. We note that Congress has still not passed legislation to reduce the disparity, despite recent efforts. Legislation addressing this issue recently passed the Senate unanimously, but it would only reduce the disparity to 18:1.

As Solicitor General, Kagan submitted numerous briefs in criminal cases before the Supreme Court. The briefs she authored revealed a tendency to promote broad authority for prosecutors, to favor a narrow view of the rights of criminal defendants, and to encourage the expansion of criminal sanctions. This is an area that gives us considerable concern. The available information does not reveal whether the positions taken in these briefs reflect Kagan's personal view of the law or the institutional positions of the Department of Justice as a prosecutor.

¹³⁵ Memorandum from Bruce Reed et al. to the President (Nov. 6, 1997) (on file in DPC Box 039, Folder 009 – Race – Hate Crimes [3]). After DOJ submitted legislative proposals to the DPC, Kagan wrote a margin note, "It looks generally O.K. to me." The next year, the tragic killings of James Byrd and Matthew Shephard occurred. Legislation was introduced in each consecutive year of the Clinton Presidency, with the White House's strong support, but it did not pass until more than a decade later.

¹³⁶ Memorandum from Janet Reno & Barry McCaffrey to President Clinton (July 3, 1997) (on file in DPC Box 010, Folder 009 – Crime – Crack Sentencing [1]).

¹³⁷ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 3, 1997) (on file in DPC Box 010, Folder 009 – Crime – Crack Sentencing [1]). E-mails indicate that Elena Kagan played a role in justifying that recommendation, suggesting edits to omit distractions from the "central criminal justice rationale." E-mail from Elena Kagan to Jose Cerda (June 29, 1997) (on file in Kagan E-mails Composed, ARMS Box 003, Folder 005).

¹³⁸ E-mail from Robert Johnson to Elena Kagan (July 3, 1997) (on file in Kagan E-mails Composed, ARMS Box 012, Folder 007).

¹³⁹ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 3, 1997) (on file in DPC Box 010, Folder 009 – Crime – Crack Sentencing [1]).

A. Expanding Prosecutorial Power

Several of Kagan's briefs promoted an increase in prosecutorial authority and the insulation of prosecutorial decision-making from scrutiny. In so doing, Kagan failed to appreciate the importance of prosecutorial restraint or evince an appropriate concern for the possibility of abuse of discretion by prosecutors.

In *Pottawattamie County v. McGhee*, Kagan's amicus brief demonstrates an extremely unbalanced view of the role of prosecutors within the criminal justice system and offers considerable reason for pause.¹⁴⁰ She argued that prosecutors, who framed two innocent African-American men by procuring a false confession and using it against them at trial, should have absolute immunity from civil liability in a Section 1983 proceeding notwithstanding their egregious misconduct. Although the parties in *McGhee* reached a settlement before the Court announced a decision, the Court demonstrated real skepticism of Kagan's position during the oral argument.¹⁴¹

In three cases before the Court in its 2009-10 Term, Kagan sought to relieve the government of some of the burden of proving criminality under a statute involving the deprivation of honest services by a public official.¹⁴² Thus, again, Kagan sought to expand the power of law enforcement, but the Supreme Court unanimously rebuffed the government's broad reading of the honest services statute, and Justices Scalia, Thomas, and Kennedy would have gone further and struck down the entire statute as unconstitutionally vague.¹⁴³

In *United States v. O'Brien and Burgess*, Kagan argued that a judge can determine the "type" of firearm used by a defendant in connection with a crime of violence or drug trafficking crime using a preponderance of the evidence standard. In her view, the type of firearm is a sentencing factor, as opposed to an element of the offense, which would have to be found by a jury beyond a reasonable doubt (a much higher standard).¹⁴⁴ Under this interpretation, it would be much easier for a prosecutor to obtain a sentencing enhancement. The Supreme Court rejected the argument and, instead, concluded that the type of firearm is an element of the offense, rather than a sentencing factor, and must be found by a jury beyond a reasonable doubt.¹⁴⁵

¹⁴⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, *Pottawattamie County v. McGhee* (No. 08-1065), 2009 WL 2159654.

¹⁴¹ Transcript of Oral Argument at 20-26, *Pottawattamie County v. McGhee*, 130 S. Ct. 1047 (2010) (No. 08-1065).

¹⁴² Brief for the United States, *Weyhrauch v. United States* (No. 08-1196), 2009 WL 3495337; Brief for the United States, *Black v. United States* (No. 08-867), 2009 WL 3155001; Brief for the United States, *Skilling v. United States* (08-1394), 2010 WL 302206.

¹⁴³ *Skilling v. United States*, ___ U.S. ___ (June 24, 2010); *Black v. United States*, ___ U.S. ___ (June 24, 2010); *Weyhrauch v. United States*, ___ U.S. ___ (June 24, 2010).

¹⁴⁴ Brief for the United States, *United States v. O'Brien & Burgess* (No. 08-1569), 2009 WL 4099524.

¹⁴⁵ ___ S. Ct. ___, 2010 WL 2025204 (May 24, 2010).

B. Academic Understanding of Critical Issues

On more than one occasion, Kagan's briefs adopted theoretical arguments without regard for their practical consequences or their impact on the fundamental fairness of our criminal justice system. In *Skilling v. United States*, Jeffrey Skilling contended that the sustained and prejudicial pretrial publicity he faced regarding his role in the collapse of Enron entitled him to a change of venue from Houston, Texas, the site of Enron's headquarters. Although the Fifth Circuit concluded that the publicity was so damning and overwhelming that Skilling was entitled to a presumption of prejudice, Kagan contended that a change of venue was unnecessary.¹⁴⁶ She argued that the court's questioning of seated jurors about the existence of bias against Skilling and the jurors' assurances to the trial court that they could be fair, eliminated the need for a change of venue. In making this argument, Kagan (like the Fifth Circuit) failed to appreciate the fact – long recognized by courts (including the Supreme Court), social scientists, and experienced trial practitioners – that potential jurors cannot reliably evaluate the impact of pervasive negative publicity on their ability to be fair. Kagan, thus, relied on an academic, rather than a practical, understanding of the impact of prejudicial media and the power of voir dire, and thus seriously jeopardized the most fundamental of rights – the right to a fair and unbiased jury. In a 6-3 ruling, the Court rejected Skilling's claim that he did not receive a fair trial. In a dissent joined by Justices Stevens and Breyer, Justice Sotomayor criticized the majority for "understate[ing] the breadth and depth of community hostility toward Skilling and overlook[ing] significant deficiencies in the District Court's jury selection process."¹⁴⁷

In *Padilla v. Kentucky*, a non-citizen defendant claimed that his lawyer was ineffective for failing to advise him of the possibility that he would be deported if he pleaded guilty. In her amicus brief, Kagan contended that there was no Sixth Amendment violation because the errors made by Padilla's counsel involved collateral and not direct criminal consequences and affirmative misadvice instead of a deliberate omission.¹⁴⁸ In finding that the defendant's constitutional rights were violated, the Court noted that it had never made a distinction between "direct and collateral consequences" for purposes of ineffectiveness claims and that deportation should not be considered a wholly collateral consequence given its close connection to the criminal process.¹⁴⁹ Moreover, the Court noted that the Solicitor General's argument "would invite two absurd results:" it would encourage counsel to remain silent about important issues and deny rudimentary advice about deportation to an entire class of defendants.¹⁵⁰

C. Constitutional Rights of Criminal Defendants

Several of Kagan's briefs demonstrate a narrow view of the constitutional rights of criminal defendants. Specifically, Kagan repeatedly took positions that ignored the

¹⁴⁶ Brief for the United States, *Skilling v. United States* (No. 08-1394), 2010 WL 302206.

¹⁴⁷ *Skilling v. United States*, ___ U.S. ___ (June 24, 2010).

¹⁴⁸ Brief for the United States as Amicus Curiae Supporting Affirmance, *Padilla v. Kentucky* (No. 08-651), 2009 WL 2509223.

¹⁴⁹ 130 S.Ct. 1473, 1481 (2010).

¹⁵⁰ *Id.* at 1484.

importance of key constitutional provisions and/or failed to appreciate the crucial role that constitutional protections play in our criminal justice system. Thus, in *Michigan v. Bryant*,¹⁵¹ and *Briscoe and Cypress v. Virginia*,¹⁵² Kagan's amicus submissions sought to undermine a defendant's Sixth Amendment right of confrontation in order to increase law enforcement and criminal prosecution capacity. The Court agreed to review *Bryant* and has not yet announced a decision. In *Briscoe and Cypress*, the Supreme Court rejected Kagan's argument, reversed the decision of the Virginia Supreme Court, and found that the defendants' Sixth Amendment Confrontation Clause rights were violated.¹⁵³

Additionally, Kagan's briefs in several Supreme Court cases addressing the contours of *Miranda* provide significant insight about her views on defendants' Fifth Amendment rights. *Miranda* was adopted by the Court as a measure to curtail coercive police interrogations and ensure that suspects are aware of, and able to, exercise constitutional protections during interactions with law enforcement. Despite the general acceptance of *Miranda* by law enforcement and the public alike, it is often viewed by the conservative members of the Court as an obstacle to efficient and effective police investigation. Thus, *Miranda* has been repeatedly singled out for criticism.

In *Berghuis v. Thompkins*, the Court retreated from *Miranda*'s core values in concluding that suspects must unambiguously assert their desire to remain silent in order to properly invoke their Fifth Amendment right to remain silent.¹⁵⁴ Kagan's amicus brief called for the blanket rule that the Supreme Court ultimately adopted in a 5-4 decision.¹⁵⁵ The newly announced rule undermines the protections of *Miranda* and makes it easier for law enforcement to obtain coerced confessions by talking suspects into a waiver after *Miranda* warnings are given. Indeed, Justice Sotomayor's dissent noted that the Court's decision "turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent – which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so."¹⁵⁶ She further notes that "[t]hose results ... find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded."¹⁵⁷

In *Florida v. Powell*, the Court reversed a Florida Supreme Court finding of a *Miranda* violation.¹⁵⁸ The Supreme Court determined that *Miranda* warnings that explained that a suspect has the right to counsel *before* interrogation, but did not mention the right to counsel *during* an interrogation, were not misleading. The Court relied, in part, on Kagan's amicus submission, which presented a technical parsing of the *Miranda*

¹⁵¹ Brief for the United States as Amicus Curiae Supporting Petitioner, *Michigan v. Bryant* (No. 09-150), 2010 WL 1848212.

¹⁵² Brief of the United States as Amicus Curiae Supporting Respondent, *Briscoe & Cypress v. Virginia* (No. 07-11191), 2009 WL 3615002.

¹⁵³ 130 S. Ct. 1316 (2009).

¹⁵⁴ ___ S. Ct. ___, 2010 WL 2160784 (June 1, 2010).

¹⁵⁵ Brief for the United States as Amicus Curiae Supporting Petitioner, *Berghuis v. Thompkins* (No. 08-1470), 2009 WL 4927918.

¹⁵⁶ *Berghuis*, No. 08-1470, ___ S. Ct. ___, 2010 WL 2160784, at *27.

¹⁵⁷ *Id.*

¹⁵⁸ 130 S. Ct. 1195 (2010).

warning and ignored the most commonsense understanding of the warnings given.¹⁵⁹ Kagan's position and the Court's decision could also easily lead to a muddling of what actually constitutes sufficient warnings and, therefore, extend the leeway afforded to law enforcement during interrogation to the detriment of suspects.

Maryland v. Shatzer further exemplifies Kagan's willingness to erode *Miranda*. *Shatzer* concerned the definition of custody and the validity of *Miranda* warnings given to an inmate who was incarcerated for a crime unrelated to the subject of the questioning. Specifically, the inmate asserted his right to counsel when questioned by police, and therefore foreclosed the interrogation. Two years later, while the inmate was still incarcerated but after he had been transferred to another facility, the interview was resumed and the suspect made incriminating statements. The Court ruled that once the initial interrogation ends and the suspect is released back into the prison population for more than 14 days, there is a break in custody such that interrogation can resume despite the prior request for counsel.¹⁶⁰ Kagan's amicus submission supported this break-in-custody exception to *Miranda*.¹⁶¹ Her amicus also made the argument – adopted by the Court – that the change from interrogation conditions to prison conditions constituted a break in custody. Kagan's (and the Court's) position seems to encourage misconduct by the police in order to obtain a *Miranda* waiver – particularly in instances where a police officer seeking to obtain a confession interrogates a suspect, releases her, and then waits an appropriate amount of time (14 days) to again initiate interrogation.

In *Montejo v. Louisiana*,¹⁶² the Supreme Court overruled its 1986 decision in *Michigan v. Jackson*,¹⁶³ and declared that the automatic appointment of counsel to a defendant (as opposed to the appointment of counsel at the defendant's request) prior to questioning does not prevent the police from subsequently questioning that defendant without counsel's presence. This decision was a significant and surprising break from prior law, which came about after the Court, *sua sponte*, directed the parties to submit briefing on the continued constitutionality of *Jackson*. Thereafter, Kagan's office filed an amicus brief in this case urging the Court to overrule *Michigan v. Jackson*, arguing that it was an unnecessary prophylactic against police coercion and it did not comport with the purposes of the Sixth Amendment right to counsel.¹⁶⁴ Notably Kagan's position and the Court's 5-4 decision mark a further incursion on the defendant's right to counsel.

In other instances, Kagan repeatedly submitted briefs that interpreted statutes in favor of increased punishment and to the detriment of criminal defendants. In *Johnson v. United States*,¹⁶⁵ Kagan argued that any prior conviction of battery under state law – including intentional, nonconsensual touching – qualified as a violent felony for purposes

¹⁵⁹ Brief for the United States as Amicus Curiae Supporting Petitioner, *Florida v. Powell* (No. 08-1175), 2009 WL 2903916.

¹⁶⁰ 130 S. Ct. 1213 (2010).

¹⁶¹ Brief for the United States as Amicus Curiae Supporting Petitioner, *Maryland v. Shatzer* (No. 08-680), 2009 WL 1069335.

¹⁶² 129 S. Ct. 2079 (2009).

¹⁶³ 475 U.S. 625 (1986).

¹⁶⁴ Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson*, *Montejo v. Louisiana* (No. 07-1529), 2009 WL 1019983.

¹⁶⁵ 130 S. Ct. 1265 (2010).

of a sentencing enhancement under federal law.¹⁶⁶ The Court, in a 7-2 opinion written by Justice Scalia, ruled that the Florida felony offense of battery by “[a]ctually and intentionally touch[ing]” another person does not have “as an element the use . . . of physical force against the person of another,” and thus does not constitute a “violent felony” under § 924(c)(1).¹⁶⁷ Kagan’s position was thus rejected in an opinion by one of the Court’s most conservative members, and the sentencing enhancement imposed by the court below was reversed.

In *Carachuri-Rosendo v. Holder*, Kagan contended that a second simple drug possession offense constituted an aggravated felony that subjected a non-citizen to immigration removal even if that offense was not subject to enhancement in state court because, regardless of what happened in state court, it could have been the subject of an enhancement in federal court.¹⁶⁸ The Court disagreed with Kagan and held that “the mere possibility that the defendant’s conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be ‘convicted of a[n] aggravated felony’ before he loses the opportunity to seek cancellation of removal.”¹⁶⁹

During her tenure as Solicitor General, Kagan also elected not to submit briefs in important criminal cases before the Supreme Court, which could provide further insight into her views on issues of criminal law. *Graham v. Florida* was one of two cases in which the Supreme Court was called upon to decide whether, in light of the significant differences between children and adults, the Eighth Amendment permits children to receive life without parole sentences for non-homicide offenses. In May 2010, the Supreme Court declared that such sentences constitute cruel and unusual punishment.¹⁷⁰ Kagan did not submit a brief to the Supreme Court in this case.

ACCESS TO JUSTICE

While she was a law clerk to Justice Marshall, Kagan advised him whether the Supreme Court should grant certiorari in *DeShaney v. Winnebago County Social Services Department*. This case raised the question of whether, in Kagan’s words, “a reckless failure by welfare authorities to protect a child from a parent’s physical abuse constitutes a deprivation of liberty within the meaning of the Fourteenth Amendment.” Although county officials were informed that Joshua DeShaney had been admitted to the hospital on several occasions with multiple injuries that raised suspicions of child abuse and although county caseworkers made visits to his home to investigate, they declined to intervene until his father beat him so severely that he suffered permanent brain damage. Kagan noted in her memorandum to Justice Marshall that the facts were “horrific” but expressed concern that the Court would ultimately reject DeShaney’s constitutional challenge.¹⁷¹ Her worries proved prescient. A strong dissent from Justice Brennan, joined by Kagan’s boss

¹⁶⁶ Brief for the United States, *Johnson v. United States* (No. 08-6925), 2009 WL 3663947.

¹⁶⁷ 130 S. Ct. 1265 (2010).

¹⁶⁸ Brief for Respondent, *Carachuri-Rosendo v. Holder* (No. 09-60), 2009WL 384444.

¹⁶⁹ ___ S. Ct. ___, 2010 WL 2346522 at *11 (June 14, 2010).

¹⁷⁰ 130 S. Ct. 2011 (2010).

¹⁷¹ Memorandum from Elena Kagan to Justice Marshall, *DeShaney v. Winnebago County* (Sept. 3, 1987).

and Justice Blackmun, criticized the majority's "failure to see that [government] inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it."¹⁷²

During Kagan's tenure, the Solicitor General's Office weighed in on issues affecting access to justice. Kagan signed a merits amicus brief in *Perdue v. Kenny A. ex rel. Winn*, which involved the scope of the federal fee-shifting statutes designed to incentivize robust enforcement of civil rights statutes by allowing prevailing plaintiffs to recover reasonable attorneys' fees from defendants. *Kenny A* was a class action lawsuit on behalf of 3,000 foster children that resulted in a landmark and sweeping consent decree that reformed Georgia's child welfare system. To calculate the fee award due to plaintiffs' attorneys under the primary fee-shifting statute for civil rights cases, the district court judge first tabulated the "lodestar" fee by multiplying the attorneys' rates by the number of hours they worked. The judge then enhanced that lodestar by a factor of 1.75, citing the attorneys' excellent representation and exceptionally good results.

In her merits amicus brief, Solicitor General Kagan supported the Georgia officials' challenge to the fee award on the ground that the lodestar rate may never be enhanced for superior performance or exceptionally good results.¹⁷³ LDF filed an amicus brief supporting the foster care children, who were represented in the Supreme Court by Paul Clement, who served as Solicitor General under President George W. Bush. As LDF's amicus brief demonstrated, fee enhancements for exceptional performance and results further Congress's intent to encourage lawyers to take the most pressing cases and obtain broad-reaching relief that roots out entrenched discrimination or eradicates systemic inequities.¹⁷⁴ The Supreme Court unanimously rejected the position advocated by Georgia and the United States – that enhancements for superior performance are never appropriate.¹⁷⁵ But the Court split over the types of circumstances which would warrant such an enhancement. A five-justice majority held that the district court had provided insufficient justification for the premium awarded to the attorneys in this case.¹⁷⁶ The dissenters would have adopted a more permissive standard.¹⁷⁷

In contrast to Kagan's narrow interpretation of the fee-shifting statute in *Kenny A.*, the Solicitor General's office asserted a robust interpretation of the safeguards provided by another federal civil rights statute in amicus briefs filed in *Sossamon v. Texas* and *Cardinal v. Metrish*. Both cases raise the question whether an individual may sue a state or a state official in his or her official capacity for monetary damages for violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁷⁸ RLUIPA requires states to justify any substantial burden on the religious exercise of inmates in federally

¹⁷² 489 U.S. 189, 212 (1989) (Brennan, J., dissenting).

¹⁷³ Brief for the United States as Amicus Curiae Supporting Petitioners, *Perdue v. Kenny A.* (No. 08-970), 2009 WL 1864009.

¹⁷⁴ Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *Perdue v. Kenny A.* (No. 08-970), 2009 WL 2722576.

¹⁷⁵ *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1673, 1678 (2010); *id.* at 1683-84 (Breyer, J., dissenting).

¹⁷⁶ *Id.* at 1674-77.

¹⁷⁷ *Id.* at 1679-83 (Breyer, J., dissenting).

¹⁷⁸ 42 U.S.C. 2000cc *et seq.* (2000).

funded correctional facilities as furthering a compelling interest by the least restrictive means possible. In response to the Supreme Court's request for the Solicitor General's views on whether certiorari was warranted, Kagan signed an amicus brief agreeing with the petitioners that official-capacity suits are allowed because a state that receives federal funds for its correctional institutions waives its Eleventh Amendment immunity against damages actions under RLUIPA. The Solicitor General further recommended that the Supreme Court grant certiorari to review this issue, which it did in *Sossamon*. Argument will be scheduled for next term.¹⁷⁹ *Sossamon* could have ramifications beyond RLUIPA because it implicates the scope of sovereign immunity as a limitation on states' liability for violations of antidiscrimination statutes.

Under Kagan, the Solicitor General's Office has been willing to abandon prior positions taken by the *government* that limited vindication of civil rights – although not as often as we would have hoped. For instance, in *Kucana v. Holder*, the Office switched its position to ensure more expansive access to judicial review for asylum seekers. Agron Kucana, an Albanian citizen, faced deportation because he remained in the United States after his business visa expired. He sought to reopen his removal proceedings, contending that political conditions in Albania had worsened and thus he was eligible for asylum. The Board of Immigration Appeals (BIA) denied the motion, and the Seventh Circuit ruled that Congress had stripped federal courts of jurisdiction to review the BIA's decision. With Kagan at the helm, the Solicitor General's Office reversed the government's prior position and, in briefs at the certiorari and merits stages, supported Kucana's contention that the Seventh Circuit had misread the statute.¹⁸⁰ The Supreme Court agreed with Kucana and Kagan that a BIA decision on a motion to reopen asylum proceedings is subject to judicial review.¹⁸¹

CONCLUSION

In her tribute to Justice Thurgood Marshall, Elena Kagan wrote that "Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories – stories of people's lives as shaped by law, stories of people's lives as might be changed by law."¹⁸² Over the course of her illustrious career, Elena Kagan has held positions of prestige, influence and honor. If confirmed by the Senate, Elena

¹⁷⁹ See *Sossamon v. Texas*, __ S. Ct. __, 2010 WL 2025142 (May 24, 2010). The Solicitor General recommended that *Cardinal* was a better vehicle than *Sossamon*, but the Court disagreed. See Brief for the United States as Amicus Curiae, *Sossamon v. Texas* (No. 08-1438), 2010 WL 990561; Brief for the United States as Amicus Curiae, *Cardinal v. Metrish* (No. 09-109), 2010 WL 990562.

¹⁸⁰ At the certiorari stage, the government adopted Kucana's position that the Seventh Circuit's statutory interpretation was incorrect, but it contended that the case did not merit review. See Brief for Respondent in Opposition, *Kucana v. Holder* (No. 08-911), 2009 WL 797590. After the Court granted certiorari, the government again sided with Kucana on the statutory question. See Brief for Respondent Supporting Petitioner, *Kucana v. Holder* (No. 08-911), 2009 WL 2028903; Reply Brief for Respondent Supporting Petitioner, *Kucana v. Holder* (No. 08-911), 2009 WL 3615006.

¹⁸¹ *Kucana v. Holder*, 130 S. Ct. 827 (2010). In several other criminal and immigration cases, the Solicitor General's Office, under Kagan, has filed response briefs shifting the government's position, and the Supreme Court has granted, vacated, and remanded for further consideration in light of the government's new position. See, e.g., *Vazquez v. United States*, 130 S. Ct. 1135 (2010); *Hunter v. United States*, 130 S. Ct. 1135 (2010); *Frankel v. United States*, 130 S. Ct. 72 (2009); *Afanwi v. Holder*, 130 S. Ct. 350 (2009).

¹⁸² Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1127 (1993).

Kagan will assume the most important position of her lifetime – one that can profoundly impact the direction of racial justice in this country. We hope she will carry forth the wisdom she imparted from Justice Marshall. In so doing, she would fulfill the wishes of a President, whose election was possible in part because of Justice Marshall's contributions, and whose stated goal was to select a Supreme Court nominee capable of understanding the law's impact on those individuals in whose shoes she has never walked.



National Association of Social Workers
Office of the Executive Director

...the power of social work

Elizabeth J. Clark, PhD, ACSW, MPH
Executive Director

June 3, 2010

The Honorable Patrick Leahy
United States Senate
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
United States Senate
Ranking Member
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

This letter is written to express the unqualified support of the National Association of Social Workers (NASW) for the nomination of Elena Kagan to the United States Supreme Court. As the largest professional association of social workers worldwide, NASW seeks to enhance the professional growth and development of its 145,000 members and to advance sound social policies for all communities and populations that are a part of the United States.

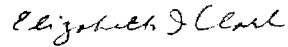
NASW supports Elena Kagan as she would bring to the Court outstanding credentials for her intellectual ability, leadership skills and a deep understanding and respect for the American legal framework, its scholarship and traditions. She would follow in the footsteps of a number of Supreme Court jurists such as Chief Justice William Rehnquist who were appointed to the Court not having had prior judicial experience, but whose intelligence, work history and understanding of American jurisprudence proved them worthy appointees and valued contributors to the work of the Supreme Court. As a former law clerk to Justice Thurgood Marshall, Ms. Kagan had an introduction early in her legal career to the inner workings of the Supreme Court and to its critical mission. As Solicitor General, Ms. Kagan has gained additional insight into the advocacy role of the federal government before the Supreme Court.

NASW favors the appointment of another woman to serve on the Supreme Court. NASW policy, *Civil Liberties and Justice* supports "the appointment of judges who reflect more accurately the demographic diversity of the United States, particularly in regard to people of color and women." The appointment of Ms. Kagan helps to serve that goal. Since Justice Sandra Day O'Connor was nominated to the Supreme Court in 1981, becoming the first woman on the Court, the opportunities for women in the legal profession have increased dramatically. The representation of women on the Supreme Court should reflect these demographic changes in the legal profession. The appointment of a third female justice would help to correct the gender

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The appointment of Elena Kagan is both desirable in broadening the Court's representation of women and most appropriate in ensuring that the Court be staffed by jurists who are intelligent, well rounded in their legal experience and dedicated to the proper functioning of the Supreme Court. For all these reasons, NASW supports the nomination of Elena Kagan to the U.S. Supreme Court.

Sincerely,



Elizabeth J. Clark, PhD, ACSW, MPH
Executive Director



NATIONAL ASSOCIATION OF WOMEN JUDGES

1341 Connecticut Avenue, NW, Washington, DC 20036
 T: 202 393 0222 F: 202 393 0125 W: www.nawj.org

Dana Fabe
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 Alaska Supreme Court
 Anchorage, Alaska

Marjorie Laird Carter
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ABA Delegate

Carolyn Engel Temin
International Director
 Through May 2010

Sue Pae Yang
International Director
 Commencing May 2010

Marie Kornisar
Executive Director
 Washington, DC

May 19, 2010

The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

As the current President and a past President of the National Association Women Judges, the voice of our nation's female jurists, we write on behalf of NAWJ in support of Solicitor General Elena Kagan's nomination to the United States Supreme Court.

As appellate judges with nearly two decades of judicial service each, we well recognize the essential qualifications that a justice of our highest court must have: superior intellectual capacity as well as intimate knowledge and a deep understanding of constitutional law and the driving principles of legal jurisprudence in this country. It cannot be seriously disputed that General Kagan brings these qualifications with her in abundance. Additionally, as President Obama has also said, a Justice of the Supreme Court should have the background and experience that will enable her to appreciate the impact of the law on average Americans; she should be a skilled communicator so that her views will be welcomed if not adopted by her colleagues.

General Kagan's rich and varied legal career -- as a private attorney, a white house lawyer, professor, dean and as the country's top lawyer [solicitor general] -- provides her with a unique constellation of experiences that will bring fresh ideas to the court. The depth and breadth of General Kagan's educational and life experience, coupled with her intellectual aptitude and preparedness will serve her well on the high court. A brilliant and highly regarded lawyer and law professor, her communications skills are renowned.

That she would be the third women on the bench is also significant. Numerous studies show that the presence of women on a court has an impact on the overall decision-making of the judge's on that court that goes beyond the opinions of the female judges themselves. The presence of women affects the decisions of male jurists as well.

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Page Two of Two
May 19, 2010
Chairman Leahy

In order to benefit from the diversity of background and experience that women bring to the bench, the presence of women cannot be occasional or token, but must consistently reflect the reality of our society. Women and men continue to graduate from our law schools and be hired by our law firms, in nearly equal numbers and by 2009, fully 32.5% of lawyers in this country were women, and that percentage has continued to increase. With this appointment, the Supreme Court of the United States will, at last, reflect the percentage of women attorneys in the United States, if not the gender of our citizenry.

Not all judges appointed to our appellate courts have, or need, prior experience as trial judges. A few decades ago, most justices had little or no judicial experience -- both the late Chief Justice William Rehnquist and Justice Lewis Powell Jr. were confirmed to the court in 1972 without any judicial background.

We support with enthusiasm and without qualification the nomination of Elena Kagan to the Supreme Court of the United States.

Sincerely,



Dana Fabre
President, National Association of Women Judges



Past President, National Association of Women Judges



NATIONAL CONGRESS OF AMERICAN INDIANS

July 1, 2010

The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

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SOUTHWEST

Joe Garcia
Ojibwa-Chippewa

WESTERN

Irma Cuth
Ute Indian Tribe

EXECUTIVE DIRECTOR

Jacqueline Johnson Pata
Ruger

NCAI HEADQUARTERS

Dear Chairman Leahy:

On behalf of the National Congress of American Indians, I respectfully request that you post the attached resolution on the Senate Judiciary Committee website alongside other formal endorsements of Solicitor General Elena Kagan for the Supreme Court of the United States. This resolution was just recently passed at our Mid-Year Conference in Rapid City, South Dakota last week, and it indicates NCAI's strong support for Solicitor General Kagan's confirmation.

Should you have any questions or need additional information please contact our Staff Attorney Katy Jackman at kjackman@ncai.org.

Sincerely,

Jacqueline Johnson Pata
Executive Director

SE: 6/21/10

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #RAP-10-013



TITLE: Support for the Confirmation of Solicitor General Elena Kagan to the United States Supreme Court

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, there is a Nation-to-Nation relationship between the federal government and the Indian tribes that is founded in the U.S. Constitution, the Treaties and the Federal Trust Relationship; and

WHEREAS, over the course of U.S. history the Supreme Court has established principles of respect for tribal self-government and deference to the political branches and intergovernmental comity in determining the course of the federal-tribal relationship and the scope of recognized tribal authority; and

WHEREAS, in recent years the Supreme Court has broken with its past constitutional deference and instead has engaged in a series of decisions that undermine tribal self-government in Indian Country despite strong support from both Congress and the Administration for principles of tribal self-government; and

WHEREAS, the Supreme Court has grown increasingly disinterested in the consequences of its decision on Indian tribes and the daily lives of Indian people in diminishment of tribal sovereignty, public safety and health on Indian reservations, tribal economic development, generation of tax revenue, and protection of tribal cultures and religions; and

WHEREAS, Solicitor General Kagan was nominated by President Obama on May 10, 2010 to serve on the United States Supreme Court; and

WHEREAS, Solicitor General Kagan's record shows that she has respect for and a willingness to give serious consideration to the fundamental principles of inherent tribal sovereignty and the federal trust responsibility; and

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Irvin Cash
Gila Indian Tribe

EXECUTIVE DIRECTOR

Jacqueline Johnson Felt
Tiger

NCAI HEADQUARTERS

1516 P Street, N.W.
Washington, DC 20005
202 466 7767
202 466 7792 fax
www.ncai.org

WHEREAS, Solicitor General Kagan has demonstrated a commitment to civil rights and equal justice under the law throughout her career, particularly as a White House counsel to President Clinton where she worked on issues such as strengthening hate crimes legislation and civil rights enforcement, and as Dean of Harvard Law School where she worked to ensure a diverse student body and faculty; and

WHEREAS, as White House counsel, Solicitor Kagan gained experience with tribal government issues, particularly law enforcement and taxation.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby support the confirmation of Solicitor General Kagan to the United States Supreme Court; and

BE IT FURTHER RESOLVED, that the NCAI urges the Senate Judiciary Committee to include in its confirmation proceedings a public discussion of the U.S. Constitution and its relationship to tribal self-government; and

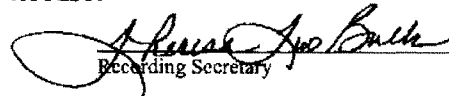
BE IT FURTHER RESOLVED, that the NCAI urges all of the Justices of the United States Supreme Court to increase their understanding of Indian tribal governments, to engage in visits to Indian reservations and discussions with tribal judges and elected tribal leaders, and to support the principles of respect for tribal self-government and deference to the political branches and intergovernmental comity in determining the course of the federal-tribal relationship and the scope of recognized tribal authority; and

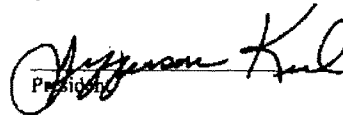
BE IT FINALLY RESOLVED, that this resolution shall be the policy of the NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2010 Mid-Year Session of the National Congress of American Indians, held at the Rushmore Plaza Civic Center in Rapid City, South Dakota on June 20-23, 2010, with a quorum present.

ATTEST:


Recording Secretary


President



National Council of Jewish Women

New York Office
 475 Riverside Drive, Suite 1501
 New York, NY 10115
 Tel: 212 655 4048
 Fax: 212 645 7466
 Email: nyoffice@ncjw.org

Washington Office
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 Hebrew University, Mt. Scopus
 Jerusalem, Israel 91905
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 Email: israel@ncjw.org

Web: www.ncjw.org

June 10, 2010

The Honorable Patrick Leahy
 Chairman, Senate Judiciary Committee
 433 Russell Senate Office Building
 Washington, DC 20510

The Honorable Jeff Sessions
 Ranking Member, Senate Judiciary Committee
 335 Russell Senate Office Building
 Washington, DC 20510

Dear Senators:

I am writing on behalf of the 90,000 members and supporters of the National Council of Jewish Women who are deeply committed to ensuring the confirmation of Supreme Court justices with a demonstrated commitment to fundamental constitutional rights. In this spirit, we ask you to give full, fair, and timely consideration to the nomination of Solicitor General Elena Kagan to the court and vote to send her nomination to the full Senate with a favorable recommendation.

For the Senate, the process of exercising its constitutional duty to advise and consent to the nomination of members of the US Supreme Court is of foremost importance. The Supreme Court rules in decisions that impact all of our lives, everyday. Lifetime appointments matter and have an impact for generations to come. We urge the Senate Judiciary Committee to examine the nomination of General Kagan with due diligence, focusing on her record. This important nomination should not be subject to obstruction or delay motivated by partisan politics.

General Kagan has a stellar record and varied legal experience. In addition to her academic career teaching at the University of Chicago Law School and as dean of Harvard Law School, she served in all three branches of government. Her nomination to the Supreme Court is receiving broad support from members of the legal community across the ideological spectrum.

General Kagan has a demonstrated commitment to fundamental freedoms and legal expertise. She deserves a thorough airing of her record, carried out by the Senate with due regard for the dignity of the office to which she is nominated. NCJW believes that she will make an ideal Supreme Court justice and should be confirmed expeditiously.

Sincerely,

Nancy Ratzan
 NCJW President
 Cc: Members of the Senate Judiciary Committee



National District Attorneys Association
 44 Canal Center Plaza, Suite 110, Alexandria, Virginia 22314
 703.549.9222 / 703.863.3195 Fax
 www.ndaa.org

June 25, 2010

The Honorable Patrick Leahy
 Chairman
 The Honorable Jeff Sessions
 Ranking Member
 Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear Senator Leahy and Ranking Member Sessions:

On behalf of the National District Attorneys Association, the oldest and largest organization representing America's state and local prosecutors, we'd like to offer our full support for the nomination of Solicitor General Elena Kagan to become the next Associate Justice of the United States Supreme Court.

Because state and local prosecutors handle 95% of the criminal prosecutions nationally, rulings by the Supreme Court have far-reaching, serious impacts upon the cases in our offices. Her depth of experience with all aspects of the law – as a law clerk for Supreme Court Associate Justice Thurgood Marshall; as an academician, most prominently as dean of the Harvard Law School, where she gained a reputation for fair-mindedness by hiring professors of widely varied ideologies; and as United States Solicitor General, where she serves as the nation's chief litigator before the Supreme Court - has helped mold Solicitor Kagan into an outstanding nominee to serve on our nation's highest court.

The National District Attorneys Association believes that Solicitor Kagan's diverse and impressive life experiences will be a welcome addition to the Court in fashioning theory that will work in practice. We are happy to offer our full support for Solicitor Kagan's nomination to serve as a Supreme Court Associate Justice and encourage her swift nomination by the Senate.

Sincerely,

Christopher Chiles
 President

To Be the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People

NJDC
National Jewish Democratic Council

CHAIRMAN
Marc R. Stanley
NATIONAL OFFICE
777 N. Capitol St NE, Suite 305
Washington, DC 20002
Phone: (202) 216-9060
Fax: (202) 216-9061

June 15, 2010

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777 N. Capitol St NE, Suite 305
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The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

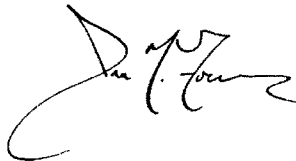
Dear Chairman Leahy and Ranking Member Sessions:

The National Jewish Democratic Council (NJDC) strongly supports President Barack Obama's nomination of Solicitor General Elena Kagan to the Supreme Court of the United States.

Kagan is a uniquely accomplished candidate with impressive academic and professional qualifications. She brings with her a commitment to upholding our Constitutional values and a deep understanding of the needs of ordinary Americans. Her record demonstrates a deep appreciation of the importance of the Establishment Clause's prohibition on endorsement of religion. She will be a thoughtful and compassionate addition to a Court that has become increasingly divided in favor of corporate interests and the wealthy.


NJDC looks forward to an expeditious and fair confirmation hearing, and a speedy and successful confirmation vote in the full Senate before the Court convenes in the fall.

Sincerely,



Ira N. Forman
CEO

NATIONAL LGBT BAR ASSOCIATION

 An affiliate of the American Bar Association

June 25, 2010

The Honorable Patrick Leahy
 United State Senate
 Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Chairman Leahy:

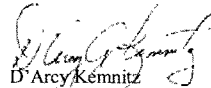
On behalf of the National LGBT Bar Association, I would like to strongly endorse Solicitor General Elena Kagan for nomination to the U.S. Supreme Court. The LGBT Bar is a national association of lawyers, judges and other legal professionals, law students, activists, and affiliated lesbian, gay, bisexual and transgender (LGBT) legal organizations.

As the voice of the LGBT legal community, the LGBT Bar is committed to promoting diversity within the legal profession. We look forward to the day when the makeup of the federal judiciary mirrors the diversity of our great country, and we believe the nomination of Ms. Kagan would be a step in that direction. Although women comprise approximately 55% of the U.S. population, Ms. Kagan would only be the fourth female justice in the 200-plus year history of the court.

Ms. Kagan's distinguished career includes a clerkship for Justice Thurgood Marshall and a critically lauded tenure the dean of the Harvard Law School, before becoming the first female U.S. Solicitor General. We believe Ms. Kagan possesses a unique perspective which would prove invaluable on the Supreme Court.

The National LGBT Bar Association is proud to endorse Ms. Kagan for nomination to the U.S Supreme Court and we ask that you give her the strongest possible consideration. Thank you.

Sincerely,



D'Arcy Kemnitz
 Executive Director
 National LGBT Bar Association

CC: Jeremy Paris
 Erica Chabot
 Kareem Dale

1301 K Street NW, Suite 1100 East Tower, Washington, DC 20005
 t -- 202.637.7661 • info@lgbtbar.org • www.lgbtbar.org



NATIONAL MINORITY LAW GROUP

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Phone: (312) 346-1100
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June 11, 2010

President Barack H. Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
326 Russell Senate Office Building
United States Senate
Washington, DC 20510

Re: Confirmation of Solicitor General Elena Kagan

Dear President Obama, Chairman Leahy and Ranking Member Sessions:

On behalf of the National Minority Law Group¹ ("NMLG"), this is to express our organization's support for the confirmation of Solicitor General Elena Kagan as an Associate Justice of the U.S. Supreme Court. General Kagan is extremely well qualified to serve on the Supreme Court, and we endorse her nomination without qualification.

General Kagan has exemplary academic and legal credentials, a stellar reputation as Solicitor General, well-regarded tenure as Dean of Harvard Law School, prolific years as an engaging

¹ The National Minority Law Group (www.nmlg.org) is a fully integrated group of certified minority owned law firms devoted to delivering the highest quality legal services to corporate America on a national basis. NMLG has brought together more than 500 attorneys, all members of "av" rated, minority owned firms located in throughout the U. S. Membership is limited to firms that comply with a strict set of criteria and have undergone a detailed due diligence process. NMLG encourages the broad dissemination of information about our organization to colleagues and corporate officers who are responsible for retaining outside counsel for their organizations.



NATIONAL MINORITY LAW GROUP

President Barack Obama

The Honorable Patrick J. Leahy, Chairman

The Honorable Jeff Sessions, Ranking Member

Page 2


professor of law, and an enviable record of public service in the Office of White House Counsel. Her rigorous preparation and thoroughly researched and well-reasoned law articles, pleadings, and legal opinions have earned praise and respect from her colleagues.

Some have expressed concern that her lack of experience as a sitting judge might be a shortcoming, despite her obvious deep understanding of the law. On the contrary, this should be considered an attribute. She offers experiences in life, government and business that will bring a refreshing new perspective to the bench. As to learning the role of a judge, she will be tutored by her new colleagues, perhaps the eight most qualified teachers in the United States. In turn she will provide a sharp focus on the impact of judicial decisions on everyday life. In short, she will suggest to them how some of the rest of us live with judicial decisions.

General Kagan's record evinces no clear bias in favor of or against any particular issue. Instead, it reflects intellectual rigor, meticulous preparation, and fairness. Her record demonstrates a consistently balanced and thoughtful review of complex legal issues. Her impeccable credentials, wealth of experience, and exceptional legal mind will benefit the Court and the nation.

We congratulate General Kagan on her nomination to this important office. We support the President in his ongoing efforts to bring diversity in all its forms to national government, and we encourage the Senate to confirm this highly qualified nominee.

Sincerely,



Martin P. Green
President
National Minority Law Group

111 West Washington Street

Suite 1650

Chicago, Illinois 60602



June 25, 2010

Chairman Patrick Leahy
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20002

Dear Chairman Leahy:

On behalf of the National Partnership for Women & Families, I write to express our strong support for the nomination of Solicitor General Elena Kagan to the position of Associate Justice of the United States Supreme Court. The National Partnership is a national, non-partisan nonprofit advocacy organization dedicated to promoting fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. Because women have so much at stake, we have examined the records of Supreme Court justice nominees throughout our nearly 40-year history, and advocated for confirmation of those with a demonstrated commitment to equal justice.

It is clear that General Kagan is supremely qualified to serve on the Supreme Court. She is a brilliant legal scholar who has made a career of "firsts;" she was the first woman dean of Harvard Law School and first woman Solicitor General. She has not only broken barriers, she has demonstrated unequivocally that women can serve in these positions with distinction.

Her work on policy initiatives during the Clinton Administration, at Harvard, and most recently in the Solicitor General's office have given her a deep understanding of the issues that affect women's lives. She understands the importance of the right to privacy, and fair education, employment and welfare policies.

General Kagan's impressive body of work and her extraordinary legal acumen have garnered praise from those of all political leanings. She will bring to this position a wealth of practical experience regarding the ramifications of Court decisions, a strong sense of how government policies shape our lives, and a demonstrated ability to persuade and build consensus among people with diverse ideological and political views.

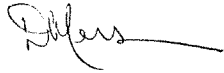
General Kagan's nomination marks a tremendous historical moment. If confirmed, General Kagan will be the third woman Associate Justice on the Court and the fourth woman ever to hold that position. Her confirmation would mean that, for the first time in our nation's history, one-third of Justices on the highest court would be women. Her confirmation would send a powerful message about the roles women can play in our world.

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

In recent years, we have seen a steady stream of Supreme Court decisions that eroded protections against employment discrimination and our right to privacy, and closed courthouse doors to workers or individuals seeking justice. Therefore, it is more important than ever that the Senate confirm justices with a demonstrated commitment to equal justice. Elena Kagan is exactly this type of nominee. She has our unqualified support.

We look forward to General Kagan's hearing and swift confirmation.

Sincerely,





512 10th Street, NW Washington, DC 20004-1401
 (202) 626-8800 FAX: (202) 737-9189 Website: www.nrlc.org

(202) 626-8820

June 23, 2010

To the Honorable Members of the United States Senate:

The National Right to Life Committee (NRLC), representing affiliated right-to-life organizations in all 50 states, respectfully urges you to oppose the confirmation of Elena Kagan to the office of Associate Justice of the United States Supreme Court.

We have studied carefully various memoranda and other material written by Ms. Kagan during her tenure on the White House staff of President Bill Clinton (1995-1999) (although a large amount of material has been suppressed for reasons not adequately explained), as well as other writings and actions by Ms. Kagan as a clerk to Justice Thurgood Marshall, as an academic, and as Solicitor General of the United States. Our conclusion is that Elena Kagan is first and foremost a social engineer, animated primarily by a desire to shape public policy on a host of issues. Her legal training and talent is chiefly directed to these ends. Ms. Kagan has demonstrated that she has strong convictions on how public policy should be cast on a wide range of issues, yet it also appears that she has long aspired to judicial rather than elective office. This is perhaps not surprising, because she believes that it "is not necessarily wrong or invalid" for appointed judges "to mold and steer the law in order to promote certain ethical values and achieve certain social ends," as she opined in her 1983 Oxford University thesis. For one with such a view, a seat on the U.S. Supreme Court is the apex of power – a lifetime license to make law and reshape public policy by decree, on a wide range of issues, without any need to achieve the degree of consensus required in legislative bodies or the distracting requirement for periodic accountability to an electorate.

Thus, if she is confirmed to the U.S. Supreme Court, we anticipate that Ms. Kagan often will treat the U.S. Constitution not as a body of basic law that truly constrains both legislators and judges, but rather, as a cookbook in which may be found legal recipes that will allow the imposition of the policies that Ms. Kagan deems to be justified or advisable, or that are so regarded by whatever groups she sees as the enlightened elites on a given subject. This will be in keeping with the models provided by two of Ms. Kagan's judicial heroes, Justice Marshall and Aharon Barak, the former president of the Supreme Court of Israel.

The White House documents reveal Ms. Kagan to have been a key strategist – perhaps, indeed, the lead strategist within the White House – in the successful effort to prevent enactment of the Partial-Birth Abortion Ban Act during the Clinton Administration. The picture that emerges of

N.R.L.C. ON THE NOMINATION OF ELENA KAGAN, PAGE 2

Ms. Kagan is not that of a staffer who presented the President with objective information and disinterested analysis, but rather, a staffer who sometimes presented selective and tendentious information, and who employed a variety of legal and political arguments, to achieve her overriding goal of defeating the legislation.

Early on (in January, 1996, if not earlier), it appears that Ms. Kagan was instrumental in providing President Clinton gravely distorted assertions regarding the frequency of partial-birth abortion and the reasons for which it was typically performed, although more accurate information had been published by a congressional committee and was readily available. In June, 1996, she described a private briefing from the American College of Obstetricians and Gynecologists (ACOG) in which she learned that “[i]n the vast majority of cases, selection of the partial birth procedure is not necessary to avert serious adverse consequences to a woman’s health . . . there just aren’t many [circumstances] where use of the partial-birth abortion is the least risky, let alone the ‘necessary,’ approach.” Although Ms. Kagan herself described this briefing as “a revelation,” she also advised against immediately conveying its substance to the President. Moreover, in December 1996, when Ms. Kagan obtained an ACOG draft for a proposed *public* statement that reported that “a select panel convened by ACOG could identify no circumstances under which [the partial-birth] procedure . . . would be the only option to save the life or preserve the health of the woman,” Ms. Kagan wrote that such a public statement “of course, would be disaster.” It appears that Ms. Kagan was dismayed not by the *realities* of partial-birth abortion, but by the prospect that public awareness of those realities would harm the White House efforts to prevent enactment of the ban. In addition, it appears that Ms. Kagan herself was probably the originator of diluting language that appeared in the final public statement approved and released by the ACOG Executive Board in January, 1997 – ostensibly as the judgment of top medical authorities.

Initially, in February 1996, President Clinton favored banning partial-birth abortions, both before and after “viability,” except in any case in which, in the abortionist’s judgment, *the pregnancy itself* threatened the life of the mother or serious adverse health consequences. But Ms. Kagan objected that this was unconstitutional and that pro-abortion advocacy groups “will go crazy.” She argued for allowing use of the method when any “serious” health benefit was asserted *even if the woman and her unborn baby were entirely healthy*, and prevailed. The following year (in May, 1997), Ms. Kagan pushed further. Employing a mixture of legal, policy, and political arguments, she ultimately won Mr. Clinton’s endorsement for a substitute bill proposed by Senator Daschle, which applied *no restrictions whatever* on partial-birth abortion prior to “viability” (for example, in the fifth and sixth months, which in fact is when the greatest number of partial-birth abortions are performed), and which applied only a loose, loophole-ridden standard on abortionists even in the seventh month and later. Ms. Kagan explicitly recognized, in a memorandum dated December 14, 1996, that Daschle’s purpose was to “provide cover for pro-choice Senators (who can be expected to support it) . . .” In a memo dated May 13, 1997, Ms. Kagan advised President Clinton to “endorse the Daschle amendment in order to sustain your credibility on HR 1122 [the Partial-Birth Abortion Ban Act] and prevent Congress from overriding your veto.”

N.R.L.C. ON THE NOMINATION OF ELENA KAGAN, PAGE 3

Some recent commentators have viewed these documents as showing Ms. Kagan in a “centrist” role, since even the Daschle Amendment was criticized by some pro-abortion advocacy groups and by some Justice Department officials, who regarded it as too restrictive. We disagree with this reading. The documents contain clear evidence that Ms. Kagan was in sympathy with the Justice Department’s perspective regarding the Supreme Court precedents (see, for example, Ms. Kagan’s memorandum to Walter Dellinger dated February 24, 1996), but Ms. Kagan had no intention of allowing constitutional technicalities to get in the way of what she viewed as a workable strategy to defeat the bill and keep partial-birth abortion unrestricted.

The bottom line is that Ms. Kagan was instrumental in persuading President Clinton to endorse in 1997 an alternative proposal (the Daschle substitute) that was more protective of the practice of partial-birth abortion than the position which the President had embraced in 1996, but which also was sufficiently artful in its language to provide political “cover” for pro-abortion senators, and thereby to prevent the real ban from becoming law. Although the Partial-Birth Abortion Ban Act was supported, in the 105th Congress, by more than two-thirds of the House of Representatives and by 64 members of the U.S. Senate, the effort to override President Clinton’s second veto fell three votes short in the Senate in 1998. Thus, the Kagan-backed strategy did, in fact, prevent enactment of the Partial-Birth Abortion Ban Act during the Clinton Administration. **Ms. Kagan played a key role in keeping the brutal partial-birth abortion method legal for an additional decade.**

Ultimately, a bill that differed little from the bill that Elena Kagan fought so tenaciously and deemed unconstitutional – a bill that banned partial-birth abortion both before and after “viability,” unless necessary to save a woman’s *life* – was upheld by the U.S. Supreme Court in 2007, after having been signed into law by President George W. Bush in 2003.

On other issues of interest to our organization, Ms. Kagan also comes across in the White House documents as a goal-oriented staffer who worked hard to push policy decisions in directions that we regard as pernicious.

For example, soon after the first cloned human mammal (Dolly the sheep) was created in 1996, Ms. Kagan defended the position that the creation of human embryos by cloning should be allowed, as long as the embryos were used as research subjects and not allowed to develop to birth (a policy that in later years came to be known as “clone and kill”).

In 1998, Ms. Kagan addressed the question of whether physicians in Oregon should be prevented by federal law from using federally controlled drugs in the practice of assisted suicide. Ms. Kagan opined that federal legislation would be a “terrible idea.”

In the area of First Amendment jurisprudence, Ms. Kagan has troubling views. For decades, the U.S. Supreme Court has read the First Amendment’s command, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .,” to apply to speech – including paid advertising – by organized groups of Americans regarding those who hold or seek federal office. In an e-mail written October 31, 1996, Ms. Kagan went out of her way to say that she disagreed.

N.R.L.C. ON THE NOMINATION OF ELENA KAGAN, PAGE 4

She wrote: "I also think the Court should reexamine its premise that the freedom of speech guaranteed by the First Amendment entails a right to throw money at the political system." But if modes of communication that cost money are excluded from the scope of the First Amendment, then those with control of mainstream media outlets and other entrenched elites gain political advantage, while those who represent unfashionable causes are relegated to the soapbox in the park.

As Solicitor General, in the case of *Citizens United v. FEC*, Ms. Kagan defended the proposition that the government has the authority to severely restrict or ban not only broadcast ads but even pamphlets, if produced by incorporated groups, that are deemed to be election-related because of their proximity to an election and their reference to federal office seekers. President Obama singled out Ms. Kagan's work on this case for special praise at the press conference at which he announced her nomination to the U.S. Supreme Court. On this issue, in which the social policy favored by most contemporary liberal elites runs headlong into one of the clearest prohibitions in the Bill of Rights, the evidence suggests that Elena Kagan, if confirmed to the Supreme Court, will disregard the command of the First Amendment in order to permit a system of government-managed speech about officeholders and office seekers, with the underlying purpose of enhancing the influence of some groups of political stakeholders at the expense of other groups.

In 1995, Elena Kagan wrote that "it should be no surprise by now that many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value." We respectfully suggest that enormous damage already has been done to the body politic by Supreme Court justices who believe that they have the right to impose their "conceptions of value" even when this requires overriding constitutional laws adopted through the normal processes of representative democracy, as we saw in *Roe v. Wade*, and even when it requires tortured evasions of clear constitutional prohibitions, such as some justices have employed to justify government-imposed restrictions on political speech.

While all of these matters should be explored in greater depth during the forthcoming hearings, we cannot conceive that anything could be said that would fundamentally alter our assessment of this nominee. Therefore, we respectfully urge that you oppose Ms. Kagan's confirmation to the U.S. Supreme Court.

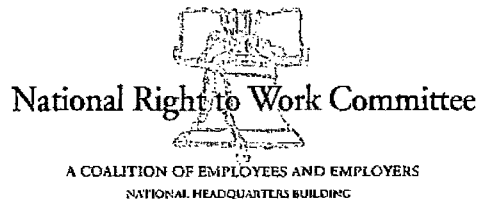
Sincerely,



David N. O'Steen, Ph.D.
Executive Director

Douglas Johnson
Legislative Director

Susan T. Muskett, J.D.
Senior Legislative Counsel



July 1, 2010

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of the over 2.6 million members of the National Right to Work Committee, I strongly urge you to vote against confirmation of Elena Kagan for a lifetime seat on the United States Supreme Court. Her record as an high-level White House advisor to President William Jefferson Clinton demonstrates that her views about the First-Amendment and statutory rights of American workers are far outside the judicial mainstream.

In 1976, in *Abood v. Detroit Board of Education*, a case in which National Right to Work Legal Defense Foundation attorneys represented the plaintiff, public school teachers, the U.S. Supreme Court considered whether non-union public employees can constitutionally be compelled as a condition of employment to subsidize their union monopoly bargaining agent's political activities. The Court, unanimously, held "that a State cannot constitutionally compel public employees to contribute to union political activities which they oppose."

The First-Amendment right of workers not to be forced to subsidize union politics, first recognized in *Abood*, has been reaffirmed by the Supreme Court in several subsequent cases brought to the Court for workers by National Right to Work Legal Defense Foundation attorneys, cases such as *Ellis v. Railway Clerks* (1984), *Teachers Local 1 v. Hudson* (1986), *Lehnert v. Ferris Faculty Ass'n* (1991), and *Davenport v. Washington Education Ass'n* (2007).

The Court's *Abood* ruling relied on the principle underlying the Supreme Court's 1976 decision about the Federal Election Campaign Act in *Buckley v. Valeo*, that

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"Americans must have the right but not be compelled to join labor unions"

"contributing to an organization for the purpose of spreading a political message is protected by the First Amendment." The Court has reiterated that principle repeatedly, and relied upon it again as recently as this year in *Citizens United v. Federal Election Commission*.

However, in 1996, when she was Associate Counsel to President Clinton, Ms. Kagan rejected this long, unbroken line of Supreme Court precedent that protects the First-Amendment right of public employees – and of Americans generally – not to be compelled by government to subsidize political activities of private, voluntary associations.

In an e-mail message on October 31, 1996, to Paul J. Weinstein, Jr., Chief of Staff of the White House Domestic Policy Council, Ms. Kagan said (emphasis added):

It is unfortunately true that almost any meaningful campaign finance reform proposal raises constitutional issues. This is a result of the Supreme Court's view – which I believe to be mistaken in many cases – that money is speech and that attempts to limit the influence of money on our political system therefore raise First Amendment problems. . . . I also think the Court should reexamine its premise that the freedom of speech guaranteed by the First Amendment entails a right to throw money at the political system.

In her Senate Judiciary Committee testimony on June 29, 2010, Ms. Kagan claimed in answer to a question from Senator Orrin Hatch that these were merely the Clinton Administration's, not her personal, views.

However, later, on October 31, 1996, Ms. Kagan was one of several White House staff members whose memorandum recommending how the White House should respond to questions about President Clinton's "Campaign Finance Reform Announcement" was transmitted to White House Chief of Staff Leon Panetta. That memo from Ms. Kagan and others incorporated Ms. Kagan's argument that the First Amendment does not protect the right to spend money for political activities. In short, in 1996 Ms. Kagan both suggested and endorsed that crabbed view of the First Amendment.

Thus, Ms. Kagan's testimony this week before the Senate Judiciary Committee clearly is disingenuous. It is reasonable to conclude from her record that, if confirmed,

Ms. Kagan would be willing to overrule *Abood's* well-established protection of the constitutional right of workers not to be forced to subsidize union politics.

This conclusion is supported by other documents the Clinton Presidential Library recently produced for the Senate Judiciary Committee in preparation for its hearings on Ms. Kagan's Supreme Court nomination.

On November 14, 1996, Ms. Kagan sent a memorandum on White House stationery to then White House Counsel Jack Quinn and then Deputy White House Counsel Kathleen Wallman about a draft "memo to the President on campaign finance." In her memo, Ms. Kagan said:

The memo does not address what seems to me the key issue in developing a strategy on campaign finance legislation: how to deal with Republican efforts to restrict labor union spending. I think the Republicans will insist on including in any campaign finance legislation a provision making it difficult for unions to use money from compulsory union dues in political campaigns. . . . We should start thinking now how we're going to deal with this Republican poison pill.

In 1988, of course, in *Communications Workers v. Beck*, yet another case in which National Right to Work Legal Defense Foundation attorneys represented the plaintiff workers, the Supreme Court had already held that the National Labor Relations Act -- like the First Amendment -- prohibits unions from using compulsory union dues of objecting workers in political campaigns. Thus, any provision that would make "it more difficult for unions to use money from compulsory union dues in political campaigns" would simply protect a constitutional and statutory right of workers recognized by the Court in the *Abood* line of cases and in *Beck*.

Ms. Kagan nonetheless subsequently recommended that President Clinton oppose any legislation protecting the right of workers not to be forced to subsidize union politics, despite the First Amendment's guarantee of that basic worker freedom of speech and association.

On February 12, 1997, Kathleen Wallman, then Deputy Assistant to the President for Economic Policy, circulated an 11:30 a.m. draft memorandum for the President on

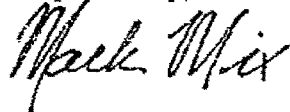
possible policy announcements of labor issues that the Vice President could make at a meeting of the AFL-CIO's Executive Committee later that month. The draft indicates that Ms. Kagan, by then Deputy Assistant to the President for Domestic Policy, was writing two sections of the memo that were not included in the draft. One of those sections that Ms. Kagan "agreed to draft" concerned the Administration's "[p]osition on Beck legislation aimed at limiting the use of union dues in political activity."

Later that same day, Ms. Kagan e-mailed Ms. Wallman her recommendation about "legislation aimed at limiting the use of union dues in political activity" (*italics added*): John Hilley [Director of Legislative Affairs], Bruce Reed [Director of the Domestic Policy Council], and I all recommend that you state *strong opposition* to Beck legislation, no matter what it is attached to."

In sum, as a high-level White House official Ms. Kagan both disagreed with the well-established legal principle that underlies the long line of Supreme Court decisions recognizing the constitutional right of workers not to be compelled to subsidize union political activities as a condition of employment and opposed any legislation designed to protect that fundamental right of free speech and free association. This puts her far outside the judicial mainstream and demonstrates a disdain for the rights of independent-minded American workers.

Consequently, on behalf of the National Right to Work Committee's over 2.6 million members, I strongly urge you to vote NO on confirmation of Ms. Kagan's nomination to the Supreme Court.

Respectfully,



Mark A. Mix

NATIONAL RIFLE ASSOCIATION OF AMERICA
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030



July 1, 2010

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

We are writing to announce the National Rifle Association's position on the confirmation of Solicitor General Elena Kagan as Associate Justice of the United States Supreme Court.

Other than declaring war, neither house of Congress has a more solemn responsibility than the Senate's role in confirming justices to the U.S. Supreme Court. As the Senate considers the nomination of Solicitor General Kagan, Americans have been watching to see whether this nominee – if confirmed – would respect the Second Amendment or side with those who have declared war on the rights of America's 80 million gun owners.

During confirmation hearings, judicial nominees make carefully crafted statements regarding issues with which they do not personally agree. They often speak in terms of "settled law" or "I understand the right". When those statements are contradicted by an entire body of work over a nominee's career, however, it would be foolhardy to simply take them at face value. In Ms. Kagan's own words, "you can look to my whole life as to what kind of justice I would be." We agree.

As she has no judicial record on which we can rely, we have only her political record to review. And throughout her political career, she has repeatedly demonstrated a clear hostility to the fundamental, individual right to keep and bear arms guaranteed under the U.S. Constitution.

As a clerk for Justice Thurgood Marshall, Ms. Kagan said she was "not sympathetic" to a challenge to Washington, D.C.'s ban on handguns and draconian registration requirements. As domestic policy advisor in the Clinton White House, a colleague described her as "immersed" in President Clinton's gun control policy efforts. For example, she was involved in an effort to ban more than 50 types of commonly-owned semi-automatic firearms – an effort that was described as: "taking the law and bending it as far as we can to capture a whole new class of guns." And as U.S. Solicitor General, she chose not to file a brief last year in the landmark case *McDonald v. Chicago*, thus taking the position that incorporating the Second Amendment and applying it to the States was of no interest to the Obama

Administration or the federal government. These are not the positions of a person who supports the Second Amendment.

During her confirmation hearings last year, Justice Sonia Sotomayor repeatedly stated that the Supreme Court's historic *Heller* decision was "settled law". Even further, in response to a question from Chairman Leahy, she said "I understand the individual right fully that the Supreme Court recognized in *Heller*." Yet last Monday in *McDonald*, she joined a dissenting opinion which stated: "I can find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes".

We would also note that both *Heller* and *McDonald* were 5-4 decisions. The fact that four justices would effectively write the Second Amendment out of the Constitution is completely unacceptable. Ms. Kagan has repeatedly declined to say whether she agrees with the dissenting views of justices Stevens, Breyer, Ginsburg and Sotomayor, which leaves unanswered the very serious questions of whether she would vote to overturn *Heller* and *McDonald* or narrow their holdings to a practical nullity.

This nation was founded on a set of fundamental freedoms. Our Constitution does not give us those freedoms - it guarantees and protects them. The right to defend ourselves and our loved ones is one of those. The fundamental, individual right to keep and bear arms is another. These truths are what define us as Americans.

Any individual who does not believe that the Second Amendment guarantees a fundamental right and who does not respect our God-given right of self-defense should not serve on any court, much less receive a lifetime appointment to the highest court in the land. Justice Sotomayor's blatant reversal on this critical issue requires that we look beyond statements made during confirmation hearings and examine a nominee's entire body of work. Unfortunately, Ms. Kagan's record on the Second Amendment gives us no confidence that if confirmed to the Court, she will faithfully defend the fundamental, individual right to keep and bear arms of law-abiding Americans.

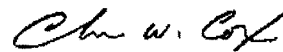
For these reasons, the National Rifle Association has no choice but to oppose the confirmation of Solicitor General Elena Kagan to the U.S. Supreme Court. Given the importance of this issue, this vote will be considered in NRA's future candidate evaluations.

Thank you for your attention to our concerns. Should you have any questions or wish to discuss further, please do not hesitate to call on us personally.

Sincerely,



Wayne LaPierre
Executive Vice President
NRA



Chris Cox
Executive Director
NRA-ILA

cc: Majority Leader Harry Reid; Republican Leader Mitch McConnell; Members of the United States Senate

National Senior Citizens Law Center

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June 25, 2010

The Honorable Patrick Leahy
Chair, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy:

I am writing to convey the strong support of the National Senior Citizens Law Center for the nomination of Solicitor General Elena Kagan to the Supreme Court of the United States. Although we recognize that the Senate Judicial Committee's confirmation hearings will not conclude for over another week, at this juncture, based on her extraordinary public record, it is clear to us that she would be a valuable addition to the Court. At every stage of her career, Elena Kagan has proven that she remains committed to continuing a tradition of public service instilled in her by a family long dedicated to the public interest. In her varied government, private, and educational positions, she has advocated on behalf of public health, shareholders' rights, and campaign finance reform with technical aptitude and an eye for bridging ideological divides. These skills will have great value on a high court increasingly engaged in cases with outsized effects upon the daily lives of working American men and women.

As you, President Barack Obama, and other Democratic members of the Committee have said, the primary question for the Supreme Court going forward, certainly the question of primary importance to NSCLC's constituency of low-income older Americans, is whether legislation passed for the protection and benefit of ordinary people is faithfully upheld as intended by Congress. Too often, a bitterly split Court has ignored the clear purpose and intent of laws and effectively rewritten legislation to benefit the powerful, stripping away protections intended for

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National Senior Citizens Law Center

the disadvantaged. Elena Kagan's record makes clear that she will be a worthy successor to the great justice she will replace, Justice John Paul Stevens, in thoughtfully and vigorously opposing such judicial activism.

Regrettably, the list of divided decisions that unjustifiably favor the interests of large organizations over the plight of ordinary citizens guiding their families through hard economic times is growing. Recent examples are:

- **Gross v. FBL Financial Services** (2009), a decision in which the dissenting justices characterized as "unabashed judicial law-making," "irresponsible," and in "utter disregard" of the Court's own precedents and "Congressional intent," the narrow 5-4 majority which so weakened the 1967 Age Discrimination in Employment Act that employers are left with little incentive to comply with its equal opportunity mandate;
- The recently decided **Rent-A-Center v. Jackson** (2010), wherein the Court disregarded the purpose of the Federal Arbitration Act and empowered employers to bar employees from attempting to enforce *any* protections under *any* law, by forcing them into secret, unreviewable proceedings before hand-picked arbitrators - even if under applicable law the employment contract mandating this result is "unconscionable;"
- **Exxon Shipping Co. v. Baker** (2008), poignantly relevant anew - wherein the Court arbitrarily legislated a standard drastically limiting damages, below the actual economic losses suffered by tens of thousands of fishermen, small business owners, and residents who had lost their livelihoods in what was, until the spring of 2010, the worst oil spill off American shores ;
- **Ledbetter v. Goodyear Tire & Rubber Co.** (2008), wherein a bare majority of the Court continued this trend of rendering unenforceable worker protections by literally hinging an employment discrimination lawsuit on the ability of an employee to know what she and many similarly situated are barred by employers from knowing - that they are victims of a double standard in pay due to their sex.

National Senior Citizens Law Center

NSCLC therefore looks forward to the hearings on Elena Kagan's nomination. We expect these hearings to spotlight this recent pattern of bending laws to serve powerful interests rather than the vulnerable constituencies they were enacted to serve. As you, Mr. Chairman, have noted, hearings serve the crucial purpose of "shin[ing] a light on how the Supreme Court's decisions affect Americans' everyday lives." You have further observed that "Congress has passed laws to protect Americans in these areas, but in many cases, the Supreme Court has ignored the intent of Congress." We believe that Elena Kagan's brilliance, pragmatism, and fidelity to the law will help move the Court in the direction of honoring Congress' purpose and faithfully administering laws enacted to benefit ordinary Americans.

We applaud Solicitor General Elena Kagan's nomination and urge a fair and efficient confirmation.

Respectfully,



Paul Nathanson
Executive Director
National Senior Citizens Law Center
1444 Eye Street NW, DC 20005



VIA EMAIL

June 29, 2010

The Honorable Patrick Leahy
 United States Senate
 Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear Senator Leahy,

On behalf of the New America Alliance (NAA), we wish to endorse and commend President Obama's selection of Solicitor General Elena Kagan as his nominee for the U.S. Supreme Court.

Co-founded by The Honorable Henry Cisneros and Raúl Yzaguirre, the NAA is an organization of American Latino business leaders committed to leading the process of Latino empowerment and wealth-building by expanding the forms of capital most crucial for economic advancement - economic capital, human capital and philanthropy.

We have benefited from one of our founding members, Roel Campos, being a member of the Visiting Committee of the Harvard Law School (HLS), who has helped evaluate Elena Kagan's past performance as Dean of HLS. After carefully studying the qualifications of Elena Kagan, we have come to the following conclusions:

- Elena Kagan is recognized as one of the great legal minds in our country. She has a superb legal education, clerked with Justice Thurgood Marshall, and has a record of outstanding legal scholarship. In her public service, she has shown herself to be someone who works well with members of both parties. She has served with distinction as the first woman Solicitor General of the United States and has impressed all with her legal argument, integrity, and fairness.
- In her Deanship at the Harvard Law School, as the first woman Dean of HLS, she showed herself to be an outstanding leader in a complex setting. She worked tirelessly to improve the environment for both students and faculty. She supported recruitment of both conservative and liberal scholars.
- During Kagan's deanship, the percentage of Hispanics, African Americans, and other minorities in the entering class increased substantially. Faculty and students have noted Kagan's commitment to making all students - including, minority students, military veterans, conservative and liberal student groups (and their parents) feel welcome at the law school.
- As Dean, Elena Kagan created processes to identify and recruit qualified law school academics of color to the HLS faculty. This effort resulted in the serious consideration and employment offers to the law faculty of several scholars of color, including Hispanics.

In short, General Kagan is someone who can bridge ideology and entrenched views, create consensus, has a deep sense of justice, and has a profound respect for individuals from all walks of life.

For these reasons and many others, we believe that General Elena Kagan will make an outstanding addition to the U.S. Supreme Court.

Respectfully yours,



Carlos Loumiet
Chair of the Board



Maria del Pilar Avila
Chief Executive Officer

CC: Jeremy Paris, Chief Counsel on Nominations and Oversight
Erica Chabot, Press Secretary-Judiciary Committee
Stephanie Valencia, Associate Director, White House Office of Public Engagement
Cecilia Munoz, Director of Intergovernmental Affairs
Tina Tchen, Director of Public Liaison
Lisa Brown, Assistant to the President and Staff Secretary
Kareem Dale, Special Assistant to the President

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June 16, 2010

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Senator Sessions:

I write in support of the nomination of Elena Kagan as an Associate Justice of the Supreme Court of the United States.

I first met Elena in 2003 when she was appointed as Dean of Harvard Law School. At the time I had just completed the fourth year of a ten-year tenure as dean of the Law School here at Notre Dame.

In May 2003 I was among the deans who served on the faculty of the three-day Seminar for New Law School Deans sponsored annually by the Section of Legal Education of the American Bar Association. I noticed a number of qualities in Elena during her participation as a new dean that characterized my interactions with her over the next six years in various legal education fora, including deans' meetings and committee meetings of the American Bar Association, the American Association of Law Schools, and the American Law Deans Association.

First, Elena took the time to participate in the national legal education associations and to do her fair share of committee work. This may strike you as obvious, but I assure you that it is not. The claims on the time of the Dean of Harvard Law School are many, and in my experience, Harvard was not frequently present in these fora prior to Elena's tenure. Her presence spoke volumes before she ever uttered a word.

The Honorable Patrick Leahy
 The Honorable Jeff Sessions
 June 16, 2010
 Page 2

Second, in listening to her interventions at many meetings, I noted that Elena rarely spoke first, and I do not remember her ever beginning a sentence with the words "At Harvard." She seemed mindful that even in a room of law school deans (who are rarely accused of being shrinking violets), the Dean of Harvard Law School is somewhat like the 500lb. gorilla. Thus, she often chose to let others express their opinions first, and to let the dialogue develop before offering her own thoughts.

Let me be clear that in these instances Elena knew her own mind. She possesses a powerful intellect, and she is a natural-born leader. She asserts herself strongly when she assesses that this is the best approach. Elena often chooses to lead by persuasion, however. She listens to the views of others, adds her own, exhibits respect for differences in opinion, and cogently makes her case. Her style is such that when she speaks, people listen. Within legal education fora, people listened to her not so much because she was the Dean of Harvard Law School, but because she had her own distinctive voice – reasoned and reasonable in forging group positions. This is not an easy task among law school deans, who often face challenges in agreeing upon collective action.

I mentioned that Elena never began sentences with the words "At Harvard." She knew that she led a law school with a storied history and a resource base that is the envy of most institutions. Nonetheless, she treated the dean of every law school as a genuine peer, noting on many occasions that deans face many issues in common that are marked only by differences in degree.

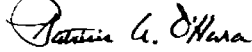
At the same time, I very much appreciated Elena's respect for the value of institutional pluralism. While the challenges that deans face are similar across legal education, law schools often carve out different niches or are animated by different missions. Elena's interventions at meetings exhibited a recognition of these differences and reflected an appreciation for the richness such diversity can bring to the academy.

Although I was an external observer, Elena's accomplishments as Dean of Harvard Law School strike me as remarkable for a six-year tenure. She achieved faculty consensus in favor of a significant curricular reform of the first year of studies, and she made stellar faculty appointments. In a manner similar to the way in which she put a personal face on Harvard Law School in national deans' meetings, she accomplished the same result within the student community at Harvard. I know a number of students who studied at Harvard Law during her tenure or who were active as young alumni, and they credit her with very positive changes in the student life culture.

The Honorable Patrick Leahy
 The Honorable Jeff Sessions
 June 16, 2010
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In summary, in every setting in which I have observed Elena and in my own interactions with her, she exhibits a powerful intellect, an open mind, a willing ear, a masterful ability to advocate a position and craft a solution in which others will join, genuine warmth, and great humility. She has served with distinction and with integrity at the highest levels of the academy and government. If confirmed, I have every confidence that she will bring these same qualities to bear as an Associate Justice, and that she will join the line of prior justices who transferred formidable skills developed outside the judicial arena to highly successful service on the Supreme Court.

Sincerely yours,



Patricia A. O'Hara
 Professor of Law

**Testimony on the Nomination of
Elena Kagan to be Associate Justice of the United States Supreme Court**
United States Senate Judiciary Committee
(July 1, 2010)

by

William J. Olson

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Chairman Leahy, Senator Sessions, and Members of the Committee:

My name is William Olson. I have practiced law in the District of Columbia and the Commonwealth of Virginia for 34 years, including Second Amendment law. For many years, our law firm has represented one of the nation's leading pro-Second Amendment groups — **Gun Owners of America**.¹ We have filed amicus briefs in U.S. Supreme Court cases such as Heller, McDonald, and in a few weeks, plan to file another amicus brief in the U.S. Court of Appeals for the District of Columbia Circuit — in a case known as Heller II.

Despite the Court's recent decision in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008) and this past Monday's decision in McDonald v. Chicago, 561 U.S. ___, (2010), freedom-loving Americans understand that their right to keep and bear arms continues to be in jeopardy. Both victories were achieved by a narrow 5-4 vote. The elevation of any opponent of private ownership of firearms to the High Court constitutes a direct threat to the Second Amendment.

While Solicitor General Kagan's record on many important issues is sparse, the Committee must draw conclusions from what has been disclosed. As of today, her record reveals an underlying hostility to the people's right to keep and bear arms. She is not a person who could be expected to defend the Second Amendment as an Associate Justice of the Supreme Court. No Senator who fails to do everything in his power to prevent another anti-gun Justice from ascending to the High Court can return home and claim to be a friend of the Second Amendment.

I will address one revealing incident from each stage of Elena Kagan's career — as a Supreme Court law clerk in the 1980's, as a Clinton political operative in the 1990's, and as a nominee before this Committee.

If, after these hearings, there remain any questions as to what Elena Kagan said, or did, or believes about the Second Amendment, it would be my hope and prayer that no vote on her confirmation would occur until those issues are fully addressed.

¹ The Gun Owners of America website is at <http://gunowners.org/>. The Gun Owners Foundation website is at <http://www.gunowners.com/>.

1. The Case of Lee A. Sandidge v. United States.

Elena Kagan first revealed her Second Amendment views 23 years ago in Sandidge v. United States, 520 A.2d 1057 (D.C. App.), *cert. denied*, 484 U.S. 868 (1987). There, the defendant was convicted of possession of an unregistered handgun and ammunition in the District of Columbia — essentially the same provisions of the D.C. Code ruled unconstitutional in Heller. The D.C. Court of Appeals affirmed his conviction.

I happen to be familiar with that 1987 case, as firearms attorney Dan Peterson and I filed the only amicus brief in that case in the D.C. Court of Appeals — supporting Mr. Sandidge's appeal. In our amicus brief, we explained that the D.C. government asserted:

the limitless principle that “statutory regulation of firearms is constitutionally permissible under the Second Amendment...”
[and] that the Second Amendment does not “**guarantee to individuals the right to possess** firearms.”²

I searched for and found my Sandidge file, and refreshed my recollection about the facts of the case. The file in Sandidge records that Mr. Sandidge was an African-American man who worked at a laundromat in the District. He was required to carry its cash receipts with him from the laundromat to his apartment over the laundromat at the end of the day — which necessitated leaving the building and walking on the street briefly between the two entrances. Mr. Sandidge previously had been robbed, and was carrying a .25 semi-automatic pistol for his own protection when he was arrested. In fact, there was testimony that there had been frequent robberies at the laundromat.

Mr. Sandidge's petition for a writ of certiorari was reviewed by Elena Kagan while clerking for Justice Thurgood Marshall. Ms. Kagan's memorandum on the case recommended to Justice Marshall the denial of the petition for cert, as follows:

[Petitioner's] sole contention is that the District of Columbia's firearms statutes violate his constitutional right to “keep and bear Arms.” **I'm not sympathetic.**³

² Amicus Brief of Center for Judicial Studies and Gun Owners Foundation, Lee A Sandidge v. United States of America, D.C. Court of Appeals No. 84-1045 (Oct. 14, 1986), p. 10 (emphasis added). The Court's opinion appears at 520 A.2d 1057 (D.C. App., 1987). (The Center for Judicial Studies was founded and headed by revered scholar and constitutional lawyer, the late James McClellan. <http://www.mcclellanlibrary.org/>)

³ Elena Kagan, Memorandum of Aug. 27, 1987, Sandidge v. United States (emphasis added).

The appellant's brief in Sandidge, and our amicus brief, set out many of the same arguments and authorities later relied on by the Supreme Court in Heller. Ignoring these matters, the D.C. Court of Appeals improperly ruled that the Second Amendment was a collective right, not an individual right. One of the D.C. Court of Appeals judges advanced the astonishing theory that the Second Amendment did not even apply to the District of Columbia.

But law clerk Kagan had no problem turning her back on a man improperly convicted for owning a handgun for self-defense purposes — which Heller later ruled was protected by the Second Amendment. She was “not sympathetic.” Two points.

First, as a Supreme Court Justice, Elena Kagan would have significant discretionary powers, especially in decisions whether to grant certiorari. The Supreme Court Rules set forth the reasoned considerations governing the Court's discretion whether to grant review — unsurprisingly, “not sympathetic” is not one of them.⁴

Second, while most gun owners are not lawyers, they are better students of the Constitution than Ms. Kagan, having long understood that the Second Amendment protects an individual right. If, while serving as a Supreme Court law clerk, Elena Kagan did not “sympathize with” a man unjustly convicted for exercising his Second Amendment right to keep and bear arms in his own self-defense, why should anyone trust her to protect the Second Amendment now?

It is not that a judge cannot have strong feelings about a case, but emotion untethered to reason in the exercise of power to grant or deny review bespeaks an absence of judicial temperament. Since Sandidge, Ms. Kagan has neither said nor done anything to assure this body that she would not be governed by the same overriding anti-gun emotions.

2. Role in the Clinton Administration.

Elena Kagan's role from 1995 through 1999 as an Associate Counsel and Deputy Assistant for Domestic Policy in the Clinton Administration gives us what may be the most revealing insight into her hostility to the Second Amendment — the fact that she appeared willing to misuse the President's power to issue Executive Orders to usurp the authority of Congress to impose illegal barriers to firearms ownership. In her zeal for gun control, she showed a lack of respect for constitutional separation of powers as clarified by Justice Hugo Black in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). There, a member of the “liberal wing” of the Court, Justice Black stated emphatically that it was Congress, not the

⁴ However, certiorari can be granted for “an important question of federal law that has not been, but should be, settled by this Court.” Supreme Court Rule 10(c).

President, who had the authority to determine national policy and to set the rules for carrying that policy into effect.

Ms. Kagan was heavily involved in the Clinton White House's damage control involving the constitutional challenge to the ill-conceived 1994 Brady Bill. In a case litigated by firearms scholar Stephen P. Halbrook, Sheriff Jay Printz of Montana and Sheriff Richard Mack of Arizona convinced the U.S. Supreme Court in Printz v. United States, 521 U.S. 898 (1997), to strike down the Brady Bill requirement that state and local law enforcement officers be drafted into federal service to conduct and certify background checks on all handgun sales.

Even before this ruling was announced on June 27, 1997, the Clinton White House actively pursued an end-run strategy should the Supreme Court find the Brady Bill unconstitutional. Elena Kagan was in the thick of it.

After discussing legislative options to "respond to this Supreme Court decision," a March 17, 1997 e-mail from Dennis K. Burke concludes with a revelation about Elena Kagan's role:

Based on Elena's suggestion, I have also asked both Treasury and Justice to give us options on what POTUS could do by executive action -- for example, could he, **by executive order, prohibit a FFL** [federal firearms licensee] from selling a handgun w/o a CLEO [chief law enforcement officer] certification? We will continue to pursue.⁵

The only conclusion that can be drawn from this e-mail is that Elena Kagan believed that the President of the United States had authority to circumvent the role of Congress and to act unilaterally, without any statutory authority, to impose restrictions on the private ownership of handguns. Like President Truman's advisors, discredited in Youngstown, Ms. Kagan had no constitutional misgivings about a unilateral presidential seizure of power.

Then, in November 1997, Ms. Kagan co-authored a transmittal memorandum to President Clinton that attached a proposed Presidential Directive to suspend the importation of new classes of firearms that were not covered by the 1994 assault weapons ban and had already been approved for importation by ATF.⁶ The Los Angeles Times reported that: "At the time of the import ban, Jose Cerda, who worked in the domestic policy shop run by Kagan and her

⁵ Dennis K. Burke e-mail to Michelle Crisci and Bruce Reed, Mar. 17, 1997 (KCL 6272) (emphasis added).

⁶ Memorandum from Charles F.C. Ruff and Elena Kagan to President William J. Clinton (Nov. 13, 1997).

boss, Bruce Reed, said, 'We are taking the law and bending it as far as it can to capture a whole new class of guns.'"⁷

In response to President Clinton's actions, then Senate Judiciary Committee Ranking Member Patrick Leahy was reported to have written to President Clinton that he "strongly believes that using a Presidential directive to avoid the normal legislative process regarding any changes to the assault weapons ban is the wrong way to go."⁸ I agree completely with the position taken at the time by Senator Leahy.

3. Statements During Confirmation Hearings.

During her confirmation hearing to be Solicitor General, Elena Kagan was asked about the Supreme Court's decision in Heller. Although she acknowledged the precedential weight of Heller and agreed to abide by the Heller decision as Solicitor General, she expressly "refrained from providing [her] personal views" or stating whether the case "was rightly decided?"⁹

First, as a Supreme Court Justice, Elena Kagan must take an oath to support the U.S. Constitution as the Supreme Law of the Land. Yet it appears that she believes that her oath is to "support" Supreme Court case precedent, not to support the Constitution as it is written, as required by Article VI.

When asked whether the Second Amendment protected the individual right to keep and bear arms, she stated:

there is no question, **after Heller**, that the Second Amendment [contains such a guarantee].¹⁰

⁷ James Oliphant, "Gun Rights Could Pose Problem for Kagan" (May 27, 2010) <http://www.latimes.com/news/nationworld/nation/la-na-kagan-guns-20100528.0,6017901.story>

⁸ See U.S. Senate Republican Policy Committee, *Clinton's New Gun Ban: Administration Set to Trespass on Congressional Authority* (Mar. 16, 1998), available at <http://rpc.senate.gov/releases/1998/importban-kf.htm>

⁹ Elena Kagan responses to "Written Questions of Senator Chuck Grassley to Elena Kagan to Be Solicitor General, U.S. Department of Justice," p. 1; Elena Kagan responses to "Written Questions of Chairman Patrick Leahy for Elena Kagan Nominee to be Solicitor General of the United States," p. 7, <http://judiciary.senate.gov/nominations/111thCongress/ExecutiveNominations/upload/Kagan-QFRs.pdf>.

¹⁰ Elena Kagan responses to "Written Questions of Senator Chuck Grassley to Elena Kagan to Be Solicitor General, U.S. Department of Justice," p. 2 (emphasis added).

That's nice — but what about before Heller? Heller did not rewrite the Second Amendment — the Supreme Court's decision only rejected a false notion that it protected a collective right. Her answer, that as Solicitor General she was bound by Heller, provides no assurance to this body that as a Supreme Court Justice, she is bound by the Second Amendment as written by the framers, rather than as interpreted by her predecessors.

Indeed, General Kagan's only reference to Second Amendment rights is to court opinions. When asked in these hearings on Tuesday by Senator Grassley whether the Second Amendment codified a preexisting right, or whether the right to keep and bear arms was created by the Constitution, she replied: "I never really considered that question." But when Senator Grassley asked the question whether the Second Amendment right was a "fundamental right," Kagan readily replied that it was so because the majority of justices in the McDonald case said so.

So the Kagan view of rights is whatever a majority of the Supreme Court rules at a particular time in a particular case. Under her philosophy of rights, what the Court grants, the Court may take away. No wonder Ms. Kagan refrained from testifying before this Committee during its hearings on her nomination as Solicitor General whether Heller was "rightly decided."¹¹ She has no standard whereby to measure the rightness or wrongness of a court decision.¹² Rather, to her a court opinion is "settled law" and "entitled to respect."

Beyond that — whether rights are given to us by our Creator God as the Declaration of Independence states — is a question that she never took time to consider. If Ms. Kagan has never even thought about whether our inalienable right to defend ourselves from criminals and tyrants comes from God or Government, she cannot be trusted to protect our God-given right to self-preservation.

<http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>.

¹¹ Elena Kagan responses to "Written Questions of Chairman Patrick Leahy for Elena Kagan Nominee to be Solicitor General of the United States," p. 7, <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/Kagan-QFRs.pdf>

¹² This is true not only with respect to the Second Amendment, but the First as well. During re-argument in Citizens United, when asked by Justice Ginsburg whether it would be unconstitutional for the government to ban a book on a candidate for election to federal office, General Kagan declined to admit any First Amendment violation. Her only reply was that "the FEC never has never applied [2 U.S.C. section] 441b in that context" and "there would be quite good as-applied challenge to any attempt to apply 441b in that context." Citizens United v. Federal Election Commission, 558 U.S. 50 (2010), Tr. 64-65 (reargument).

Based on her statements, could there be any doubt that, if General Kagan had been the pivotal vote on the Court when it decided Heller, she would have swung the decision against the right of American citizens to possess firearms suitable and necessary for their self-defense? And while General Kagan now professes to support the precedent of Heller, at its core, Heller only determined that a complete ban on handguns was impermissible, leaving many issues to be decided in the future. None of the nine justices advanced the view that the right was a collective one, only differing as to the scope of the right. However, we can find no indication that Ms. Kagan agrees that the Second Amendment secures an individual right, which could make her, if confirmed, the most anti-Second Amendment of all sitting Justices.

CONCLUSION

In responding to questions from this Committee when confirmed as Solicitor General, Elena Kagan stated that her job then was to “channel” Justice Thurgood Marshall.¹³ Justice Marshall apparently did not feel himself bound by the text of the Constitution, preferring to “do what [he thought] was right, and let the law catch up.”¹⁴ I doubt that the American people want a Justice who would channel such views and do what she thinks is right on the Second Amendment — since, thus far, Elena Kagan has yet to show the Second Amendment any respect whatsoever.

¹³ Confirmation Hearing on the Nomination of Elena Kagan Nominee to be Solicitor General of the United States (Feb. 10, 2010) p. 99, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:55828.pdf

¹⁴ Deborah L. Rhode, *A Tribute to Justice Thurgood Marshall: Letting the Law Catch Up*, 44 Stan. L. Rev. 1259 (June, 1992).

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William J. Olson is the principal of the law firm of William J. Olson, P.C., which has offices in Vienna and Winchester, Virginia. He has been in the private practice of law in the Metropolitan Washington, D.C. area for over 34 years. His practice includes constitutional, firearms, postal, nonprofit, health, and election law.

Mr. Olson holds a J.D. degree from the T.C. Williams School of Law, University of Richmond, and an A.B. degree in Political Science and Economics from Brown University. He is a member of the bars of the Commonwealth of Virginia and the District of Columbia, and admitted to practice before the U.S. Supreme Court, the U.S. Courts of Appeals for the 4th, 5th, 6th, 7th, 10th and 11th and D.C. Circuits, the U.S. District Courts for the District of Columbia, Eastern District of Virginia, Maryland (inactive), the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Armed Forces. He has been listed in *Who's Who in American Law*, *Who's Who in America*, and *Who's Who in the World*.

He was appointed by President Reagan to the Board of Directors of the national Legal Services Corporation (LSC), where he also served as Chairman. He had earlier served in the Office of President-Elect Reagan as head of the Transition Team for the LSC. He also served as a liaison member of the Administrative Conference of the U.S. He served for three years as Special Counsel (for Labor and Employee Relations) to the Board of Governors of the U.S. Postal Service. In the Reagan Administration, he also served on the President's Export Council's Subcommittee on Export Administration. He served as Chairman of the Fairfax County (Virginia) Republican Party.

Since its founding in 1993, Mr. Olson has served as legal co-counsel of the Free Speech Coalition, an organization dedicated to defending the speech, advocacy, and associational rights of nonprofit organizations against excessive government regulation. He has served as legal co-counsel to the Free Speech Defense and Education Fund since its formation in 1995. He is legal counsel to Conservative Legal Defense and Education Fund. He has been a founding director and officer of Victims Assistance Legal Organization (VALOR) since 1979. He served for six years on the Board of Directors of Goodwill Industries of Greater Washington (formerly Davis Memorial Goodwill Industries).

He is the author and co-author of legal and public policy studies on topics including executive orders and emergency powers, postal law and economics, immigration law, and firearms law. His writings have been published by organizations such as the American Enterprise Institute, CATO Institute, Crew & Kleindorfer, U.S. Border Control, Gun Owners Foundation, and articles in publications such as *Engage: The Journal of the Federalist Society*, and *USA Today*. He has testified before Committees of the U.S. Congress, the Federal Election Commission, and the Internal Revenue Service on a variety of occasions. He has also been a guest on radio and television shows such as the Jim Lehr Newshour, the Larry King Show, the Art Bell Show, CNN's Crossfire, Fox's O'Reilly Factor, NET's Endangered Liberties, and the Glenn Beck Television Show.

Mr. Olson lives in Frederick County, Virginia with his wife Janet, who was former Executive Director of the U.S. House of Representatives Republican Conference. The Olsons have two grown children.



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Ashley B. Carson

June 2, 2010

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy & Ranking Member Sessions,

OWL proudly supports President Obama's nomination of Elena Kagan to the US Supreme Court. This historic nomination - just the fifth time a woman has been nominated to the Court - would provide for three female justices serving on the Court simultaneously, and Kagan's history, experience, and stance on important issues would be of great value.

Kagan has had a distinguished career as a law school professor, the first female Dean of Harvard Law School, and our nation's first female Solicitor General. She also has a long history of public service, a deliberate approach to legal issues, a extraordinary record of accomplishment and a history of working effectively with others who hold divergent political and legal views.

Elena Kagan is a dedicated legal scholar, and we are elated that President Obama has chosen to nominate another accomplished woman to serve on the Court. Women are the first to know and understand that women on the Court are critical to ensuring that our rights are protected from cradle to grave.

OWL applauds President Obama's choice of Elena Kagan and encourages individuals to support her nomination and confirmation.

Sincerely,

Ashley Carson
Executive Director, OWL

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TESTIMONY OF MR. TONY PERKINS
PRESIDENT & CEO, FAMILY RESEARCH COUNCIL
WASHINGTON, D.C.

BEFORE THE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

CONFIRMATION HEARINGS FOR THE APPOINTMENT OF
ELENA KAGAN TO THE SUPREME COURT OF THE UNITED STATES

JULY 1, 2010

Chairman Leahy, Ranking Member Sessions, and other members of the Committee,

I am grateful for the opportunity to address this body regarding the nomination of Solicitor General Elena Kagan to serve as an Associate Justice of the Supreme Court of the United States.

As a former Marine and police officer who spent many years in uniform, I will focus my remarks today on General Kagan's treatment of military recruiters at the Harvard Law School contrary to the requirements of a federal law, the Solomon Amendment. I will argue that her vehement opposition to that law – in the face of a clear federal mandate – raises doubts as to whether she possesses the requisite judicial temperament and impartial nature required of a Supreme Court justice.

General Kagan has been an outspoken opponent of the law passed by Congress in 1993 which prohibits open homosexuality in the military. Congress, recognizing the importance of widespread recruiting to the success of the military, later passed the law known as "the Solomon Amendment" in 1995. It requires any school receiving funding from the Department of Defense to allow military recruiters on campus.

It was not until 2002 that the Department of Defense began to enforce the Solomon Amendment's funding requirements. Under that pressure, Harvard reluctantly began to cooperate again with military recruiters. It was after then-Professor Kagan became dean of the Harvard Law School in 2003 that she wrote to the school to make clear just how grudging that cooperation would be in light of the military's "repugnant" policy.¹ She declared, "I abhor the military's discriminatory recruitment policy," and she added for good measure that the policy was "...a profound wrong—a moral injustice of the first order."

In 2005, regarding the Solomon Amendment, Dean Kagan wrote to the Harvard Law School community, "I believe the military's discriminatory employment policy is deeply wrong—both unwise and unjust."² "A moral injustice of the first order?" Really?

General Kagan's comments indicate that she had little or no concern about the specific needs of our military institutions or the men and women who serve in them. Her remarks reveal that nothing will stand in the way of her extensive and aggressive political activism – not even the well-being of the members of our armed forces.

Mr. Chairman, the purpose of our military is to fight and win this country's wars. War is the most difficult human activity bar none. It requires organized groups of men and women to act with strategic and tactical lethality while its members are simultaneously being wounded and killed. As the great Prussian military analyst General Karl von Clausewitz wrote, "Everything in war is simple, but the simplest thing is difficult."

In war, the normal ways of living are completely sacrificed in the harsh, punishing environment of combat. Even in peace time settings and in units not engaged in combat, great sacrifices are required. Foremost among these deprivations is the elimination of personal privacy and space. Military life, by its nature, must be characterized by a regular lack of privacy and repeated situations of forced intimacy.

In such an environment it is *not* "a moral injustice of the first order" to minimize the sexual exposure that such an environment forces on soldiers, sailors, corpsmen, and airmen. *It is the only sensible and effective way to run a military organization.* The forced exposure of one's most intimate nature to others possessing the capacity for same-sex attraction would systematically corrode morale and military

effectiveness. It is this difficult reality that the military wishes to avoid with the adoption of policies like “Don’t Ask, Don’t Tell.”

Elena Kagan’s various remarks regarding the military recruiting controversy at Harvard suggest a breathtaking lack of perspective about the military and the national security needs of this nation. These deficiencies alone *should* call into question her qualifications to be an associate justice of the United States Supreme Court.

With all this said, it must be noted that the current law on homosexuality in the military has been *repeatedly* challenged—and upheld—by the federal courts. As all of you know, the Solomon Amendment was deemed constitutional by a unanimous Supreme Court. Then Dean Kagan had taken the opportunity of a circuit court ruling striking down the Solomon Amendment to stick the military recruiters in an off-campus ghetto even though the court had stayed its ruling. That stay did not stay Kagan.

Some writers have been defending Kagan’s actions on military recruiting, claiming they do not demonstrate that she is “anti-military.” There is truth in that only in that she does not oppose the military simply because they *are* the military.

However, she clearly *does* oppose the military because they have not yet bowed to the demands of the sexual counter-culture. It's not that Elena Kagan does not want the military to defend our nation against terrorism; it's just that she wants to use the military to advance the Left's radical social policies *more*. At least, from her record, we know her priorities.

This becomes even more clear when one examines a 2005 Harvard law professors' brief in the Solomon Amendment case -- which Kagan signed. Apart from its technical legal argument, this amicus brief began with a sweeping declaration that is startling in its implications. Kagan and the others declared, "We are deeply committed to a fundamental moral principle: 'A society that discriminates based on sexual orientation—or that tolerates discrimination by its members—is not a just society.'"

Note that Kagan and the professors condemn not only a society that "discriminates," but one "that tolerates discrimination by its members." The implications of this are chilling for the freedom of speech and the freedom of religion. It should be frightening not only to the majority of Americans that still affirm that homosexual behavior is morally wrong, but especially disturbing to

those whose views on homosexuality are the result of an orthodox view of the Bible which clearly characterizes homosexual conduct as sinful.

It should also be alarming for those of us who live in the 45 states that still define marriage as the union of a man and a woman. It seems rather obvious that Elena Kagan would strike down any marital statute – including the federal Defense of Marriage Act – which defines marriage as being only between one man and one woman. She should be asked to square the statement in the 2005 amicus brief with the view of the vast majority of Americans that traditional marriage is not only constitutional, but that it is the only acceptable form of marriage.

It is also worth noting that the nominee's outrage about the military recruiting policy has been selective and, perhaps, hypocritical. President Clinton signed the law, passed by Congress in 1993, that now defines policy regarding open homosexuality in the military. The Solomon Amendment also became law under President Clinton. Yet, those facts did not keep General Kagan from working in that administration to advance her career. Nor did it keep her from going along with Harvard University's acceptance of a massive gift from a Saudi Arabian prince who wished to insinuate acceptance of shariah law into one of America's foremost legal institutions. Shariah is the religious law of Saudi Arabia, and it

serves harsh treatment of women and homosexuals, but the prince and his minions did not receive the treatment dished out to the American military recruiters at Harvard Law School.

As an aside, General Kagan herself has been pointedly telling us all about her great love for the military as of late. She describes her close relations with military personnel at Harvard, and we hear about a 2007 speech at West Point. In my mind, this makes her actions somewhat worse because she was willing – through public e-mails and actions – to stigmatize the military as being morally inferior even though she supposedly had these close relationships. What are we to say of her? It appears that not even personal affection and friendships can trump her political and ideological commitments. This seems like a dangerous quality for a judge to have. In the courtroom, a neutral judge cannot abhor one of the parties that stand before her or cast off one party for the perceived greater good of the many.

In closing, I believe that Solicitor General Kagan subscribes to an ideological view of the world which will level all laws and institutions that do not accept the alternative sexual practices and living arrangements that she favors. It is a movement that is willing to sacrifice our military, our cherished institutions, and our freedoms for the sake of this narrow but incredibly disruptive ideological

agenda. She appears to have an agenda that neither the constitution nor the law will limit or constrain. We do not need a justice on the Supreme Court who sees it as her life mission to write the *Roe v. Wade* of homosexual rights. Her political and legal activism in this area endangers the military, and it endangers the institution of marriage. By themselves, these positions make her unfit to sit as an associate justice of the United States Supreme Court. I urge the Senate to reject her nomination.

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NOTES

¹ E-mail, Dean Kagan to Harvard Law School, October 9, 2003.

² E-mail, Dean Kagan to Harvard Law School, September 20, 2005.

1 July 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy,

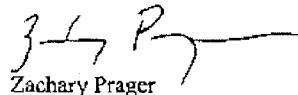
I write in support of Solicitor General Elena Kagan's nomination to the United States Supreme Court. I am a lieutenant in the U.S. Navy Judge Advocate General's Corps. I was a student at Harvard Law School under Ms. Kagan and commissioned into the Navy upon graduation in 2007. Without Ms. Kagan's leadership and evenhandedness as Dean, I would not have joined the military.

Dean Kagan set a standard at Harvard of respect for military servicemembers, while still expressing her opposition to the Don't Ask, Don't Tell policy. She made it clear that Harvard Law School would fight the policy, but never impugn the soldiers, sailors and airmen who came to Harvard to recruit. Her guidance on this issue permeated throughout her administration, from the Dean of Student's Office to the Office of Career Services. Like many students, I was reticent to join an institution that practices overt discrimination. The environment they established opened the door for me to consider the military as a career path. Their example helped clear my reservations.

My decision to join the Navy was welcomed by Dean Kagan's administration. Military service was valued the same as any other public interest job. At a dinner to honor those of us entering public service, I dined next to public defenders, federal prosecutors and human rights activists. Notably, I now serve in the Navy alongside another classmate, and alumni from my class serve in the Marine Corps and Army Judge Advocate General's Corps.

I am proud to serve in the Navy and I love my job. I completed a deployment to Iraq and leave soon for my next tour overseas in Japan. I am grateful to Dean Kagan for her leadership on military recruiting, as well as the myriad of other positive impacts that she had on my law school experience. I would not be serving today without it. She has earned my most heartfelt support for her nomination.

Very Respectfully,



Zachary Prager

Zachary W. Prager



**TESTIMONY OF STEPHEN B. PRESSER, RAOUL BERGER
PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY
SCHOOL OF LAW, HEARINGS ON THE CONFIRMATION OF
SOLICITOR GENERAL ELENA KAGAN AS ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT BEFORE THE JUDICIARY
COMMITTEE, UNITED STATES SENATE**

JULY 1, 2010

My name is Stephen B. Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I have been teaching and writing about American legal and Constitutional history for the past thirty-six years. I am the senior author of the leading law school American Legal History casebook, a co-author of a Constitutional Law casebook, the author of a monograph on modern Constitutional law, as well as the author of a treatise on shareholder liability for corporate debts and a co-author of a treatise on mergers and acquisitions. I have also written many articles on legal history, Constitutional Law, and corporations. I am honored to have this opportunity to appear at the invitation of this committee, to testify in connection with the confirmation hearings regarding the nomination of Solicitor General Elena Kagan as an Associate Justice of the United States Supreme Court.

The specific question I have been asked to address is the propriety of a Supreme Court Justice's turning to international or foreign authority in order to interpret the Constitution of the United States. This question is really part of a broader problem, which is, simply stated, what a Justice is supposed to do when a Justice explicates the meaning of Constitutional provisions. This broader problem is one that I have been dealing with throughout the almost four decades I have been in the academy, and while there have been countless books and articles written by law

professors and political scientists addressing this problem, as time has gone on, the issue has become, for me, one that lends itself to relatively simple straightforward analysis. The more time I spend with this issue, the more important it seems to be to return to first principles, and, in particular, to return to the most important statement on judicial review, that offered by Alexander Hamilton, in Federalist 78, quoting the Baron de Montesquieu, to the effect that there can be no liberty when the judicial function of government is not separated from the legislative.¹ Or, to put it in the vernacular, to state a concept clearly understood by most of the American people, though not necessarily by most legal academics,² it is the job of Justices to *judge*, not to *make* law.

In the past few years we have seen several instances of Justices turning to international or foreign law to make American constitutional law. Thus Justice Kennedy, turning to the law of the European Community, writing his opinion in *Lawrence v. Texas*,³ found support for his view — departing clearly from prior precedent — that consensual homosexual acts could not be criminally punished. In a similar manner, recent Supreme Court decisions, again relying at least in part on European and other international authority, have decided that it is unconstitutional to apply the death penalty to minors,⁴ and that it is unconstitutional to apply the death penalty to

¹ Said Montesquieu, “Nor is there liberty if the power of judging is not separate from legislative power and from executive power.” MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et. al eds. & trans., Cambridge Univ. Press 1989) (1749), quoted in THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (using a slightly different formulation, which is “there is no liberty, if the power of judging be not separated from the legislative and executive powers”). The Baron de Montesquieu, Charles de Secondat (1689-1755), was a brilliant French Enlightenment political thinker who is generally credited with the modern notion of the separation of legislative, executive, and judicial powers on which, in large part, our Constitution is based.

² For a discussion of the different assumptions and understandings of popular culture and elite opinion (as it manifests itself in Supreme Court decisions and academic discourse), focused on the appropriateness of reliance on foreign law, see Steven G. Calabresi, “‘A Shining City on A Hill’: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law,” 86. B.U.L.Rev. 1335, 1410-1414 (2006).

³ 539 U.S. 558, 572-573, 576-577 (2003) (Opinion of Justice Kennedy for the Court, referring to a decision by the European Court of Human Rights).

⁴ *Roper v. Simmons*, 543 U.S. 551, 575-578 (2005) (Opinion for the Court by Justice Kennedy, invoking *inter alia*, the United Nations Convention on the Rights of the Child, which “contains an express prohibition on capital

persons suffering from mental retardation.⁵ The results in all of these cases could conceivably be wise social policy, but they all represent, really, legislative acts by the Court. In our polity, where the people are supposed to be sovereign, changes in such social policies are supposed to be for the popular organ, the legislature, or for the ultimate popular act, amending the Constitution.

The idea that there ought to be a “living constitution,” that it is the job of the Justices to remold and reinterpret Constitutional provisions to meet the needs of the times, dominates the legal academy, and, too often, wins a majority of the Court, but it seems to me that it flies in the face of Hamilton’s and Montesquieu’s teaching, and indeed, is nothing less than a betrayal of the core American ideal, that ours is a government of laws, not men,⁶ and that we live by the rule of law, and not by the arbitrary fiat of judges or Justices.

This notion of a living constitution was recently expressed in a Harvard Commencement address by no less a figure than recently-retired Justice Souter, who claimed that it was inevitable that Justices should remake constitutional law, since the constitution was designed for “living people,” and many of the provisions in the constitution point in contrary directions, facts that called for creativity on the part of the Justices in reconciling these conflicting principles, and in

punishment for crimes committed by juveniles under 18,” and which “every country in the world has ratified save for the United States and Somalia.”

⁵ *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)(Opinion for the Court by Justice Stevens, referencing the views of “the world community,” and of “other nations that share our Anglo-American heritage, and [of] the leading members of the Western European community.”

⁶ See, e.g. Article XXX of the First Part of the Massachusetts Constitution, drafted by John Adams in 1780, “In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

accommodating the changing needs of the American people.⁷ Curiously absent from Justice Souter's commencement speech, however, was a recognition that legislatures, not Justices, are best equipped to meet the needs of a "living people," and that the task of reconciling conflicting Constitutional principles does not give license for departing from prior precedent or making new Constitutional law. Such tasks might most wisely be accomplished through the Amendment process. Also missing from Justice Souter's speech was an understanding that, as the Tenth Amendment to the Constitution makes clear,⁸ and as James Madison underscored in *Federalist* 45,⁹ the primary policy-making authority in our country ought to be the state and local governments, not the federal judiciary.

Turning to international or foreign authority, then, as a means of reworking Constitutional provisions or overturning prior precedents betrays the nature of our federalist system, and flies in the face of the rule of law.¹⁰ As my colleague, John McGinnis, has stated, "There is no reason to think that foreign laws, including foreign judicial decisions, contain better

⁷ David H. Souter, Commencement Address at Harvard University, delivered May 27, 2010, available, *inter alia*, at <http://www.thedefendersonline.com/2010/06/04/text-of-justice-david-souter-s-speech-harvard-commencement-remarks/> (accessed June 26, 2010).

⁸ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment X.

⁹ "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite." *Federalist* 45 (James Madison), Cooke, note 1, *supra* at 313. The *Federalist Papers* are generally acknowledged to be the finest contemporary guide to understanding the Constitution, and, indeed, the finest work of political science ever written by Americans.

¹⁰ See, e.g. Donald J. Kochan, "Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law," 29 *Fordham Int'l L. J.* 507, 509 (2006) ("When judges are allowed to cherry-pick from laws around the world to define and interpret their laws at home, activism is emboldened and the rule of law is diminished.") See also Justice Thomas's comment in *Foster v. Florida*, 537 U.S. 990 (2002) that "While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans." (Thomas, J. concurring in denial of certiorari) (emphasis in original). For elaboration of Justice Scalia's view that using contemporary foreign law as a guide to interpretation of the United States Constitution is inconsistent with originalist theory and the theory of popular sovereignty on which the Constitution is based, see, e.g. "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer," 3 *Int'l J. Const. L.* 519 (2005).

norms for the United States than those made democratically in the United States, because they do not purport to be good norms for the United States, but instead emerge from complex social structures that are different from those in the United States.”¹¹

It should be acknowledged, of course, that from the beginning of our history federal judges and Supreme Court justices have used international authority in order to reach judicial decisions, and, indeed even to aid in the interpretation of provisions of the United States Constitution.¹² But there is a profound difference between this use of international law engaged in since the early years of our republic, and that use of Justice Kennedy’s referred to earlier. In the early years of our republic, and subsequently, judges and justices have quite properly sought to understand and apply the “law of nations,” a body of supra-constitutional principles that apply to every nation, and that have been the subject of work by international scholars for hundreds of years. This body of law, however, these principles of the law of nations, have been understood to be reflections of what might best be understood as the law of nature, as divinely-revealed ever-constant simple restraints on all governments and all peoples.¹³

For example, as one important eighteenth century federal court decision explored, it is one of the dictates of the law of nations that citizens of nations that are at peace with one another should not enlist in the armed forces of third nations to make war on those nations at peace, lest this be deemed a cause of war, and lead to strife and death.¹⁴ The law of nations was a body of

¹¹ John O. McGinnis, “Foreign to Our Constitution,” 100 Nw.U.L.Rev. 303, 308 (2006).

¹² For some discussion of the longstanding nature of this practice see, e.g. David J. Seipp, “Our Law, Their Law, History, and the Citation of Foreign Law,” 86 B.U.L.Rev. 1417 (2006).

¹³ For this understanding in our early republic, and, in particular, how it was understood by Justice James Wilson, who, as a law professor, lectured on the law of nations and the law of nature, see, e.g. Stephen B. Presser, “A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence,” 73 Nw.U.L.Rev. 26, 48-52 (1978).

¹⁴ U.S. v. Henfield, 11 Fed. Cas. 1099 (C.C. Pa., 1793).

timeless principles, and not a means of radically changing the law. Recourse to the law of nations was a means of aligning national conduct with rules of international law in existence since before the establishment of our Constitution, rules our Constitution actually implicitly embraced.

This recourse to the law of nations, this traditional recourse to international law, is very different from turning to recent international or foreign jurisprudence to implement policies and rules very different from those previously prevailing. One is a longstanding legitimate use of international authority, the other is a usurpation of the sovereignty of the people.

As you members of the Senate examine the qualifications of General Kagan for this awesomely responsible position, you must ask yourselves whether she is a person who believes that it is appropriate to turn to international or foreign authority to alter the meaning of the federal Constitution. I do believe that if she is, this may lead you to question her qualifications as a potential Supreme Court Justice.

This is, of course, a call for you to make, and not for law professors like me. Still, I can say that I am aware of at least some troubling comments made by General Kagan when she was Dean Kagan, at the law school from which we both graduated. About two years ago, when Dean Kagan was introducing Justice Anthony Kennedy, before he spoke to Harvard Law students as part of the celebration of his twenty years on the Supreme Court bench, Dean Kagan praised him both as a jurist who addressed constitutional questions from an "independent" perspective, and as one who understood that questions of Constitutional interpretation had to be made pursuant to a

realization that the United States is part of an international community.¹⁵ Thus, Dean Kagan observed that “Justice Kennedy has emerged as a fiercely independent voice on cases involving all manners of legal issues,” and that “He has also spoken and written as many of you know about the importance of looking outward and of recognizing that our own legal system operates in an international context.” Further, Dean Kagan remarked that “I would point to Justice Kennedy’s independence. I would point to Justice Kennedy’s integrity, and I would point to Justice Kennedy’s unique and evolving vision of law. Far from swinging between positions that are defined by others, Justice Kennedy consistently charts his own course.” Dean Kagan concluded her introduction of the Justice by stating that Justice Kennedy was “one of our nation’s most admirable and greatest jurists.”¹⁶ It seems very likely to me, that in her words to introduce Justice Kennedy then, Dean Kagan laid out her own jurisprudential philosophy, and while I have reviewed a fair amount of Ms. Kagan’s comments in her professional career, it seems to me that this introduction of Justice Kennedy may well be the most concise and clear statement of where Ms. Kagan herself stands.

When a law school Dean is welcoming a graduate who sits on the United States Supreme Court, the Dean certainly does not make disparaging comments, and Ms. Kagan’s words might lend themselves to a variety of benign interpretations, but her praise of Justice Kennedy’s jurisprudence and his independence could certainly be interpreted as Ms. Kagan’s suggesting both that it was appropriate for Justices to formulate their own notions of what the Constitution should mean, and that it was appropriate for Justices to change the meaning of the Constitution by reference to emerging international norms and policies. As I have tried to suggest here, it is

¹⁵ Elena Kagan, Dean, Harvard Law School, Introduction at Q & A with Justice Kennedy at Harvard Law School (Mar. 11, 2008).

¹⁶ *Ibid.*

our tradition that both of those ideas are betrayals of what a Justice is supposed to do, and I do believe it is your task to try to discover if that is, in fact, what General Kagan believes.¹⁷ If she does, I think you have cause to hesitate before voting to confirm her as a Justice of the Supreme Court. In a country such as ours, governed by the rule of law, it is not the job of a judge or a Justice to have a “unique and evolving vision of law,” or to “chart his own course.” It is, to the best of his or her ability, to determine what the law is, and then to follow it. Before you vote to confirm a Justice Kagan, you must be sure that she understands that.

Respectfully submitted,

Stephen B. Presser¹⁸

¹⁷ This would seem to be Ms. Kagan’s view as well. In an important review of a book on the confirmation process, then Professor Kagan wrote that it ought to be the job of Senators reviewing the qualifications of a nominee to the Court to understand the jurisprudence that a nominee would implement on the Court, and that, in particular, Senators ought “to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires.” Elena Kagan, “Confirmation Messes Old and New,” 62 U.Chi.L.Rev. 919, 935 (1995).

¹⁸ I want to thank my research assistants, Ted Wells and Amy Chung, for thoroughly exploring the debate on using international and foreign sources for Constitutional interpretation, and to acknowledge the kindness of Steven Calabresi, John McGinnis, Laura Bridges, ArLynn Presser, and Elizabeth Stein in commenting on drafts of this testimony. The errors and inconsistencies that remain are mine alone.

**Testimony of Patricia Lee Refo on the Nomination of Solicitor General Elena Kagan as
Associate Justice on the Supreme Court of the United States**

I am a partner in the law firm of Snell & Wilmer in Phoenix, Arizona and Co-chair, with Dean JoAnne A. Epps of Temple University Beasley School of Law, of the Committee for the Evaluation of Supreme Court Nominees of the National Association of Women Lawyers ("NAWL"). On behalf of NAWL, I submit this testimony for the record in support of the confirmation of Solicitor General Elena Kagan.

The mission of the Committee is to review and evaluate the qualifications of each nominee to the United States Supreme Court with an emphasis on laws and decisions regarding women's rights or that have a special impact on women. After careful evaluation of General Kagan's background and qualifications, the Committee has concluded that General Kagan is well qualified for this position, which is the highest recommendation permitted. Based on its extensive review, the Committee is confident that General Kagan possesses the requisite intellectual and analytic talent, judicial temperament, and professional demeanor to serve on the highest court in the land. The Committee is equally confident that she will approach cases and controversies with a mind that is open to all perspectives and with an appreciation of the professional and societal difficulties encountered by women and minorities. We therefore encourage your vote in favor of her confirmation.

Founded over 100 years ago, and with thousands of members from all 50 states, NAWL is committed to supporting and advancing the interests of women lawyers and women's legal rights. From campaigning in the early 1900's for women's voting rights and the right of women to serve on juries, to supporting in 2009 the Lilly Ledbetter Fair Pay Act, NAWL has been a

supporter of the interests of women. As such, NAWL cares deeply about the composition of the Supreme Court and insuring that it includes the perspectives of all Americans, especially those of women, not just because most of our members are women, but because all of our members care about issues that affect women. This is the fourth nomination on which the Committee has submitted an evaluation and recommendation.

NAWL's recommendation today is based on the work of NAWL's Committee for the Evaluation of Supreme Court Nominees. In accordance with NAWL procedures, the Committee independently evaluated the qualifications of General Kagan to serve as an Associate Justice of the Supreme Court. The Committee placed special emphasis on matters regarding women's rights or that have a special impact on women. The 21 Committee members, appointed by the President of NAWL, include law professors and a law school dean, appellate practitioners and lawyers concentrating in litigation.

The Committee's work was extensive and exhaustive. We read thousands of pages of documents relating to General Kagan including her published articles, her publicly available speeches and voluminous other materials relating to her work as a scholar, as a law clerk and as an advocate in her various positions from Dean of Harvard Law School to Solicitor General and White House counsel. Committee members reviewed these documents as part of its assessment of General Kagan's ability to present sound legal analysis. While advocacy writings do not necessarily represent personal views and opinions, those writings were assessed for quality of reasoning including appropriate reliance on precedent.

In addition, members of the Committee interviewed well over 100 people who know General Kagan in a variety of capacities. Those interviewed included former colleagues in her various positions in the government and academia, former students, professional acquaintances,

former classmates, fellow law clerks and others with knowledge of General Kagan and her qualifications. The purpose of the interviews was to obtain information regarding General Kagan's legal abilities, legal philosophy and temperament, as well as information concerning her record of hiring and treatment of women, particularly during her tenure as the Dean of Harvard Law School. During the interviews, the Committee also sought information on the following specific topics: Women and the Workplace; Women and the Criminal Justice System; Women and Health Care; Women and Education; Women and Family; Women in the Military; Women and Finance; Women and Retirement; Policies and Laws Impacting Multicultural Women; Enforcement of Statutes regarding Women's Rights; Federal versus State Law Relief; and any other issues with likely impact on women.

Of those interviewed about General Kagan, one described her as having the potential to be "a great justice and to live up to the legacy of replacing a true legal giant." Another predicted that Kagan would be one of the best 15 justices to ever serve on the Court. Another said General Kagan will be the "Justice of the Ages." In over 100 interviews, not one person questioned her skill, intellect or capability. All emphasized her openness to listening to all disparate sides of an issue. Support for her nomination to the Supreme Court came from all demographic groups.

General Kagan has a keen intellect, as well as a deep knowledge of and respect for the Constitution, which she has repeatedly demonstrated in her writings and statements. She has already served in two of the highest positions in our nation's legal profession – Dean of Harvard Law School and Solicitor General of the United States – with great distinction and success. We note that she was also the first woman to hold either of these positions. Her tenure in these positions was marked by accomplishments, leadership and the highest quality legal thinking. In addition, our extensive interviewing process indicates that General Kagan was a leader in

bringing diversity into the hiring process of Harvard Law School. She is clearly an effective consensus builder. Moreover, the Committee believes that the fact that she has never served on the bench will bring a diversity to the current Supreme Court that will enhance and enrich its deliberations. We believe she will follow in the footsteps of many of our finest Supreme Court Justices who also did not have prior judicial experience.

Finally, while the Committee does not support her nomination simply because she is a woman, it is long past time to increase the number of women who serve on the Court. With her confirmation, you will be taking an important step to rectify the centuries-old disparity in the representation of women on our highest court.

For all of these reasons, NAWL strongly supports the confirmation of Solicitor General Elena Kagan to be an Associate Justice of the United States Supreme Court.



HARVARD LAW SCHOOL

CAMBRIDGE • MASSACHUSETTS • 02138

David Rosenberg
Lee S. Kreindler Professor of Law

Direct line: [REDACTED]
Email: [REDACTED]

June 28, 2010

Senator Patrick Leahy
Senator Jeff Sessions
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

I am a member of the Harvard Law School (HLS) faculty and write to provide information that may be of relevance to your consideration of Solicitor General Elena Kagan's nomination to become an Associate Justice of the United States Supreme Court. In particular, the information concerns my experience with then Dean Kagan regarding a clinical externship program I supervise that provides legal research support for the Counterterrorism Section of the National Security Division of the Department of Justice. Under this program, which began in the fall of 2004, between 4-7 students are accepted annually to provide legal research for 5-10 hours a week over the course of two semesters on projects relating to ongoing prosecutions and investigations, as well as to matters of more general application, such as production of a manual of jury instructions for counterterrorism trials.

I simply want to report the fact that then Dean Kagan's backing for the program was full, unwavering, and critically important to its creation and continuing effectiveness and success to date. Indeed, DOJ was reluctant to initiate such a program without Dean Kagan's confirmation of the school's support for the program, including an assurance that faculty, facilities, and even financial resources would be provided as needed to enable students to complete their assignments. Dean Kagan supplied the assurance because, as she indicated to me, the proposed program promised students a unique educational experience through the opportunity of working with and being trained by a highly competent group of DOJ attorneys and of performing important service to the nation.

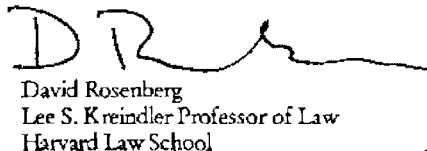
Over the course of her tenure, Dean Kagan intervened to facilitate the program by advising or encouraging the Office of Clinical Studies to adjust general requirements for participation in clinical externships to avoid overburdening or deterring student participation in the counterterrorism clinical and also to avoid imposing unnecessary costs on DOJ. Some requirements that were modified concerned the signing and filing of forms.

One modification, however, concerned a matter of substance and presented the possibility of ending the program outright. In 2005, the Clinical Office rules were changed to require all externship students to submit to the Office copies of writings they created as part of their clinical work. Unlike much clinical externship work, students in the counterterrorism program never create writings that become part of any judicial or other public record. DOJ informed me that they were unlikely to continue the program if this disclosure requirement remained in place.

In support of a request to Dean Kagan and the Clinical Office to waive this requirement, I made the case that the student work is always strictly privileged and confidential and of course may at times involve national security-sensitive matters. Upon this representation, I was informed by the Clinical Office that the requirement would be waived for students in my program because the cost of losing the program greatly exceeded the administrative benefits of the disclosures. I don't know the actual extent of Dean Kagan's involvement in this decision, but I strongly suspect it was substantial. I infer this from both the deliberative nature of the response I received, which was consistent with the way the Dean directly treated other questions relating to the program, and the expression of support and appreciation for the program's educational value.

In closing, I affirm that I received no teaching credit, remuneration, or other benefit from or in connection with the program's existence, so I am not supplying this information for any reason other than its possible utility in your decision-making process. I also believe that the counterterrorism clinical received no special consideration from the Dean. She exercised her normal deanal discretion after deliberative, careful examination of the evidence and interests involved, seeking only to do what she evidently did for all HLS programs, to gain maximum benefit for school's education mission. On the other hand, we received support that was always offered and given ungrudgingly.

Sincerely yours,


David Rosenberg
Lee S. Kreindler Professor of Law
Harvard Law School

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1 July 2010

TESTIMONY BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Ronald D. Rotunda*

You have asked my opinion regarding the instances in which Solicitor General Kagan should disqualify herself under 28 U.S.C.A. § 455. The relevant subsections are as follows:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding *in which his impartiality might reasonably be questioned*.

(b) He shall also disqualify himself in the following circumstances:

...

(3) Where he has served in governmental employment and in such capacity participated as counsel, *adviser* or material witness concerning the proceeding *or expressed an opinion concerning the merits of the particular case in controversy*;

...

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation . . .

(e) *No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)*. Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) [Omitted].¹

In interpreting §455(d)(1), we must take into account that it appears to be augmented by 28 U.S.C.A. § 455(a), which requires that any federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

* I am attaching an updated resume for your information.

¹ Emphasis added.

Ronald D. Rotunda

Congress enacted § 455(b)(3) in response to cases like *Laird v. Tatum*, 409 U.S. 824 (1972). Respondents in *Laird* moved to disqualify Justice Rehnquist because “of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents’ allegations, and because of his public statements about the lack of merit in respondents’ claims.”² Justice Rehnquist acknowledged that the respondents were—

substantially correct in characterizing my appearance before the Ervin Subcommittee as an “expert witness for the Justice Department” on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.³

Justice Rehnquist also conceded that he had referred to *Laird v. Tatum*, by name, “in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin.”⁴

At the time of this case, the relevant statutory language read:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.⁵

Applying this language of the statute, Justice Rehnquist refused to disqualify himself.

At the time, many people thought that Rehnquist should have recused himself and the statute should be revised to make that clear. Hence, Congress responded by amending the language⁶ so that it includes the following language: “participated as counsel, *adviser* or material

² 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

³ 409 U.S. 824, 825-26 (Memorandum of Rehnquist, J.).

⁴ 409 U.S. 824, 826-27 (Memorandum of Rehnquist, J.).

⁵ 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

⁶ 1974 U.S. Code, Congressional & Administrative News 6351, 6355 -6356 (1974), H.R. REP. 93-1453, H.R. Rep. No. 1453, 93TH Cong., 2nd Sess. 1974, 1974

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witness concerning the proceeding *or expressed an opinion concerning the merits of the particular case in controversy.*" The statute no longer requires that the judge have appeared as "of counsel." There is no requirement that the government lawyer (now judge or justice) have appeared on the brief.

Clearly, Rehnquist would have had to disqualify himself in *Laird v. Tatum*, if he had applied the test of this amended statute. The scope of that statute as applied to Solicitor General Kagan is the focus of my testimony.

First, it is clear that §455 applies to all federal judges, including those on the Supreme Court. It refers, after all, to any "*justice, judge, or magistrate judge of the United States.*" In addition, the disqualification that §455(b)(3) imposes that is so important that the parties cannot waive it.⁷

Under this standard, Solicitor General Kagan obviously is correct when she says that she must recuse herself in all cases in which she is counsel of record. However, her obligation to

U.S.C.C.A.N. 6351, 1974 WL 11635 (Leg. Hist.) refers specifically to the result in *Laird in Tatum*:

"Subsection (b)(3) of the amended statute is an addition to the language of the ABA canon on disqualification. It is intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer. This situation occurs more frequently in the federal judicial system than it does in state judicial systems and for this reason the committee believes that the federal statute should be more explicit than are the minimum standards adopted by the ABA for application in all the states. Subsection (b)(3) carries forward from subsection (b)(2) a required disqualification where the judge, as a government lawyer, had acted as counsel, adviser or material witness concerning the proceeding. In addition, the judge must disqualify himself where, as a government lawyer, he had expressed an opinion concerning the merits of the particular case in controversy. Thus, subsection (b)(3) is a statutory solution to the problems which have confronted many of our federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency. For example, Mr. Justice Byron White felt compelled to ask for a legal memorandum to guide his decision whether to remain in cases which were in the Department of Justice during his service there. A variation of this problem arose in *Laird v. Tatum*, 408 U.S. 1, wherein Mr. Justice William Rehnquist found it necessary to explain in a separate memorandum (409 U.S. 824) his decision not to disqualify himself because of prior testimony before a congressional committee."

⁷ 28 U.S.C.A. § 455(e).

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disqualify herself does not stop there. She also must recuse herself in all situations where she was an *adviser* “concerning the proceeding” or where she “*expressed an opinion concerning the merits of the particular case in controversy.*”

The statute defines “proceeding” broadly, to include “pretrial, trial, appellate review, or other stages of litigation.”⁸ “Proceeding” is not limited to trial because it includes all stages of litigation. The question is whether it includes steps preparatory to litigation, even if those steps occur before a case is actually filed. We know that other federal judicial rules governing disqualification refer to “proceeding” and acknowledge that a proceeding can be “pending” or “impending.”⁹

In addition, the United States Courts webpage advises that:

Judges may not hear cases in which they have either personal knowledge of the disputed facts, a personal bias concerning a party to the case, *earlier involvement in the case as a lawyer*, or a financial interest in any party or subject matter of the case.¹⁰

The lawyer may have been involved in advising how the litigation should be structured, in which case she would have had “earlier involvement in the case as a lawyer.”

It is not unusual for a lawyer to be involved in preparation for a particular case being filed by the client, or in preparation for expected litigation to be filed against the client. That advice is not part of “pretrial” in the sense that there is no motion or discovery in connection with pretrial matters. However, it is part of “pretrial” in the sense that it occurs prior to expected litigation; one of the “stages of litigation” occurs when the lawyer is preparing for particular

⁸ 28 U.S.C.A. §455(d)(1).

⁹ E.g., Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144 (Fed. Judicial Center 2002) (discussing *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), at p. 35 & n. 155, [http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/\\$file/recusal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/$file/recusal.pdf)). See also, Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions – A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611 (2001).

¹⁰ <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (emphasis added). See also, e.g., GUIDE TO JUDICIARY POLICY, *Ethics and Judicial Conduct*, volume 2, at p. 55-1 (June 2009), <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02-OGC-Post2USCOURTS-PublAdvisoryOps.pdf>.

“To start, a ‘judge should not make public comment on the merits of a matter *pending or impending* in any court.’” (emphasis added).

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litigation that one expects to file or to defend. Either pre-litigation strategy or pre-litigation investigation is one of the things that lawyers do.

For example, *United States v. Arnpriester*,¹¹ held that §455(b)(3) applies and requires a judge to disqualify himself in a criminal case because he was the U.S. Attorney at the time of an “investigation *preceding* the indictment”¹² that eventually led to indictment. The court emphasized: “there can be no prosecution unless it is preceded by investigation.”¹³ The court relied on both §§ 455(a) [impartiality might reasonably have been questioned] & 455(b)(3) [he had served in government employment as counsel in connection with indictment] in reaching its result. The trial judge was not personally involved in the investigation. It simply occurred under his watch.

Hence, if General Kagan was offering advice in connection with particular litigation that the United States would file, or that the United States expected that particular litigation would be brought against it, it is likely that §455(b)(3) — as augmented by §455(a) — would apply.

We do not know how many cases where Solicitor General Kagan must disqualify herself if she is confirmed, but this statute assuredly requires disqualification in many instances where she is not counsel of record. The statute does not limit disqualification to cases where General Kagan’s name is on the brief, nor does the statute require that she express her opinion “in writing.”

Several years ago, the Solicitor General’s office¹⁴ handled or offered advice on many of the detainee cases, even in the lower courts, and gave advice on many issues related to those cases. I do not know if the Solicitor General’s office is still involved on that issue. If it is, General Kagan would disqualify herself in those cases because she was involved as an “adviser” or “*expressed an opinion concerning the merits of the particular case in controversy.*”¹⁵ The

¹¹ 37 F.3d 466 (9th Cir. 1994).

¹² 37 F.3d at 466 (emphasis added).

¹³ 37 F.3d at 467.

¹⁴ *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) disqualified a judge (and former U.S. Attorney) because of actions that an assistant U.S. Attorney took while the judge was the U.S. Attorney. The U.S. Attorney was *not* personally involved in the investigation. Nonetheless, the court disqualified the judge (who was the former U.S. Attorney): “This analysis imputes to the United States Attorney the knowledge and acts of his assistants.” 37 F.3d at 467.

¹⁵ Carter G. Phillips, a former assistant to the Solicitor General, has said that she should interpret the statute broadly, and she should therefore disqualify herself from any case in which she participated in “conversations — regardless of whether she ultimately signed the

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advice, given the language of the statute, would relate to the “merits of the particular case” and not simply observations about law in general or law involving another case, as opposed to law in the particular case that is now before her as a Supreme Court Justice. It is not necessary that she be listed as “of counsel” on the brief or be counsel of record. The fact that she gave advice about the proceeding is all that is necessary to require her to disqualify herself. The Solicitor General will have to search her records and make sure that she disqualifies herself in such circumstances.¹⁶

Similarly, if the Administration has asked her advice (and she has given it) on the constitutionality of proposed legislation in connection with contemplated litigation so that it can be said that she has expressed an opinion concerning the merits of a particular case in controversy, she should disqualify herself if that case ever comes to the Supreme Court.

There are only a few cases that interpret this section.¹⁷ None involve the Solicitor General, but that is not surprising because it has been over 40 years since a Solicitor General has moved to the high court.¹⁸ Yet, the same basic principles discussed above still apply. We do not know if the Department of Justice (e.g., the Office of Legal Counsel), or the White House, asked

office’s filing.” See, Seth Stern, *CQ TODAY*, *Kagan’s Criteria for Recusals Not Wide Enough*, *Say Legal Scholars*, 5/18/2010, 2010 WLNR 10665560.

¹⁶ For example, if she gave advice or was involved in lower court litigation in California involving the Defense of Marriage Act, she would have to disqualify herself on that litigation. It does not matter if her involvement was in support of DOMA or against it. If she was involved in that case, she cannot sit on it if it comes before the U.S. Supreme Court. See, e.g.,

“Consistent with convention, SG Kagan’s name does not appear on the district-court brief. But two former senior DOJ officials have confirmed that, under usual practices, she surely must have been aware of, and approved, the positions taken in it.” Ed Whelan, <http://www.nationalreview.com/bench-memos/49585/sg-kagan-breaks-her-vows/ed-whelan> (Aug. 18, 2009).

I do not know if General Kagan was involved with this California case, but she can tell us. If she gave any advice regarding the Government’s brief, she would have to disqualify herself in that litigation

¹⁷ See 34 A.L.R. Fed. 2d 589 (Originally published in 2009).

¹⁸ E.g., *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994), discussed above. See also, *Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980)(per curiam), held that a magistrate judge was automatically disqualified to hear a motion for reduction of the sentence because the magistrate judge was the Assistant United States attorney who had represented the government in earlier proceedings on the defendant’s motion for reduction of sentence.

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her advice on how to structure health care legislation in order to prepare for particular litigation, or if she has “expressed an opinion concerning the merits” of the litigation that various states have recently filed. If she has, must disqualify herself if that case goes to the Supreme Court.

In short, Solicitor General Kagan should disqualify herself in all instances where participated as counsel, “*adviser* or material witness concerning the proceeding *or* expressed an opinion concerning the merits of the particular case in controversy.” Her disqualification does not limit itself to cases where she is counsel of record. Under 28 U.S.C.A. § 455(b)(3), General Kagan must recuse herself from:

- Cases in which she approved appeals and/or amicus filings, whether or not she was “counsel of record;”
- Cases where she gave advice about, or “*expressed an opinion concerning the merits of the particular case* in the lower courts, or approved of lower court briefs in a case, although she is not listed a counsel on the brief;
- Cases in which she sat in on meetings with counsel and thereby “*participated* as counsel, *adviser* or material witness concerning the proceeding *or expressed an opinion concerning the merits of the particular case* in controversy,” even though Deputy Solicitor General Neal K. Katyal is listed as the counsel of record;¹⁹
- Cases in which the Supreme Court asked the Solicitor General whether it should hear the case;
- Cases before the time she was officially confirmed as Solicitor General if she gave advice or *expressed an opinion concerning the merits of the particular case* with Government lawyers who would soon become subordinate to her once she was officially confirmed;
- Cases in litigation where the Department of Justice or other Government lawyers (e.g., lawyers in the office of Counsel to the President) may have asked for her views on questions of constitutional significance or where she offered other legal advice; and,
- Cases in the lower courts in which the Department of Justice solicited her views.

➤ In all of these circumstances, it does not matter if her advice was oral or written, because the statute does not draw that distinction.

¹⁹ The court in *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994), disqualified a judge because actions were taken by an assistant U.S. Attorney when the judge was U.S. Attorney. The U.S. Attorney was *not* personally involved in the investigation. Nonetheless, the court disqualified the judge and former U.S. Attorney: “This analysis imputes to the United States Attorney the knowledge and acts of his assistants.” 37 F.3d at 467.


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- And, if she recuses herself, her disqualification is not subject to waiver by the parties, pursuant to 28 U.S.C.A. § 455(e), which provides that no justice “*shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).*”

We do not know how many cases that would be. However, she has been Solicitor General for a relatively short time, so the number of cases may not be that large. In addition, over the course of the next year or so, we should expect that number of disqualifications should drop substantially.

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August 2008-December 2008	PROFESSOR OF LAW, Chapman University School of Law
June 17, 2009 – Jan. 31, 2013	COMMISSIONER, Fair Political Practices Commission a regulatory body of the State of California,
2006- August 2008	UNIVERSITY PROFESSOR AND PROFESSOR OF LAW, George Mason University
2002-2006	THE GEORGE MASON UNIVERSITY FOUNDATION PROFESSOR OF LAW, George Mason University School of Law
Nov. to Dec. 2002	Visiting Scholar, Katholieke Universiteit Leuven, Faculty of Law, Leuven, Belgium
May 2004	Visiting Lecturer, The Institute for Law and Economics, Institut für Recht und Ökonomik, The University of Hamburg, Germany
June 2004-May 2005	Special Counsel to General Counsel, Department of Defense, The Pentagon
December 2005	Visiting Lecturer, The Institute for Law and Economics, Institut für Recht und Ökonomik, The University of Hamburg, Germany

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1993 - 2002	THE ALBERT E. JENNER, JR. PROFESSOR OF LAW, University of Illinois College of Law
Since 2002	THE ALBERT E. JENNER, JR. PROFESSOR OF LAW, EMERITUS, University of Illinois College of Law
Fall, 2001	Visiting Professor, George Mason University School of Law
Spring & Fall 2000	Cato Institute, Washington, D.C.; Senior Fellow in Constitutional Studies [Senior Fellow in Constitutional Studies, 2001-2009]
Spring, 1999	Visiting Professor, holding the JOHN S. STONE ENDOWED CHAIR OF LAW, University of Alabama School of Law
August 1980 - 1992	Professor of Law, University of Illinois College of Law
March 1986	Fulbright Professor, Maracaibo and Caracas, Venezuela, under the auspices of the Embassy of the United States and the Catholic University Andres Bello
January -- June, 1981	Fulbright Research Scholar, Italy
Spring 1981	Visiting Professor of Law, European University Institute, Florence, Italy
August 1977 -- August, 1980	Associate Professor of Law, University of Illinois College of Law
August 1974 -- August 1977	Assistant Professor of Law, University of Illinois College of Law
April 1973 - July 1974	Assistant Counsel, U.S. Senate Select Committee on Presidential Campaign Activities
July 1971 - April, 1973	Associate, Wilmer, Cutler & Pickering Washington, DC

August 1970 – July 1971 Law Clerk to Judge Walter R. Mansfield, Second Circuit, New York, N.Y.

Education:

Legal: HARVARD LAW SCHOOL (1967- 1970)
Harvard Law Review, volumes 82 & 83
J.D., 1970 Magna Cum Laude

College: HARVARD COLLEGE (1963- 1967)
A.B., 1967 Magna Cum Laude in Government

Member:

American Law Institute (since 1977); Life Fellow of the American Bar Foundation (since 1989); Life Fellow of the Illinois Bar Foundation (since 1991); The Board of Editors, The Corporation Law Review (1978-1985); New York Bar (since 1971); Washington, D.C. Bar and D.C. District Court Bar (since 1971); Illinois Bar (since 1975); 2nd Circuit Bar (since 1971); Central District of Illinois (since 1990); 7th Circuit (since 1990); U.S. Supreme Court Bar (since 1974); 4th Circuit, since 2009. Member: American Bar Association, Washington, D.C. Bar Association, Illinois State Bar Association, Seventh Circuit Bar Association; The Multistate Professional Responsibility Examination Committee of the National Conference of Bar Examiners (1980-1987); AALS, Section on Professional Responsibility, Chairman Elect (1984-85), Chairman (1985-86); Who's Who In America (since 44th Ed.) and various other Who's Who; American Lawyer Media, L.P., National Board of Contributors (1990-2000).

Scholarly Influence and Honors:

Symposium, *Interpreting Legal Citations*, 29 JOURNAL OF LEGAL STUDIES (part 2) (U. Chicago Press, Jan. 2000), sought to determine the influence, productivity, and reputation of law professors. Under various measures, Professor Rotunda scored among the highest in the nation. *E.g.*, scholarly impact, most-cited law faculty in the United States, 17th (p. 470); reputation of judges, legal scholars, etc. on Internet, 34th (p. 331); scholar's non-scholarly reputation, 27th (p. 334); most influential legal treatises since 1978, 7th (p. 405).

In May 2000, *American Law Media*, publisher of *The American Lawyer*, the *National Law Journal*, and the *Legal Times*, picked Professor Rotunda as one of the ten most influential Illinois Lawyers. He was the only academic on the list.

- Appointed UNIVERSITY PROFESSOR, August 2006, George Mason University.
- The 2002-2003 *New Educational Quality Ranking* of U.S. Law Schools (EQR) ranks Professor Rotunda as the eleventh most cited of all law faculty in the United States. See http://www.leiterrankings.com/faculty/2002/faculty_impact_cites.shtml

- Selected UNIVERSITY SCHOLAR for 1996-1999, University of Illinois.
- 1989, Ross and Helen Workman Research Award.
- 1984, David C. Baum Memorial Research Award.
- 1984, National Institute for Dispute Resolution Award.
- Fall, 1980, appointed Associate, in the Center for Advanced Study, University of Illinois.

LIST OF PUBLICATIONS:

BOOKS:

PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (Foundation Press, Mineola, N.Y., 1976) (with Thomas D. Morgan).

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TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (West Publishing Co., St. Paul, Minnesota, 1986) (*three volume treatise*) (with John E. Nowak and J. Nelson Young).

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What Can Congress Make You Do?, ORANGE COUNTY REGISTER, May 23, 2010, at p. C2, <http://www.ocregister.com/articles/congress-75386-ocprint-buy-insurance.html>

Other Activities:

March-April, 1984, Expert Witness for State of Nebraska on Legal Ethics at the Impeachment Trial of Nebraska Attorney General Paul L. Douglas (tried before the State Supreme Court; the first impeachment trial in nearly a century).

July 1985, Assistant Chief Counsel, State of Alaska, Senate Impeachment Inquiry of Governor William Sheffield, (presented before the Alaskan Senate).

Speaker at various ABA sponsored conferences on Legal Ethics; Speaker at AALS workshop on Legal Ethics; Speaker on ABA videotape series, "Dilemmas in Legal Ethics."

Interviewed at various times on Radio and Television shows, such as MacNeil/Lehrer News Hour, Firing Line, CNN News, CNN Burden of Proof, ABC's Nightline, National Public Radio, News Hour with Jim Lehrer, Fox News, etc.

1985--1986, Reporter for Illinois Judicial Conference, Committee on Judicial Ethics.

1981-1986, Radio commentator (weekly comments on legal issues in the news), WILL-AM Public Radio.

1986-87, Reporter of Illinois State Bar Association Committee on Professionalism.

1987-2000, Member of Consultant Group of American Law Institute's RESTATEMENT OF THE

LAW GOVERNING LAWYERS.

1986-1994, Consultant, Administrative Conference of the United States (on various issues relating to conflicts of interest and legal ethics).

1989-1992, Member, Bar Admissions Committee of the Association of American Law Schools.

1990-1991, Member, Joint Illinois State Bar Association & Chicago Bar Association Committee on Professional Conduct.

1991-1997, Member, American Bar Association Standing Committee on Professional Discipline.

CHAIR, Subcommittee on Model Rules Review (1992-1997). [The subcommittee that I chaired drafted the MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT that the ABA House of Delegates approved on August 11, 1993.]

1992, Member, Illinois State Bar Association [ISBA] Special Committee on Professionalism; CHAIR, Subcommittee on Celebration of the Legal Profession.

Spring 1993, Constitutional Law Adviser, SUPREME NATIONAL COUNCIL OF CAMBODIA. I traveled to Cambodia and worked with officials of UNTAC (the United Nations Transitional Authority in Cambodia) and Cambodian political leaders, who were charged with drafting a new Constitution to govern that nation after the United Nations troop withdrawal.

1994-1997, LIAISON, ABA Standing Committee on Ethics and Professional Responsibility.

1994-1996, Member, Illinois State Bar Association [ISBA] Standing Committee on the Attorney Registration and Disciplinary Commission.

Since 1994, Member, Publications Board of the A.B.A. Center for Professional Responsibility; vice chair, 1997-2001.

Since 1996, Member, Executive Committee of the Professional Responsibility, Legal Ethics & Legal Education Practice Group of the Federalist Society; Chair-elect, 1999; Chair, 2000

Winter 1996, Constitutional Law Adviser, SUPREME CONSTITUTIONAL COURT OF MOLDOVA.

Under the auspices of the United States Agency for International Development, I consulted with the six-member Supreme Constitutional Court of Moldova in connection with that Court's efforts to create an independent judiciary. The Court came into existence on January 1, 1996.

Spring 1996, Consultant, CHAMBER OF ADVOCATES, of the CZECH REPUBLIC.

Under the auspices of the United States Agency for International Development, I spent the month of May 1996, in Prague, drafting Rules of Professional Responsibility for all lawyers in the Czech Republic. I also drafted the first Bar Examination on Professional Responsibility, and consulted with the Czech Supreme Court in connection with the Court's proposed Rules of Judicial Ethics and the efforts of the Court to create an independent judiciary.

Consulted with (and traveled to) various counties on constitutional and judicial issues (*e.g.*, Romania, Moldova, Ukraine, Cambodia) in connection with their move to democracy.

1997-1999, Special Counsel, Office of Independent Counsel (Whitewater Investigation).

Lecturer on issues relating to Constitutional Law, Federalism, Nation-Building, and the Legal Profession, throughout the United States as well as Canada, Cambodia, Czech Republic, England, Italy, Mexico, Moldova, Romania, Scotland, Turkey, Ukraine, and Venezuela.

1998-2002, Member, ADVISORY COUNCIL TO ETHICS 2000, the ABA Commission considering revisions to the ABA Model Rules of Professional Conduct.

2000-2002, Member, ADVISORY BOARD TO THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (This Board was charged with removing any remaining vestiges of organized crime to influence the Union, its officers, or its members.) This Board was part of "Project RISE" ("Respect, Integrity, Strength, Ethics").

2001-2008, Member, Editorial Board, CATO SUPREME COURT REVIEW.

Since 2003, Member, Advisory Board, the Center for Judicial Process, an interdisciplinary research center (an interdisciplinary research center connected to Albany Law School studying courts and judges)

2005-2006, Member of the Task Force on Judicial Functions of the Commission on Virginia Courts in the 21st Century: To Benefit All, to Exclude None

July, 2007, Riga, Latvia, International Judicial Conference hosted by the United States Embassy, the Supreme Court of Latvia, and the Latvian Ministry of Justice. I was one of the main speakers along with Justice Samuel Alito, the President of Latvia, the Prime Minister of Latvia, the Chief Justice of Latvia, and the Minister of Justice of Latvia

June 25, 2010

Hon. Patrick J. Leahy
Chairman, U.S. Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

Hon. Jefferson B. Sessions
Ranking Member, U.S. Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

I write this letter in support of the confirmation of Elena Kagan as an Associate Justice of the United States Supreme Court. Although she has held many titles since, including Dean of Harvard Law School and United States Solicitor General, I know her as Professor Kagan, as she was my Constitutional Law professor while a student at Harvard Law School. As she said during her confirmation hearings for solicitor general, she is a "famously excellent teacher," and I could not agree more.

I enrolled in Professor Kagan's Constitutional Law class during what I believe was her first semester at Harvard. Professor Kagan was a purely Socratic teacher, meaning she would randomly select a student to question about the cases read for that day's class and pose hypothetical questions about the cases for students to analyze and answer. She was an astute listener and amazingly adept at questioning students in a manner that instilled confidence in their ability to analyze complex hypothetical questions, and getting them to her answer, even if our responses were initially a little "off track." Professor Kagan had an uncanny ability to make all students' contributions relevant to the class discussion.

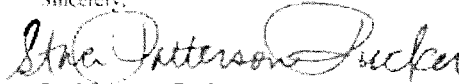
Make no mistake about it: Professor Kagan was tough, and she expected her students to be well-prepared for class. With that said, she had even higher standards for her own preparedness. Her communication skills were unmatched by any other professor's class I have ever had. She could summarize the previous day's two-hour class discussion into two minutes at the beginning of the next class. Her ability to quickly hone in on the issue and summarize it in a succinct, meaningful way – all without a bit of notes to aid her – never ceased to amaze me.

Aside from being an excellent teacher, I most recall Professor Kagan as a compassionate human being. She maintained an open-door policy to her office, and she was, in fact, one of the few professors I ever visited during office hours while a law student. I experienced some extremely challenging personal issues the semester I was Professor Kagan's student, which, combined with academic pressures, the stress of job searching and my duties as a resident tutor

and member of the Black Law Students' Association, overwhelmed me. Professor Kagan not only took note of my change in demeanor but gave me the space to really express the frustrations of law school and life in general one afternoon in her office. She encouraged and supported me as an individual just by giving me a few minutes of her time and showing her compassion. This experience demonstrated Professor Kagan's deep understanding of and ability to connect with people, a virtue which could very well be lost by someone with a resume as impressive as hers.

Professor Kagan's qualifications as a jurist, communicator and legal scholar are well-documented and do not need expansion here. However, I believe it's worthy of note and relevant to attest to Professor Kagan's emotional intelligence, empathy and ability to relate to others. These traits, combined with her keen intellect and extensive experience, make Professor Kagan exceptionally qualified to serve the Court as an Associate Justice.

Sincerely,

A handwritten signature in cursive script that reads "Staci Patterson Rucker". The signature is written in dark ink and is positioned above the printed name.

Staci Patterson Rucker
Harvard Law School '01

1065

Schnader
ATTORNEYS AT LAW
1935 — 75 YEARS — 2010

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May 24, 2010

Jerome Shestack

[REDACTED]

JUN 7 '10 10:10 AM

Senator Patrick Leahy
433 Russell Senate Bldg
United States Senate
Washington, DC 20510

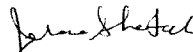
Dear Senator:

I hope your Committee will approve Elena Kagan for the Supreme Court. As a Past President of the American Bar Association and a long time member of the ABA Standing Committee on the Federal Judiciary, I am familiar with the qualifications sought for Supreme Court nominees.

I have known Solicitor General Kagan for many years. Her love of justice, her open mind and uncommon gravitas are qualities that will make her an outstanding member of the Court. As Dean of Harvard Law School, of which I am an alumni, she achieved diversity, while at the same time ending the disharmony that she met upon becoming Dean. All of her activities are stamped with excellence.

Our Court and nation will be well served if Elena Kagan becomes a Justice of the Supreme Court.

Sincerely,


Jerome Shestack

Schnader Harrison Segal & Lewis LLP
NEW YORK PENNSYLVANIA CALIFORNIA WASHINGTON, DC NEW JERSEY DELAWARE PHDATA 3297556_1

1066

COMMITTEE ON RULES

CHAIRWOMAN

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LOUISE M. SLAUGHTER
CONGRESS OF THE UNITED STATES
28TH DISTRICT, NEW YORK

May 18, 2010

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The Honorable Patrick H. Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Jeff Sessions
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy,

I want to express my sincere appreciation for your continued commitment to ensuring that the next Associate Justice of the Supreme Court will hold the Constitution to the highest standard. It is with tremendous pride that I write to you regarding President Obama's nomination of a woman, Solicitor General Elena Kagan, to the Supreme Court of the United States.

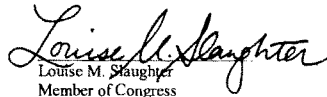
Solicitor General Kagan is the second distinguished woman to be considered for the highest court within the past year. This historic achievement is a testament to the progress women have made in recent years. In order for the Supreme Court to be truly representative of the citizens of the United States, we must increase the number of women on the highest court.

As we do not have a judicial record to review for Solicitor General Kagan, it is imperative that the Senate Judiciary Committee fully question the nominee with respect to women's rights. The emergence of a memorandum co-authored by Solicitor General Kagan during her time as a White House aide in the Clinton Administration regarding abortion is troubling. As Co Chair of the Pro Choice Caucus, I urge you and the Committee to keep the constitutional right to choose at the forefront of your minds as you question Solicitor General Kagan.

Following the contentious debate regarding federal funding for abortion leading up to the historic passage of health care reform, it is essential that the constitutionality of a woman's right to choose remain clear, unwavering and longstanding. The recent passage of several state laws designed to undermine the strength of *Roe v. Wade* further signifies the intense nature of these issues. As these laws are being brought to the courts, it is critical that we have a full understanding of Solicitor General Kagan's interpretation of the constitutional right to choose. The next Supreme Court Justice must be unwavering in their support of judicial precedent with respect to women's rights.

In light of Solicitor General Elena Kagan's nomination, I respectfully request that the Committee on the Judiciary work to ensure that the next Supreme Court Justice will uphold the constitutional right for women to choose what to do with their bodies. I appreciate your attention to this request.

Sincerely,


Louise M. Slaughter
Member of Congress

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100%

ARLEN SPECTER
PENNSYLVANIA

United States Senate
Washington, DC 20510-3802
specter@senate.gov

COMMITTEES
JUDICIARY
APPROPRIATIONS
ENVIRONMENT AND
PUBLIC WORKS
VETERANS' AFFAIRS
AGING

June 15, 2010

The Honorable Elena Kagan
Solicitor General of the United States
Washington, D.C.

Dear Solicitor General Kagan:

By letter dated May 25, 2010, I identified three subjects that I intend to cover at your confirmation hearing. I write to identify four additional subjects that I intend to cover.

The Supreme Court's Workload

The Supreme Court's workload has steadily declined. In 1870, the Court decided 280 of the 636 cases on its docket; in 1880, 365 of the 1,202 cases on its docket; and in 1886, 451 of the 1,396 cases on its docket. In 1926, the year Congress gave the Court nearly complete control of its docket by passing the Judiciary Act of 1925, the Court issued 223 signed opinions. The Court's output has declined significantly ever since. In the first year of the Rehnquist Court, the Court issued 146 opinions; in its last year, it issued only 74.

Chief Justice Rehnquist's successor, John Roberts, testified during his confirmation hearing that the Court could and should take additional cases. But the Court has not done so. During the 2005 Term, it heard argument in 87 cases and issued 69 signed opinions; during the 2006 Term, it heard argument in 78 cases and issued 68 signed opinions; during the 2007 Term, it heard argument in 75 cases and issued 67 signed opinions; and during 2008 Term, the Court heard argument in 78 cases and issued 75 signed opinions. The figures for the pending 2009 term will likely be in accord.

The Court continues to leave important issues unresolved. They include, as noted in my May 25 letter, the constitutionality of the Bush administration Terrorist Surveillance Program (TSP) and the contours of the Foreign Sovereign Immunity Act's domestic tort exception as applied to acts of terrorism.

Equally significant are unresolved circuit splits. Two prominent academic commentators note that the Roberts Court "is unable to address even half" of the circuit splits "identified by litigants." Tracey E. George & Christopher Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 Duke L.J. 1439, 1449 (2009). Questions on which the circuits have split include: May jurors consult the Bible during their deliberations in a criminal case and, if so, under what circumstances? Must a civil lawsuit predicated on a "state secret" be

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Letter to Solicitor General Elena Kagan
Page 2

dismissed? When may a federal agency withhold information in response to a FOIA request or subpoena on the ground that it would disclose the agency's "internal deliberations"? Do federal district courts have jurisdiction over petitions to expunge criminal records?

I intend to ask you, among other questions:

(1) Whether you agree with the Chief Justice Roberts's statement at his confirmation hearing that the "Court could contribute more to clarity and uniformity of the law by taking more cases;"

(2) Whether the Court has the capacity to hear substantially more cases than it has in recent years;

(3) Whether you favor reducing the number of Justices required to grant petitions for *certiorari* in cases involving circuit splits or otherwise; and

(4) Whether, if you are confirmed, you will join the Court's *cert.* pool or follow the practice of Justice Stevens (and the Justice for whom you clerked, Justice Thurgood Marshall) in reviewing petitions for *certiorari* yourself with the assistance of your law clerks?

Deference to Congressional Factfinding in Reviewing the Constitutionality of Federal Legislation

The constitutionality of federal legislation often turns on how much deference the Supreme Court gives to justificatory factual findings made by Congress. Recent nominees to the Court have emphasized that such findings are entitled to substantial deference. Chief Justice Roberts was especially emphatic on the point. He even testified that when a judge finds himself "in a position of re-evaluating legislative findings," he or she "may be beginning to transgress into an area of making law"

In too many cases during the last decade, however, the Court has disregarded Congressional findings of fact to an unprecedented degree. The most recent example was *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), where in striking down the federal ban on independent campaign expenditures by corporations, the Court disregarded what Justice Stevens called in dissent a "virtual mountain of evidence" assembled by Congress establishing the corrupting influence of such contributions on the political process. And the Court did so, again in Justice Stevens' words, "without a shred of evidence" as to how the challenged provision "have been affecting any entity" other than the petitioner in the case.

The Court's disregard of Congressional fact-finding has been especially pronounced in cases striking down laws enacted to remediate civil rights violations (whether under the commerce clause or the Fourteenth Amendment to the Constitution). These included two cases about which I have questioned prior nominees to the Court: (1) *United States v. Morrison*, 529 U.S. 598 (2000), which struck the provision of the Violence Against Women Act providing a

Letter to Solicitor General Elena Kagan
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federal civil remedy for victims of sex-based violence, despite Congress's well-documented findings of relevant constitutional violations nationwide; and (2) *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), which struck the provision of the Americans With Disabilities Act prohibiting disability-based discrimination in employment by states, despite Congress's compilation (in the dissenter's words) of "a vast legislative record," based on task force hearings attended by more than 30,000 people, "documenting 'massive, society-wide discrimination' against persons with disabilities." As I noted in pre-confirmation-hearing letters to Chief Justice Roberts and Justice Sotomayor, the Court in *Morrison* even went out of its way to disparage Congress's fact-finding competency. Justice Souter noted in a dissent joined by three other Justices that the Court had departed from its longstanding practice of assessing no more than the "rationality of the congressional [factual] conclusion[s]."

Chief Justice Roberts's statements during oral argument in *Northwest Austin Municipal District v. Holder*, 129 S. Ct. 2504 (2009), may portend even worse things to come. The case concerned the constitutionality of a key section of the Voting Rights Act that Congress extended (by a Senate vote of 98 to 0) for another 25 years during my chairmanship of the Judiciary Committee. Ultimately the Court avoided the constitutional question in *Northwest Austin* by deciding the case on narrow statutory grounds. But during oral argument, Chief Justice Roberts called into question the validity of Congress's legislative findings as to the need for the reauthorization. He said that, in extending the Act, "Congress was 'sweeping far more broadly than they need to.'"

I intend to ask you, among other questions, whether you think that the Court has been sufficiently deferential to Congressional fact-finding and whether you would go about analyzing the sufficiency of the record underlying the reauthorization of the Voting Rights Act.

Television Coverage of the Supreme Court

Although the public has the undisputed right to observe the Court's proceedings, few Americans have any meaningful opportunity to do so. Even those who are able to visit the Court are not likely to see an argument in full. There are not nearly enough seats. Most will be given just three minutes to watch before they are shuffled out to make room for others. In high-profile cases, most visitors will be denied even a three-minute seating. As Justice Stevens observed during an interview, "literally thousands of people have stood in line for hours in order to attend an oral argument, only to be denied admission because the courtroom was filled." Those who wish to follow the Court's proceedings must content themselves with reading the voluminous transcripts or listening to audiotapes released at the end of the Court's term. (The Court regularly denies, without explanation, requests to release the audiotapes of oral argument on a same-day basis.) It should come as no surprise that, according to a recent poll taken by C-SPAN, nearly two-thirds of Americans favor television coverage of the Supreme Court's proceedings.

In April 2010, the Senate Committee favorably reported both my resolution (S. Res. 339) expressing the sense of the Senate that the Court should permit television coverage and my legislation (S. 446) requiring it to allow coverage. In the last two Congresses, the Committee

Letter to Solicitor General Elena Kagan
Page 4

favorably reported nearly identical legislation (S. 1768 in the 109th Congress and S. 344 in the 110th Congress) that I introduced.

Statements made by the current Justices indicate that a majority of them—Chief Justice Roberts, Justices Stevens, Ginsburg, Breyer, Alito, and Sotomayor—are favorably disposed toward allowing coverage or at least have an open mind on the matter. Justice Stevens, whom you would replace, has said that allowing cameras in the Supreme Court is “worth a try.”

Your past statements suggest that you are proponent of coverage. Soon after becoming Solicitor General, you told the Ninth Circuit Judicial Conference that “if cameras were in the courtroom, the American public would see an extraordinary event. . . . When C-SPAN first came on, they put cameras in legislative chambers. And it was clear that nobody was there. I think if you put cameras in the courtroom, people would say, ‘wow.’ They would see their government working at a really high level – at a really high level. That is one argument for doing so.”

I intend to ask you whether, if confirmed, you will support television coverage and, if you will, whether you will try to persuade your reluctant colleagues to do likewise.

Constitutionality of Regulation of Campaign Finance

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court held unconstitutional provisions of federal law prohibiting corporations and unions from making certain independent campaign expenditures in support of candidates for federal office, thereby putting corporations on the same footing as individuals (including citizens). Some organizations opposed to campaign-finance reform have heralded *Citizens United* as the beginning of the end of campaign finance regulation. The next step, according to the policy briefs of these organizations, is to challenge the prohibition on corporate campaign contributions and, in doing, attempt to eliminate the remaining case-law distinctions between the speech rights of individual natural persons and of corporations. Under existing federal law, corporations may not make campaign contributions. (They may do so only through tightly regulated PACs.) The Supreme Court has upheld this restriction against First Amendment challenge.

Some organizations have even advocated an end to limits on campaign contributions—as distinct from campaign-related expenditures—by individuals. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld limits on contributions by individuals, even as it struck down a provision of federal law prohibiting independent expenditures in support of candidates for office. The Court accepted Congress’s finding that allowing “large individual financial contributions” threatens to corrupt the political process and undermine public confidence in it. *Buckley*’s holding on this point has been well-settled law for nearly 35 years.

I intend to ask you, among other questions:

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(1) Whether, under First Amendment law, there remains anything left of the distinction between contributions from a corporation and those from natural persons.

(2) What considerations would you bring to bear in deciding whether to overrule the portion of *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding limits on campaign contributions by individuals?

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Specter', with a stylized flourish at the end.

Arlen Specter

cc: Chairman Patrick J. Leahy, Senate Judiciary Committee
Ranking Member Jeff Sessions, Senate Judiciary Committee
All Members of the Senate Judiciary Committee

**NOMINATION OF JOHN G. ROBERTS, JR., OF
MARYLAND, TO BE CHIEF JUSTICE OF THE
UNITED STATES**

TUESDAY, SEPTEMBER 13, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SH-216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

Chairman SPECTER. It is 9:30. The confirmation hearing of Judge Roberts will now proceed.

Welcome again, Judge Roberts.

Judge ROBERTS. Thank you, Mr. Chairman.

Chairman SPECTER. We begin the first round of questioning in order of seniority, with 30 minutes allotted to each Senator.

Judge Roberts, there are many subjects of enormous importance that you will be asked about in this confirmation hearing, but I start with the central issue which perhaps concerns most Americans, and that is the issue of the woman's right to choose and *Roe v. Wade*. And I begin collaterally with the issue of *stare decisis* and the issue of precedents.

Black's Law Dictionary defines *stare decisis* as "let the decision stand, to adhere to precedents and not to unsettle things which are established." Justice Scalia articulated, "The principal purpose of *stare decisis* is to protect reliance interests and further stability in the law."

Justice Frankfurter articulated the principle, "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations."

Justice Cardozo in a similar vein, "No judicial system could do society's work if each issue had to be decided afresh in every case which raised it."

In our initial conversation, you talked about stability and humility in the law. Would you agree with those articulations of the principles of *stare decisis* as you had contemplated them, as you said you looked for stability in the law?

Judge ROBERTS. Yes, Mr. Chairman, I would. I would point out that the principle goes back even farther than Cardozo and Frank-

furter. Hamilton, in *Federalist No. 78*, said that, "To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents." So even that far back, the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, the appearance of integrity in the judicial process.

Chairman SPECTER. I move now to *Casey v. Planned Parenthood*. Thirty minutes may seem like a long time and a second round of 20 minutes, but the time will fly, and I want to get right to the core of the issue.

In *Casey*, the key test on following precedents moved to the extent of reliance by the people on the precedent, and *Casey* had this to say in a rather earthy way: "People have ordered their thinking and living around *Roe*. To eliminate the issue of reliance, one would need to limit cognizable reliance to specific instances of sexual activity. For two decades of economic and social developments, people have organized intimate relationships in reliance on the availability of abortion in the event contraception should fail."

That is the joint opinion, rather earthy in its context. Would you agree with that?

Judge ROBERTS. Well, Senator, the importance of settled expectations in the application of *stare decisis* is a very important consideration. That was emphasized in the *Casey* opinion, but also in other opinions outside that area of the law.

The principles of *stare decisis* look at a number of factors, settled expectations one of them, as you mentioned. Whether or not particular precedents have proven to be unworkable is another consideration on the other side; whether the doctrinal bases of a decision have been eroded by subsequent developments. For example, if you have a case in which there are three precedents that lead and support that result and in the intervening period two of them have been overruled, that may be a basis for reconsidering the prior precedent.

Chairman SPECTER. But there is no doctrinal basis erosion in *Roe*, is there, Judge Roberts?

Judge ROBERTS. Well, I feel the need to stay away from a discussion of particular cases. I'm happy to discuss the principles of *stare decisis*, and the Court has developed a series of precedents on precedent, if you will. They have a number of cases talking about how this principle should be applied. And as you emphasized, in *Casey* they focused on settled expectations. They also looked at the workability and the erosion of precedents. The erosion of precedent I think figured more prominently in the Court's discussion in the *Lawrence* case, for example, but it is one of the factors that is looked at on the other side of the balance.

Chairman SPECTER. Well, do you see any erosion of precedent as to *Roe*?

Judge ROBERTS. Again, I think I should stay away from discussions of particular issues that are likely to come before the Court again. And in the area of abortion, there are cases on the Court's docket, of course. It is an issue that does come before the Court. So while I'm happy to talk about *stare decisis* and the importance of precedent, I don't think I should get into the application of those principles in a particular area.

Chairman SPECTER. Well, Judge Roberts, I don't know that we are dealing with any specific issue. When you mention—and you brought the term up—erosion of precedent, whether you see that as a factor in the application of *stare decisis* or expectations, for example, on the citation I quoted from *Casey v. Planned Parenthood*.

Judge ROBERTS. Well, in the particular case of *Roe*, obviously you had the *Casey* decision in '92 or '93.

Chairman SPECTER. '92.

Judge ROBERTS. '92, in which they went through the various factors in *stare decisis* and reaffirmed the central holding in *Roe* while revisiting the trimester framework and substituting the undue burden analysis with strict scrutiny. So as of '92, you had a reaffirmation of the central holding in *Roe*. That decision, that application of the principles of *stare decisis* is, of course, itself a precedent that would be entitled to respect under those principles.

Chairman SPECTER. The joint opinion then goes on, after the statement as to sexual activity, to come to the core issue about women being able to plan their lives. The joint opinion says, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

Do you agree with that statement, Judge Roberts?

Judge ROBERTS. Yes, Senator, as a general proposition. But I do feel compelled to point out that I should not, based on the precedent of prior nominees, agree or disagree with particular decisions, and I'm reluctant to do that. That's one of the areas where I think prior nominees have drawn the line when it comes to do you agree with this case or do you agree with that case. That's something that I'm going to have to draw the line in the—

Chairman SPECTER. Well, I am not going to ask you whether you are going to vote to overrule *Roe* or sustain it, but we are talking here about the jurisprudence of the Court and their reasoning.

Let me come to another key phase of *Casey* where the joint opinion says, "A terrible price would be paid for overruling *Roe*. It would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of the Nation dedicated to the rule of law."

Now, this moves away from the specific holding and goes to a much broader jurisprudential point, really raising the issue of whether there would be a recognition of the Court's authority. And in a similar line, the Court said this: that to overrule *Roe* would be "a surrender to political pressure," and added, "To overrule under fire would subvert the Court's legitimacy."

So in these statements on *Casey*, you are really going beyond the holding. You are going to the legitimacy and authority of the Court.

Do you agree with that?

Judge ROBERTS. Well, I do think the considerations about the Court's legitimacy are critically important. In other cases—I'm thinking of *Payner v. Tennessee*, for example—the Court has focused on extensive disagreement as a grounds in favor of reconsideration. In *Casey*, the Court looked at the disagreement as a factor in favor of reaffirming the decision. So it's a factor that is played different ways in different precedents of the Court.

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the Court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.

Chairman SPECTER. A jolt to the legal system, a movement against stability—one of the Roberts doctrines.

Judge ROBERTS. An overruling of a prior precedent is a jolt to the legal system. It is inconsistent with principles of stability and yet—

Chairman SPECTER. One—go ahead.

Judge ROBERTS. I was just going to say, the principles of *stare decisis* recognize that there are situations when that's a price that has to be paid. Obviously, *Brown v. Board of Education* is a leading example, overruling *Plessy v. Ferguson*, the *West Coast Hotel* case overruling the *Lochner* era decisions. Those were to a certain extent jolts to the legal system, and the arguments against them had a lot to do with stability and predictability. But the other arguments—that intervening precedents had eroded the authority of those cases, that those precedents that were overruled had proved unworkable—carried the day in those cases.

Chairman SPECTER. One final citation from the joint opinion in *Roe*: “After nearly 20 years of litigation in *Roe*'s wake, we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.”

Do you think the joint opinion is correct in elevating precedential force even above the specific holding of the case?

Judge ROBERTS. That is the general approach when you're considering *stare decisis*. It's the notion that it's not enough that you might think that the precedent is flawed, that there are other considerations that enter into the calculus that have to be taken into account, the values of respect for precedent, evenhandedness, predictability, stability; the considerations on the other side, whether a precedent you think may be flawed is workable or not workable, whether it's been eroded.

So to the extent that the statement is making the basic point that it's not enough that you might think the precedent is flawed to justify revisiting it, I do agree with that.

Chairman SPECTER. When you and I met on our first so-called courtesy call, I discussed with you the concept of a super-*stare decisis*. And this was a phrase used by Circuit Judge Luttig in *Richmond Medical Center v. Governor Gilmore* in the year 2000, when he refers to *Casey* being a super-*stare decisis* decision with respect to the fundamental right to choose, and a number of the academics—Professor Farber has talked about super-*stare decisis*, and Professor Estrich has, as it applies to statutory lines.

Do you think that the cases which have followed *Roe* fall into the category of a super-*stare decisis* designation?

Judge ROBERTS. Well, it's a term that hasn't found its way into the Supreme Court opinions yet. I think—

Chairman SPECTER. Well, there is an opportunity for that.

[Laughter.]

Judge ROBERTS. I think one way to look at it is that the *Casey* decision itself, which applied the principles of *stare decisis* to *Roe v. Wade*, is itself a precedent of the Court, entitled to respect under principles of *stare decisis*. And that would be the body of law that any judge confronting an issue in his care would begin with, not simply the decision in *Roe v. Wade* but its reaffirmation in the *Casey* decision. That is itself a precedent. It's a precedent on whether or not to revisit the *Roe v. Wade* precedent. And under principles of *stare decisis*, that would be where any judge considering the issue in this area would begin.

Chairman SPECTER. When you and I talked informally, I asked you if you had any thought as to how many opportunities there were in the intervening 32 years for *Roe* to be overruled, and you said you did not really know, and you cited a number. And I said, "Would it surprise you to know that there have been 38 occasions where *Roe* has been taken up, not with a specific issue raised but all with an opportunity for *Roe* to be overruled?" One of them was *Rust v. Sullivan*, where you participated in the writing of the brief, and although the case did not squarely raise the overruling of *Roe*, it involved the issue of whether Planned Parenthood units funded with Federal money could counsel on abortion. And in that brief, you again raised the question about *Roe* being wrongly decided, and then I pointed out to you that there had been some 38 cases where the Court had taken up *Roe*.

I am very seldom a user of charts, but on this one I prepared a chart because it speaks—a little too heavy to lift, but it speaks louder than just—thank you, Senator Grassley. Thirty-eight cases where *Roe* has been taken up, and I don't want to coin any phrases on super precedents. We will leave that to the Supreme Court. But would you think that *Roe* might be a super-duper precedent in light—

[Laughter.]

Chairman SPECTER.—of 38 occasions to overrule it?

Judge ROBERTS. The interesting thing, of course, is not simply the opportunity to address it, but when the Court actually considers the question. And that, of course, is in the *Casey* decision where it did apply the principles of *stare decisis* and specifically addressed it. And that I think is the decision that any judge in this area would begin with.

Chairman SPECTER. Judge Roberts, in your confirmation hearing for circuit court, your testimony read to this effect, and it has been widely quoted: "*Roe* is the settled law of the land." Do you mean settled for you, settled only for your capacity as a circuit judge, or settled beyond that?

Judge ROBERTS. Well, beyond that, it's settled as a precedent of the Court, entitled to respect under principles of *stare decisis*. And those principles, applied in the *Casey* case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the Court, yes.

Chairman SPECTER. You went on then to say, "It's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the *Casey* decision." So it has that added precedential value.

Judge ROBERTS. I think the initial question the judge confronting an issue in this area, you don't go straight to the *Roe* decision; you begin with *Casey*, which modified the *Roe* framework and reaffirmed its central holding.

Chairman SPECTER. And you went on to say, "Accordingly, it is the settled law of the land," using the term "settled" again. Then your final statement as to this quotation, "There is nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as *Casey*."

There had been a question raised about your personal views, and let me digress from *Roe* for just a moment because I think this touches on an issue which ought to be settled. When you talk about your personal views, and as they may relate to your own faith, would you say that your views are the same as those expressed by John Kennedy when he was a candidate and he spoke to the Greater Houston Ministerial Association in September of 1960, "I do not speak for my church on public matters, and the church does not speak for me"?

Judge ROBERTS. I agree with that, Senator, yes.

Chairman SPECTER. And did you have that in mind when you said, "There is nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as *Casey*"?

Judge ROBERTS. Well, I think people's personal views on this issue derive from a number of sources, and there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of *stare decisis*.

Chairman SPECTER. Judge Roberts, the change in positions have been frequently noted. Early on in one of your memoranda you had made a comment on the so-called right to privacy. This was a 1981 memo to Attorney General Smith, December 11, 1981. You were referring to a lecture which Solicitor General Griswold had given 6 years earlier, and you wrote, Solicitor General Griswold "devotes a section to the so-called 'right to privacy,' arguing as we have that such an amorphous right is not to be found in the Constitution." Do you believe that the right to privacy—do you believe today that the right to privacy does exist in the Constitution?

Judge ROBERTS. Senator, I do. The right to privacy is protected under the Constitution in various ways. It's protected by the Fourth Amendment, which provides that the right of people to be secure in their persons, houses, effects and papers is protected. It's protected under the First Amendment, dealing with prohibition on establishment of a religion and guarantee of free exercise, protects privacy in matters of conscience. It was protected by the Framers in areas that were of particular concern to them that may not seem so significant today, the Third Amendment, protecting their homes against the quartering of troops.

And in addition, the Court has, with a series of decisions going back 80 years, has recognized that personal privacy is a component

of the liberty protected by the Due Process Clause. The Court has explained that the liberty protected is not limited to freedom from physical restraint, and that it's protected not simply procedurally but as a substantive matter as well. And those decisions have sketched out over a period of 80 years certain aspects of privacy that are protected as part of the liberty in the Due Process Clause under the Constitution.

Chairman SPECTER. So that the views that you expressed back in 1981, raising an issue about "amorphous" and "so-called" would not be the views you would express today?

Judge ROBERTS. Those views reflected the Dean's speech. If you read his speech, he's quite skeptical of that right. I knew the Attorney General was, and I was transmitting the Dean's speech to the Attorney General. But my views today are as I've just stated them.

Chairman SPECTER. So they were not necessarily your views then, but they certainly are not your views now.

Judge ROBERTS. I think that's fair, yes.

Chairman SPECTER. With respect to, going back again to the import of *Roe* and the passage of time, Supreme Court Chief Justice Rehnquist changed his views on *Miranda* in the 1974 case, *Michigan v. Tucker*, which I am sure you are familiar with. They did not apply *Miranda*, without going into the technical reasons there. But the issue came back to the Court in *U.S. v. Dickerson* in the year 2000, and the Chief Justice decided that *Miranda* should be upheld, and he used this language, that it became "so embedded in routine police practice to the point where the warnings have become a part of our National culture."

Do you think that that kind of a principle would be applicable to a woman's right to choose as embodied in *Roe v. Wade*?

Judge ROBERTS. Well, I think those are some of the considerations the Court applied in *Casey* when it applied *stare decisis* to *Roe*, and those were certainly the considerations that the Chief Justice focused on in *Dickerson*. I doubt that his views of the underlying correctness of *Miranda* had changed, but it was a different question in *Dickerson*. It wasn't whether *Miranda* was right, it was whether *Miranda* should be overruled at this stage, and the Chief applied and address that separate question distinct from any of his views on whether *Miranda* was correct or not when decided, and that's the approach the Court follows under principles of *stare decisis*.

Chairman SPECTER. Well, that is the analogy I am looking for in *Roe v. Wade*. He might disagree with it at the time it was decided, but then his language is very powerful when he talks about it becoming "embedded in routine police practices to the point where the warnings have become a part of our National culture." The question, by analogy, whether a woman's right to choose is so embedded that it has become a part of our National culture. What do you think?

Judge ROBERTS. Well, I think that gets to the application of the principles in a particular case, and based on my review of the prior transcripts of every nominee sitting on the Court today, that's where they've generally declined to answer, when it gets to the application of legal principles to particular cases.



HARVARD LAW SCHOOL
CAMBRIDGE • MASSACHUSETTS • 02138

June 24, 2010

To Whom It May Concern:

Enclosed is a letter that I wrote in support of Elena for an award from the organization Equal Justice Works for her promotion of public service as Dean of Harvard Law School — an award that she won. I would like the sentiments conveyed in the letter to be considered during her confirmation process.

Sincerely,

A handwritten signature in cursive script, reading "Carol Steiker".

Carol Steiker

1080



HARVARD LAW SCHOOL
CAMBRIDGE • MASSACHUSETTS • 02138

CAROL STEIKER
Howard I. and Katherine W. Abel Professor of Law

GRISWOLD HALL 409

June 9, 2008

Equal Justice Works
Law School Awards
2120 L Street, N.W.
Suite 450
Washington, D.C. 20037-1541

Re: Dean Elena Kagan

Dear Law School Awards Committee:

I am writing in support of Dean Elena Kagan of Harvard Law School, who is being nominated for the Dean John R. Kramer Outstanding Law School Dean award. As a long-time member of the faculty and the Dean's "Special Advisor on Public Service," I am well-suited to describe the truly extraordinary work that Elena Kagan has done here at Harvard to revitalize and support the school's public interest community.

Elena's work to promote public interest and public service during the past five years is so extensive and multifaceted that I hardly know where to start. Perhaps self-indulgently, I'll start with myself: Upon taking the deanship, Elena did away with the old administrative structure (1 Dean + 2 Associate Deans) and instead create a 7-person administrative structure, which included several vice deans as well as several "special advisors" in areas that Elena felt needed specialized attention, such as technology, connections to the legal profession, and public service. She asked me, one of her oldest friends (her former classmate and co-clerk for Justice Thurgood Marshall, and myself a former public defender) to be her "Special Advisor for Public Service" in order to have a cabinet-level advisor to help innovate and advocate for public service initiatives at the law school. This post was made part of a small group of administrators who meet with the Dean on a regular basis (initially, every 2 weeks) to discuss current issues at the school and offer advice. Needless to say, this is the first time this law school has had such a position, and the creation and staffing of the position as one of Elena's very first acts as Dean reflects the central importance of public service in her new administration.

One need only look at our academic program to see how much Elena's leadership has helped to promote public service goals. Most prominently, Elena has poured energy and resources into our clinical programs, especially our vastly enhanced Human Rights Program and important new clinical offerings in the areas of Environmental Law and Children's Rights. Under Elena's leadership, Harvard finally created a full tenure-track

for clinical faculty and hired a fantastic bouquet of top clinical leaders to staff it. Moreover, Elena has carried over this commitment to the academic side of the curriculum, aggressively hiring a substantial number of faculty members with public service backgrounds, most recently Assistant Professor Benjamin Sachs, who will become the first HLS faculty member to have won a Skadden Fellowship (and who then worked for another half decade as a labor-side lawyer before moving into academia). It is notable that Yale Law School, which had offered Ben a 2-year fellowship, declined to put him on its academic tenure-track, whereas Harvard, under Elena's leadership, saw the wisdom of grooming a young lawyer from the world of public interest law as a future labor law scholar, rather than insisting on hiring only those with Ph.D.'s.

One easy and objective measure of a school's commitment to public service is what it does with its money, and it is more than fair to say that Elena has consistently – and innovatively – “put her money where her mouth is.” She has increased both our Low Income Protection Program (LIPP) and our level of guaranteed summer funding for public interest jobs, placing Harvard at the very top among all law schools in providing financial support for public interest work both during and after law school. Most recently, Elena made the front page of the *New York Times* with a revolutionary new Public Service Initiative that will waive tuition for the entire third year of law school for any student who commits to 5 years of public service work after graduation. This new form of student aid will only supplement, rather than supplant, our existing Low Income Protection Program, so that students will have the benefit of *both* front-end and back-end support for public interest careers (i.e., lower tuition up front *and* waivers of loan payments while working in public interest jobs).

Finally, there is the harder to quantify but no less real commitment to promoting a *culture* of public service. Before Elena became Dean, I would have honestly opined that cultures change only rarely and when they do, only very slowly. Elena's deanship has made me rethink the “stickiness” of culture, because Elena has brought about in 5 short years a massive re-orientation of Harvard Law School's culture. Student satisfaction with the law school has gone through the roof; what used to be a culture of complaint is now more like a culture of school boosterism. And as far as public service goes, there can be no doubt in any student's mind that the school supports, values, and even cherishes such careers. It is hard to put a precise finger on how Elena has brought about such change, but I can point to two good exemplars.

First, the school's annual “public interest auction” (which regularly raises between \$100,000 and \$200,000 for summer public interest funding) used to be run by students, administrative staff, and some faculty. Since Elena has become Dean, she not only has contributed one of the most popular items (poker night at her home for a crowd of students), but she has also volunteered each year to serve as one of the two auctioneers, thus playing a central and public role on the public interest “stage.”

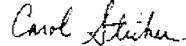
Second, Elena agreed to host, and provided the crucial logistical and financial support for, Harvard's first ever public interest reunion, “*A Celebration of Public Interest*,” which took place this past March, 2008. This event, which brought hundreds of

alumni back to Harvard (many of whom had never returned for any other event), provided a crucial forum for alumni and current students to connect over Harvard's long-standing commitment, through its graduates, to public interest and public service careers. The reviews of this event were simply staggering: the long weekend of substantive panels, networking and brainstorming sessions, and social events created a tidal swell of excitement among the alums who attended and especially for the students currently at the school. This event required a willingness to innovate, combined with the nitty-gritty of fund-raising and logistical details (beating back all other claimants for use of the law school's function rooms for a key spring weekend). It is this unique combination – the willingness to embrace new ideas and the wherewithal to ensure that new initiatives indeed succeed -- that has allowed Elena to be such a successful agent for change at Harvard Law School.

There is no question that Elena will go down in Harvard's books as one of the greatest Deans in the Law School's history. In my view, there is no area in which her leadership and success have been more evident than in the promotion of public interest work among our students and graduates. I urge Equal Justice Works to recognize her extraordinary and outstanding leadership in this area.

If I can offer any further assistance, please contact me by phone at (617) 496-5457 or by e-mail at steiker@law.harvard.edu.

Sincerely,



Carol Steiker
Howard & Kathy Aibel Professor of Law
Dean's Special Advisor for Public Service



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U.S. Court of Appeals for the 7th Circuit

Senator Patrick Leahy
433 Russell Senate Bldg
United States Senate
Washington, DC 20510

Re: Letter in Support of Elena Kagan's Nomination
to the United States Supreme Court

Dear Senator Leahy:

I am writing in support of Elena Kagan's Nomination to be an Associate Justice on the United States Supreme Court. In 2008, Equal Justice Works presented Dean Kagan with our highest award for a law school dean, the John R. Kramer Outstanding Law School Dean Award.

Equal Justice Works' mission is to mobilize the next generation of lawyers committed to justice. We collaborate with 200 law schools across the country to ensure those schools have programs that instill public service values and create opportunities for students to experience firsthand the rewards of using their legal skills to help under-served communities and causes. We also operate the nation's largest postgraduate legal fellowship programs, enabling hundreds of recent law school graduates to devote themselves to working on issues such as domestic violence, affordable housing, consumer rights, civil rights and more.

Each year, we honor a law school dean who has demonstrated a commitment to public interest law and leadership that has resulted in measurable improvements in a law schools' programs to instill public service values and experiences for students. In a highly competitive nomination process, Elena Kagan was selected as our Dean of the Year in 2008 in recognition of her commitment to justice and her work to expand public service opportunities for Harvard Law School students and graduates.

When Elena Kagan became Dean of Harvard Law School (HLS) in 2003, she promised that encouraging public service would be one of her highest priorities. In her inaugural remarks, she stated her desire that every Harvard Law School student graduate with a commitment to public service work. She expected this commitment not just of those who would pursue public service as a full-time job, but also of those who planned to spend their careers in the private sector.

She didn't just talk about the importance of public service -- she immediately put words into action. She established the new position of "Dean's Special Advisor for Public Service," and created a committee of faculty, staff and students to study and make recommendations about ways the school could further promote a public service ethos. She dramatically grew HLS's clinical program and increased its staff. During her six years as dean, the number of clinical student placements grew from 360 to

Senator Leahy
June 23, 2010
Page 2 of 2

866, more than doubling the number of students who were exposed to real world problems, developed practical skill-building and provided legal assistance to indigent or middle-income clients who would otherwise could not afford a lawyer.

Dean Kagan increased the opportunity and funding for a unique winter term during which students could pursue an internship or clinical work. The result was an increase from 19 students doing public service work during the winter term in 2005 to 166 in 2008. I met many of those students in connection with our Katrina Initiative where we sent 19 lawyers and hundreds of law students to the Gulf to help in the aftermath of the hurricanes.

Dean Kagan provided financial and other support for students who were pursuing public interest initiatives. She provided funding to students who wanted to do pro bono "caravan" trips during winter and spring breaks, and improved HLS's guaranteed summer funding for public service work as a way to ensure that all students have an opportunity to pursue public service internships. The result was 70% increase in the number of students participating in just three years.

Dean Kagan also recognized the importance of celebrating those who engage in public service. She created the Andrew L. Kaufman Award for the student who performed the most pro bono hours during their law school career, and gave recognition to all students who performed more than 1,000 hours of pro bono service during law school at Class Day and in the graduation program. Even before Elena Kagan became dean, HLS had a mandatory pro bono program - every law student must complete 40 hours of pro bono work prior to graduation. During her tenure, the numbers skyrocketed. The first graduating class under Dean Kagan in 2005 completed an average of 343 pro bono hours; her last class in 2009 completed an average of 542 hours, an increase of 158%.

Finally, Dean Kagan helped break down the debt barrier that blocks many law graduates from pursuing public interest jobs. Under her leadership, HLS waived tuition for third-year students who pledged to spend five years working for nonprofit organizations or for the government. Dean Kagan also expanded HLS's loan repayment program, the Low Income Protection Plan.

By setting the tone from the top, Dean Kagan created a culture of public service at HLS that is still going strong. We were proud to honor Elena Kagan with our Outstanding Law School Dean award two years ago, and continue to be proud of our association with a visionary leader who has done so much to further the goals of inspiring the next generation of lawyers to make public service part of their careers.

Elena Kagan's demonstrated commitment to encouraging students and graduates to engage in public service represents the highest and most noble values of the legal profession. This is why I am writing to encourage your committee and the Senate to confirm Elena Kagan as the next Associate Justice of the United States Supreme Court. Please feel free to contact me if there is anything else I can provide.

Sincerely,



David Stern
Executive Director

1085

TESTIMONY OF RONALD S. SULLIVAN JR.

PREPARED FOR THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

HEARING: JUDICIAL NOMINATION

ELENA KAGAN OF MASSACHUSETTS

TO BE

ASSOCIATE JUSTICE OF THE SUPREME COURT

OF THE UNITED STATES

Ronald S. Sullivan Jr.
Harvard Law School
The Jamestown Project

I am a Clinical Professor of Law at the Harvard Law School and a Senior Fellow at the Jamestown Project. I teach and write in the areas of criminal law, criminal procedure, legal ethics, and race theory. Prior to joining the faculty at Harvard, I served as Director of the nation's premier public defender office, the Public Defender Service for the District of Columbia, where I represented hundreds of indigent clients in thousands of matters as a staff attorney, General Counsel, and, then, Director.

Let me begin with the obvious: Anyone who has had even a passing acquaintance with Elena Kagan can attest to the fact that she has a first-class mind. An outstanding legal scholar, terrific teacher, a thoughtful and forward-looking administrator, Solicitor General Kagan's academic record is unassailable. More than her academic career and work, there is her record as a public servant, a proven one: as a government lawyer, as a policy advisor to President Clinton's administration, and as our current administration's Solicitor General. She is smart, fair, independent, respectful of the opinions of others, and a dedicated public servant. For these reasons and others that I outline below, I urge this Committee to vote out the nomination.

Hearings on Supreme Court nominations represent an important expression of our democracy. This Committee attempts to carefully balance important norms of judicial autonomy with notions of democratic accountability in crafting questions it poses to the nominee and witnesses. Understandably, the degree to which a nominee's judicial philosophy is the appropriate metric for judging her fitness to receive life tenure on our nation's highest court is hotly contested. But, whether framed in the vocabulary of judicial philosophy or formal notions of professional or intellectual aptitude, the central question that has animated recent Supreme Court nomination hearings is, "What kind of

Justice will the nominee be?" This one is no different. Inasmuch as General Kagan has not published on the contentious and controversial areas of constitutional law that tend to dominate the public discourse, the public looks for signs – proxies, even – to provide a window into the jurisprudential leanings of a prospective Justice.

To my thinking, many proxies that have been bandied about the media are not especially productive. They do not speak to the type of Justice Elena Kagan will be, if confirmed. Indeed, the structural divides that entail our judicial system often work to ensure that its actors behave in a role appropriate manner. Positions taken as a student, or law clerk, even as a lawyer in private practice, on behalf of a client, for example, do not necessarily presage how that same lawyer will rule as a judge. Advocacy in our system, as you know, does not require agreement with the position, policies, or person of the client – whether it be a Supreme Court Justice, President or private corporation – on whose behalf one advocates. Rather, advocacy requires, we are taught from the moment we enter law school, diligence, precision, reasoning both critical and creative, and an unabated passion for the rule of law – qualities General Kagan possesses in abundance. To the extent we can know what type of Supreme Court Justice General Kagan would make, the better approach, in my view, is to look at the whole person – her entire record, as an academic, an administrator, and a policy advisor. Equally important, a fair valuation of General Kagan's character will better illuminate the values she would bring to the bench should the Senate confirm her. On balance, these metrics demonstrate General Kagan to be thoughtful, measured, keenly intellectual, and a dedicated worker.

With this in mind, I would like to offer a few observations about the person I know, my former colleague, my former Dean, and, I am proud to say, my friend, Elena Kagan.

Given that much of my academic work concerns issues of access to justice, I am impressed by Elena's record on developing clinical programs while serving as the Dean of the Harvard Law School. As this Committee knows, Clinical programs provide expert legal services to people, communities, businesses, and even governments that could not otherwise afford such services. Core principles of our justice system -- equal protection under the law, equal access to justice, and the fair distribution of burdens and benefits across the citizenry -- were advanced by Elena's support and interest in clinical programs at the Harvard Law School during her tenure as Dean. Concrete people and institutions were provided with legal services and her efforts as Dean demonstrated a firm commitment to these values.

Significantly, the Harvard student body responded to Elena's efforts and commitment to providing legal services to underserved communities. The number of students participating in clinical programs grew by an astounding 240% -- from 363 clinical students when her deanship began to 866 students when she resigned to become Solicitor General. This translates into a very real appreciation for the needs, desires, and aspirations of communities around the country. As Dean, Elena understood that the law is not merely a closed system of rules with no impact on the normative universe. She also understood, as Dean, that the law impacts people, and affirmatively undertook efforts to connect some of the best legal minds in the country with those who are most in need of expert legal services. These values, fully embraced during Elena's tenure as Dean, were also embraced by the student body at Harvard Law School. During Elena's tenure as Dean, the number of hours students dedicated to pro bono work rose by 158%. I know from personal experience the kind of impact pro bono work can have on the arc of

one's professional career, as my exposure to pro bono work while, myself, a student at Harvard Law School shaped my choice to serve the underserved and indigent with the best legal training our country has to offer, expertise my former clients would otherwise not be able to afford. The clinical work done at Harvard, and supported by Elena during her time as Dean, is not merely another line added to a student's resume. Rather, clinical work is the place where some of our nation's brightest legal minds decide to use those minds in public service of our democracy—Elena's support and expansion of clinical work will have an impact on the quality of our legal system that cannot be quantitatively measured.

Specifically, under her deanship, nine clinics were created: (1) Child Advocacy Clinic, (2) Gender Violence Clinic, (3) Environmental Law and Policy Clinic, (4) Semester in Washington Clinic, (5) Negotiation and Mediation Clinic, (6) Death Penalty Clinic, (7) Sports Law Clinic, (8) Supreme Court and Appellate Advocacy Clinic, and (9) War Crimes Prosecution Clinic. The substantive variety of these clinical offerings speak to and speak well of Elena's commitment to broadly understanding the law and its important and varied role in our society.

Let me next say a word about General Kagan's intellect and intellectual method. While I have read all of her scholarship in preparation for this hearing, I do not purport to be expert in her areas of academic interest. I happily defer to the Administrative Law and First Amendment scholars who have already opined, in one form or another, to this Committee. That said, I have had sufficient scholarly interactions with her to form an opinion consistent with many others: Elena Kagan has a sharp analytical mind. She is a first-rate legal scholar, and well exceeds any minimum standards necessary to serve as a

Justice on the Supreme Court. Indeed, in my experience with General Kagan, I found her to be an active consumer of knowledge. She has a swift and eager mind, and sought to understand complex issues before comment or action. While she had many answers (not so rare for a Harvard professor), she knew that she did not have all the answers (somewhat more rare, and quite refreshing, indeed, for a Harvard professor). I clearly recall instances during her deanship where she consulted me on issues regarding the criminal law, access to justice, and indigent defense about which she was asked to opine. My sense is that these consultations were genuine, and never superficial gestures designed to provide psychic income. Instead, Elena always sought to critically engage. Clearly, she held (and holds) firm opinions, but, in my experience, she understood her opinions to be always already in progress, and subject to revision when facts and reason conspired to produce a better answer.

Allow me to pause here and emphasize the importance, I believe, of General Kagan's demonstrated commitment to challenging her own opinions and her willingness sometimes to revise, or amend her opinions in the light of continued study and collegial exchange. In our understandable insistence on trying to know, or trying to predict how a nominee will rule on this or that area of the law as a Justice, we have, perhaps, undervalued the ongoing work Justices do, work required because of the case by case nature of our judicial system. Each case heard before our Supreme Court requires not so much a pre-determined judicial philosophy or method of interpretation as much as it requires broad and continual learning, experience, a willingness to hear the case before the court prior to deciding how the case fits within some pre-determined judicial philosophy of interpretation. This temperament – the willingness to hear, study, question,

and sometimes revise – strikes me as judicious, an ideal trait for a Supreme Court Justice, and qualities that Elena Kagan possesses.

Finally, I shall end by recounting one of General Kagan's first acts as Dean. As the incoming Dean, she could have decided to hold the Royall Professorship of Law, the law school's first endowed chair. She declined. The Royall Professorship is named after Isaac Royall Jr., who donated over 2100 acres of land to Harvard in the mid-eighteenth century. But the Royall family earned its immense fortune from the trans-Atlantic slave trade. Because this chair was funded with profits from slavery, Elena Kagan opted to become the first person to hold the Charles Hamilton Houston Professorship, an endowed chair named after one of the most prominent African-American graduates of the Harvard Law School, and the architect of the legal strategy that underwrote the modern civil rights movement. This was a significant statement made by the Dean of one of the nation's top law schools, and a gesture that many in the Harvard community very much appreciated.

In the end, I submit that any fair read of General Kagan's character, career, and scholarship inevitably lead to the conclusion that she is intellectually gifted, fair-minded, hard-working, and an independent thinker. Should this Committee and this Senate consent to her nomination, she will make an outstanding Associate Justice of the Supreme Court of the United States.

Thank you for the opportunity to testify. I look forward to answering any questions the Committee may have.

June 30, 2010

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Bldg
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Bldg
Washington, D.C. 20510

Re: Nomination of Elena Kagan

Dear Chairman Leahy and Senator Sessions:

From Afghanistan I have read about the criticism being leveled at Elena Kagan during the confirmation hearings for her nomination as an Associate Justice of the Supreme Court over her decisions and positions while dean of Harvard Law School with regard to military recruiters on campus and the military's "Don't Ask, Don't Tell" (DADT) policy. Senator Sessions issued a statement that Kagan "stood in the way of devoted, hardworking military recruiters," and Senator Jon Kyl said that "[h]er tenure ... was marred, in my view, by her decision to punish the military and would-be recruits for a policy — 'don't ask, don't tell' and the Solomon Amendment..." I am one of those recruits and write to share with the Committee my experience as a law student at Harvard between 2004 and 2006 when the controversy over military recruiters on campus unfolded. Shortly after my 2006 graduation I enlisted in the Army Reserve and I am currently serving as a civil affairs officer at a remote combat outpost in eastern Afghanistan.

I am focused on my mission here, but as a citizen, lawyer, and military officer who swore to defend the Constitution, I care also about the integrity of the Supreme Court selection process and disagree with efforts to paint Elena Kagan as unsupportive of the military.

Like most Americans I want to see a nomination process focused on Kagan's qualifications and judicial philosophy, not on empty political theater. The details and chronology of her decisions with regard to military recruiters on campus have been well-reported by the media and described again by Ms. Kagan, but I will recount them briefly from my experience as a student who was there at the time considering enlistment in the military. I remember her decisions and the tenor of her messages about the military, DADT, and military recruiting.

There was a legitimate legal debate taking place in the courts over the Solomon Amendment, and when court decisions allowed it in 2004, Kagan made a decision to uphold the school's anti-discrimination policy. Military recruiters were never barred from campus. During the brief period when recruiters were not given access to students officially through the law school's Office of Career Services, they still had access to students on campus through other means. Immediately following this period, in 2005 more graduating students joined the military than any year this decade, according to the Director of the Law School's Office of Career Services.

Kagan's positions on the issue were not anti-military and did not discriminate against members or potential recruits of the military. Nor do I believe that they denied the military much-needed recruits in a time of war. There are only a few of us each year who joined the military while attending, or after graduation from, Harvard Law. Kagan's decision to uphold the school's anti-discrimination policy for a brief period of time and express disagreement with DADT did not prevent us from talking with recruiters and joining.

I heard Kagan speak several times about this issue. She always expressed her support for those who serve in the military and encouraged students to consider military service. It was clear she was trying to balance the institution's values underlying its anti-discrimination policy with her genuine support for those who serve or were considering service in the military. Indeed, her sense of DADT's injustice seemed to grow out of her belief in the importance and value of military service. I remember that she repeatedly said as much while dean. More recently while speaking to cadets at West Point, she explained that, "I personally believe that the exclusion of gays and lesbians from the military is both unjust and unwise. I wish devoutly that these Americans too could join this noblest of all professions and serve their country in this most important of all ways."

I believe she was right. But Senator Sessions recently suggested, referring to Ms. Kagan's positions, that "to some in the elite, progressive circles of academia, it is acceptable to discriminate against the patriots who fight and die for our freedoms." With due respect, as a Soldier who serves side by side in a hostile combat zone with patriots who are subjected to the discrimination imposed by DADT policy, I see it differently.

Like most servicemembers serving in a combat theater, when we go outside the wire, I care more about the fitness, experience, and tactical proficiency of the Soldiers around me than who they might want to date or marry when they get home. Out here on the ground in Afghanistan, when we are attacked—which happens often at and around my outpost—it does not matter who is straight or gay any more than it matters who is white or black or who among us can drink legally and who is still underage. We come under fire

together. And when it's over, we pick ourselves up and continue on with the mission together. Yet contrary to the military's code of leaving no comrade behind, DADT continues to selectively discriminate against some of these servicemembers who put their lives at risk for this country.

Nevertheless, reasonable, well-intentioned and equally honorable people disagree about the wisdom of DADT. To attack Ms. Kagan for a principled position she took as a law school dean that had no practical effect on military recruitment looks, from where I stand, like a political distraction. What the country deserves instead is a substantive debate over Elena Kagan's judicial philosophy and her qualifications to interpret the Constitution and decide cases as a member of this nation's highest court.

I urge you to maintain that focus for the remainder of the hearings and refrain from further hyperbole questioning Ms. Kagan's support for the men and women of the U.S. military. I believe that, while dean of Harvard Law School, she adequately proved her support for those who had served, were currently serving, and all those who felt called to serve, including those like me who joined upon graduation as well as those patriots who were not permitted to do so under the policy of "Don't Ask, Don't Tell."

Respectfully,

David M. Tressler
Juris Doctor, Harvard Law School, 2006
First Lieutenant, Civil Affairs, United States Army Reserve
Khost Province, Afghanistan



United South and Eastern Tribes, Inc.
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(P): 615-872-7900 • (F): 615-872-7417

July 2, 2010

The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Supporting the Confirmation of Elena Kagan to the United States Supreme Court

Dear Chairman Leahy:

At its recent Semi-Annual meeting, the United South and Eastern Tribes (USET), an intertribal organization comprised of twenty-five (25) federally recognized Tribes from Texas to Maine, unanimously adopted a resolution in strong support of the confirmation of Elena Kagan to the United States Supreme Court. I ask that you include this letter and that resolution, which is attached, in the official records of the Judiciary Committee.

Because the Supreme Court plays such a critical role in the development of Federal Indian Law, it is of great importance to USET that members of the Federal judiciary be familiar with Indian Country issues and with the fundamental principles of Federal Indian law, including the Federal Trust Responsibility, the Sovereign status of Indian Nations, and the government-to-government relationship between Indian Nations and the United States. USET has reviewed United States Solicitor Elena Kagan's experience with Indian Country issues and has determined that Solicitor Kagan is unusually well-versed in the fundamentals of Federal Indian law and policy. Additionally, several USET Tribal leaders have had the opportunity to work with Solicitor Kagan on various projects and have reported to the USET Board that she has displayed the highest standards of integrity and intellectual rigor.

USET strongly believes that Solicitor Kagan possesses the intellect, integrity and understanding to competently handle issues arising throughout Indian Country and to dispense justice in a fair, impartial and prudent manner. For these reasons and those cited above, USET fully endorses her confirmation to the US Supreme Court.

Respectfully

Brian Patterson, President
United South and Eastern Tribe, Inc.



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USET Resolution No. 2010:023

**SUPPORT OF THE CONFIRMATION OF UNITED STATES SOLICITOR ELENA KAGAN TO THE
UNITED STATES SUPREME COURT**

- WHEREAS,** United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-five (25) federally recognized Tribes; and
- WHEREAS,** the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprises delegates from the member Tribes' leadership; and
- WHEREAS,** USET recognizes the critical role the United States Supreme Court plays in the continuing development of Federal Indian Law, including both criminal and civil jurisdiction matters; and
- WHEREAS,** it is of great importance for the development of Federal Indian Law that members of the Federal judiciary be familiar with Indian Country issues and with the fundamental principles of Federal Indian law, including the Federal Trust Responsibility, the Sovereign status of Indian Tribes, and the government-to-government relationship between Indian Tribes and the United States; and
- WHEREAS,** USET has reviewed United States Solicitor nominee Elena Kagan's experience with Indian Country issues, including interviewing her former colleagues and reviewing the White House documents made available by the Clinton Library, and has determined that Solicitor Kagan is unusually well-versed in the fundamentals of Federal Indian law and policy; and
- WHEREAS,** several USET Tribal leaders have had the opportunity to work with Solicitor Kagan on various projects and have reported to the USET Board of Directors that she has displayed the highest standards of integrity and intellectual rigor; and
- WHEREAS,** USET believes that Solicitor Kagan possesses the intellect and understanding to competently handle issues arising throughout Indian Country and to dispense justice in a fair, impartial and prudent manner with regard to all the issues that may come before her if confirmed to the United States Supreme Court; therefore, be it
- RESOLVED** the USET Board of Directors fully endorses the confirmation of United States Solicitor Elena Kagan to the United States Supreme Court.

CERTIFICATION

This resolution was duly passed at the USET Semi-Annual Meeting, at which a quorum was present, in Mobile, AL, on Thursday, June 17, 2010.

Brian Patterson, President
United South and Eastern Tribes, Inc.

Robert McGhee, Secretary
United South and Eastern Tribes, Inc.

1097

GONZALO I. VERGARA

FACSIMILE TRANSMITTAL SHEET

TO	FROM
Senate Judiciary Committee	Gonzalo I. Vergara, Lt. Col, USAF (Ret.)
COMPANY	DATE
US Senate	5/10/2010
FAX NUMBER	TOTAL NO. OF PAGES INCLUDING COVER
202-224-9102	1
PHONE NUMBER	SENDER'S REFERENCE NUMBER
RE	YOUR REFERENCE NUMBER
Opposition to Elena Kagan	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Dear Judiciary Committee:

I urge that you reject the nomination of Solicitor General Elena Kagan to the US Supreme Court. Whatever her qualifications may be, her stand against military recruiters and her vilification of the military in general, are ultimately major detriments to her nomination. I, as a retired military officer, cannot and will not support her based on her anti-military stances. The military only does what is allowed under the law. If someone does not like military policies, they should contact their representative—not spit on our soldiers.

Ms. Kagan has metaphorically spit on the military and she should not sit on the US Supreme Court.

Very truly yours,


Gonzalo I. Vergara, Lt. Col, USAF (Ret.)


PATRICIA M. WALD

Hon. Patrick J. Leahy
Chairman, U.S. Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

Hon. Jefferson B. Sessions
Ranking Member, U.S. Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, D.C. 20510

Re Nomination of Elena Kagan for Associate Justice of U.S. Supreme Court

Dear Chairman Leahy and Ranking Member Sessions

I write in support of Ms Kagan's nomination as an Associate Justice of the U.S. Supreme Court. I have known Elena Kagan since she was a law clerk to my colleague and friend Abner Mikva on the D.C. Circuit in the mid nineteen-eighties. In that capacity I had the opportunity to view her legal acumen and writing talents at an early stage in her career. During her clerkship Judge Mikva and I sat on many panels together and our clerks held lively discussions with one another about the cases, in some of which the judges participated in as well. I know how highly Judge Mikva regarded Elena. In succeeding years I saw her as a rising young star at Chicago Law School when I visited there on occasion and over the next decade at Harvard Law School where she earned a reputation as one of its best Deans in history. She was also gracious enough to preside over a panel at the American Constitution Society in which Judges Mikva, Tatel and myself discussed judging on the circuit. I have read enough of her published writings to appreciate her analytic powers and accessible writing talents. Although I may not agree with all of her conclusions, I applaud her skills in going to the jugular as to the issues involved, particularly in the area of administrative law and Presidential powers in relation to Congressional directives.

I believe Elena would bring to the Supreme Court several critical qualities. She is an extraordinarily smart lawyer with a practical bent of mind. Her significant exposure as a law clerk and Solicitor General to the way in which courts of appeal as well as the Supreme Court operate, to the thrust and parry of dueling theories in the academy and finally to the competing demands at the highest level of government policymaking

PATRICIA M. WALD

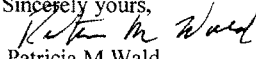
provide a broad spectrum of experience on which she can draw in the important post of Justice. Her relatively young age (for this post) assures that she will bring not only worldly wisdom but also the energy of a new generation to the novel problems that will predictable engage the Court in the years to come. I think there is widespread sentiment among both experts and ordinary people that the Court will profit from an infusion of new talent that has been honed in relevant areas outside the judicial "bubble". My own 20 year experience on the D.C. Circuit which of course draws its members almost entirely from outside the judiciary as well as extensive work abroad watching the different judicial patterns in foreign countries which use a more specialized judicial career route from the university onward convinces me that that a component of real life experience as to how legal doctrines and concepts work on the ground is a valuable asset for judges especially on appellate courts which do not have a trial court's opportunity to see and hear witnesses first hand.

I anticipate that in Ms Kagan's case the confirmation hearings will be especially important in providing an opportunity for the Senators to probe her individual views on legitimate topics such as constitutional interpretation., relationships among the three branches within our separation of powers structure, Executive powers over independent agencies ., the relevance of international law in national court proceedings , tensions between varying interpretations of the First Amendment and democratic governance. Her facile mind and willingness to engage in such dialogues promise an instructive confirmation process which should enlighten the public on the importance of the Court and its proper role in our national life.

I expect that your Committee will forward that process in a constructive way and that Ms Kagan will become a welcome third woman jurist on the Supreme Court.

Thank you for your consideration.

Sincerely yours,



Patricia M. Wald

Judge, U.S. Court of Appeals (D. C. Circuit) (ret.)

**United States Senate Committee on the Judiciary
Hearing on the Nomination of Elena Kagan to the Supreme Court**

Statement of Edward Whelan

Thank you very much, Chairman Leahy and Senator Sessions, for inviting me to testify on the nomination of Elena Kagan to the Supreme Court.

I offer my views in my capacity as president of the Ethics and Public Policy Center and director of EPPC's program on The Constitution, the Courts, and the Culture. In that capacity, I have written and lectured widely on constitutional law and judicial nominations over the past five years, including on the Supreme Court nominations of John Roberts, Samuel Alito, Sonia Sotomayor, and, now, Elena Kagan. I also draw on my additional experience over the past two decades in matters relating to the Supreme Court and constitutional law: During the Court's October 1991 Term, I served as a law clerk to Justice Antonin Scalia. From 1992 to 1995, I worked for the Senate Judiciary Committee as a senior staffer to Senator Orrin Hatch (who was ranking member and then chairman during that period); I worked heavily on judicial nominations, including the Supreme Court nominations of Ruth Bader Ginsburg and Stephen Breyer. From 2001 to 2004, I served as principal deputy assistant attorney general in the Office of Legal Counsel in the U.S. Department of Justice.

My testimony has two parts. In the first part, I will outline why I believe that senators should vote against the Kagan nomination. In the second part, I will explore the claim that supposed "activism" of the Roberts Court provides a reason to support the Kagan nomination. As I will discuss, in my view any sober assessment of the current reality and future risk of judicial activism provides further compelling reason to vote against the Kagan nomination.

One good place to begin assessing the Kagan nomination is the notorious “empathy” standard that President Obama committed to employ in making his Supreme Court picks. It’s important to recall that President Obama’s empathy standard was not some casual aside. Then-Senator Obama—who, as we are so often reminded, taught constitutional law for years at the University of Chicago Law School—elaborated that standard in the carefully prepared Senate floor statement that he delivered in 2005 to explain why he was voting against the confirmation of John Roberts to be chief justice. As Senator Obama put it, the “truly difficult” cases “can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.” In those cases, he emphasized, “the critical ingredient is supplied by what is in the judge’s heart.”¹

Then-Senator Obama repeated his empathy standard as he campaigned for president. For example, in a July 2007 speech,² he repeated his assertion that the resolution of difficult cases turns on “what is in the justice’s heart,” and he committed to select Supreme Court justices on that basis:

We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old—and that’s the criterion by which I’ll be selecting my judges. All right?

¹ Senate Floor Statement of Senator Barack Obama, September 22, 2005.

² Remarks of Senator Obama at Planned Parenthood Action Fund Conference, Washington, D.C. July 17, 2007.

No, that's not "all right," as the American people have clearly recognized.³ To be sure, empathy, properly understood, is a virtue that we Americans should strive to incorporate into our daily lives. Further, much of the debate in political life turns on competing conceptions of what a proper understanding of empathy is and on whether and how it should be pursued in public policy. But the traditional understanding of the judicial role is that judges, rather than indulging their own subjective senses of compassion, should be *dispassionate*. That traditional understanding is embedded in the statutory oath of office for federal judges, which requires federal judges to commit to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "impartially discharge" their duties. (28 U.S.C. § 453.)

Indeed, the very existence of the power of judicial review in our constitutional system—that is, the judicial power to declare laws to be in violation of the Constitution—rests on a rejection of President Obama's empathy standard. As Alexander Hamilton explained in *Federalist* #78:

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature....

The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it

³ See, e.g., Raghavan Mayur, "Thumbs-Down on Obama's 'Empathy' Standard" (discussing IBD/TIPP poll), TIPP Online, June 12, 2009, available at <http://www.tipponline.com/judiciary/thumbs-down-on-obamas-empathy-standard>; Rasmussen Reports Toplines—Supreme Court (May 12-13, 2010), question 2, available at http://www.rasmussenreports.com/public_content/politics/toplines/pt_survey_toplines/may_2010/toplines_supreme_court_may_12_13_2010.

prove any thing, would prove that there ought to be no judges distinct from that body.

The sound public reaction against President Obama's lawless empathy standard was so strong that Judge (now Justice) Sonia Sotomayor saw fit to emphatically repudiate that standard at her confirmation hearing last year, and President Obama himself has seemingly decided to avoid referring to it. But there's every reason to believe that the empathy standard continues to reflect President Obama's considered—but badly misguided—thinking about how Supreme Court justices should determine the meaning of the Constitution and federal laws in what he calls the “truly difficult” cases. And does anyone doubt that what President Obama calls the “truly difficult” cases are just those cases in which traditional interpretive methods don't generate the results that he deeply desires?

What is President Obama's empathy standard really about? As President Obama attempts to remake America into a European social democracy, it's not surprising that he wants justices who will ignore constitutional limits that stand in his way and who will invent new constitutional rights, on matters like same-sex marriage, that permanently entrench the agenda of the Left.

President Obama's empathy standard best explains why he would nominate, in Elena Kagan, someone who may well have less experience that bears on the work of a justice than any entering justice in the past five decades or more. What Ms. Kagan does offer President Obama (in addition to her formidable intellect) is a record, both in the Clinton White House and as Harvard law school dean, as a shrewd political operator who shares his leftist values and who will use her savvy to try to advance them. Further, her

occasional expressions of judicial philosophy over the years are entirely consistent with President Obama's empathy standard. Examples include her celebrating Justice Thurgood Marshall's view that the Supreme Court has freewheeling authority to (in her words) "safeguard the interests of people who had no other champion"; her bizarre acclaim for Israeli arch-activist Aharon Barak as "my judicial hero"; and her defense of judges who "try to mold and steer the law" to promote the "ethical values" and "social ends" that they favor.

Ms. Kagan has already shown that she will allow her ideological biases to warp her legal judgment. Consistent with her extremist rhetoric against Don't Ask, Don't Tell ("a profound wrong—a moral injustice of the first order"), Ms. Kagan escalated her battle against military recruiters when a federal court ruled in late 2004 that the Solomon Amendment was unconstitutional. Even though she recognized that the legal effect of the court's ruling had been blocked, she decided to bar the military recruiters from the law school's jobs office in (as she put it) the "hope ... that the [Defense] Department would choose not to enforce its interpretation of the Solomon Amendment." She also signed her name to an amicus brief in the Supreme Court case (*Rumsfeld v. FAIR*) that offered a highly implausible reading of the Solomon Amendment that all the justices determined would have rendered it "largely meaningless." In sum, at a time of war, she elevated her ideological commitment on gay rights above what Congress, acting on the advice of military leaders, had determined best served the interests of national security, and she treated military recruiters worse than she treated the elite law firms that were donating their legal services to anti-American terrorists and suspected terrorists.

Ms. Kagan also appears to have indulged her ideological bias on gay rights as Solicitor General by undermining federal laws that she was duty-bound to defend. She failed to seek Supreme Court review of a rogue Ninth Circuit ruling (in *Witt v. Department of Air Force*) that threatened Don't Ask, Don't Tell and that subjected the military to burdensome litigation. And under her charge the Department of Justice filed a brief (in *Smelt v. United States*) that gratuitously *disavowed* the position that the Defense of Marriage Act "is rationally related to any legitimate government interests in procreation and child-bearing." As a law professor who is an ardent proponent of same-sex marriage wrote:

*This new position is a gift to the gay-marriage movement, since it was not necessary to support the government's position. It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. Indeed, some state court decisions have relied very heavily on procreation and child-rearing rationales to reject SSM [same-sex marriage] claims. The DOJ is helping knock out a leg from under the opposition to gay marriage.*⁴

Overall, then, there is ample reason to believe that Elena Kagan embraces President Obama's lawless empathy standard and that she would use her position as a Supreme Court justice—quite possibly for the next 30 to 40 years—to indulge her leftist values instead of neutrally interpreting the law.

⁴ Dale Carpenter, "DOJ Boosts the Cause of SSM," Aug. 17, 2009, available at <http://volokh.com/2009/08/17/doj-boosts-the-cause-of-ssm/>.

II

In recent days and weeks, various supporters of Ms. Kagan's nomination, including a number of senators, have sought to bolster their position—and, one suspects, to distract attention from the nominee's manifest shortcomings—by flinging assertions that the Supreme Court under Chief Justice John Roberts has engaged in a pattern of conservative judicial “activism.” I will explain in this part why I believe that these assertions are badly confused and why a sober assessment of the current reality and future risk of judicial activism provides further compelling reason to vote against the Kagan nomination.

A

The term “judicial activism” has many possible meanings. Some people on both sides of the partisan divide use the term and its cognates as an all-purpose epithet for any judicial decision whose result they don't like. So used, the term does not convey a judgment, or even a charge, that the decision is legally *wrong*. Insofar as any of the critics of the Roberts Court are using the term in that empty way, there is obviously little or no point in arguing with them.

In my judgment, the term “judicial activism” is best used, in the constitutional context, to allege one category of judicial error in interpreting the Constitution: the wrongful overriding (typically through the invention or expansion of supposed constitutional rights) of democratic enactments or of other policy choices made by other government officials. In this usage, the term succinctly conveys the charge that the courts have wrongfully invaded the realm of representative government, and it emphasizes the limits on the judicial role in a system of separated powers. This usage

necessarily presupposes that there is a *right* method (or at least a permissible set of methods) of judicial interpretation of the Constitution (how else could one charge that a ruling is wrong?), and it ultimately ought to invite explication of how that method wouldn't generate the ruling that is alleged to be activist.

"Judicial activism" is but one category of judicial error in constitutional cases. It is distinct from a second category, which I call "judicial passivism"—the wrongful failure to enforce constitutional rights. In distinguishing these two categories, I don't mean to imply that one category of error is worse than the other. The two categories are, however, qualitatively different in several respects. One difference is that errors of judicial passivism are correctible through the ordinary political processes: statutes can afford the protections that the Court wrongly denies. By contrast, errors of judicial activism usurp the political processes and are correctible only by extraordinary means: the Court's reversal of its erroneous precedent or constitutional amendment.

The term "judicial activism" has less resonance in the context of statutory rulings, precisely because judicial errors in statutory cases are correctible through the political processes. Nonetheless, the term can sensibly be used to identify judicial decisions that implausibly construe statutes.

Considerations of *stare decisis*, or adherence to precedent, are often confused (frequently deliberately, it would seem) with judicial restraint. But advocacy of judicial restraint and criticism of judicial activism focus first and foremost on the proper role of the courts in a representative government and in a system of separated powers. Judicial restraint is a necessary virtue for the courts because it works to keep courts within their proper bounds. *Stare decisis*, by contrast, is largely an intrajudicial doctrine. When the

Supreme Court addresses a question that it has addressed before, it accords a degree of respect, or deference, to its previous treatment of the question, partly from the presumption that the Court carefully addressed the question the first time, partly from the impracticability of addressing every question anew in every case.

Stare decisis may well have some interbranch implications in some cases, especially, say, where governmental institutions have been designed and maintained in reliance on previous Court rulings. But *stare decisis* considerations are at their weakest when a previous constitutional ruling by the Court has wrongly overridden the democratic processes. In such instances, a sound understanding of judicial restraint may well call for the Court to revisit its prior ruling. When judges override a legislative enactment, citizens have the right to demand that the judicial decision be right—and that a decision that usurps the political processes be overturned.

In recent years, some academics have attempted to neuter the term “judicial activism” by redefining it to mean any exercise of judicial review, *whether right or wrong*, that results in the invalidation of a statute or regulation. I’m reminded of the late, great William F. Buckley Jr.’s response to the leftist charge during the Cold War that the CIA and the KGB were engaged in morally equivalent acts of spycraft. As Buckley put it, that’s like “saying that the man who pushes an old lady into the path of a hurtling bus is not to be distinguished from the man who pushes an old lady out of the path of a hurtling bus: on the grounds that, after all, in both cases someone is pushing old ladies around.”⁵ Likewise, the attempt to neuter the term “judicial activism” obscures the essential distinction between a right decision and a wrong one.

⁵ William F. Buckley Jr., *Miles Gone By: A Literary Autobiography* (2004).

To paraphrase the old Smith Barney commercial, the term “liberal judicial activism” has acquired its stigma the old-fashioned way: it’s earned it. Since the Warren Court’s heyday in the 1960s, the Court has entrenched the Left’s agenda, and usurped the realm of representative government, through a series of activist rulings on a broad range of matters, including: abortion, secularism, obscenity and pornography, gay rights, criminal law and procedure, national security, and the death penalty. These monuments of liberal judicial activism have deeply transformed American politics, institutions, and culture. (Whether various of those transformations have been for the better or for the worse is a matter for dispute, but few would contest the impact of the transformations.) They continue to dominate the legal landscape, and further work on them has taken place under what is conventionally called the Roberts Court, as the recent narrow liberal majorities in cases like *Boumediene v. Bush* (2008), *Hamdan v. Rumsfeld* (2006), *Kennedy v. Louisiana* (2008), and *Graham v. Florida* (2010) starkly illustrate.

Even worse, new edifices of leftist ambition are in the works: Elena Kagan, if confirmed, is an entirely predictable vote in favor of the invention of a federal constitutional right to same-sex marriage. Her vote might well provide the decisive fifth vote for that radical remaking of the central social institutions of marriage and the family—and for the associated stigmatizing as irrational bigots of all those Americans who understand the essence of marriage as the union of a man and a woman. More broadly, Kagan would also predictably be the fifth and decisive vote in support of the Court’s continuation of its unprincipled practice of selectively relying on foreign and international legal materials to alter the meaning of constitutional provisions. That

practice is just one part of a broader transnationalist agenda that would import and impose selected new norms of international law, displace the constitutional processes of representative government, and dilute cherished traditional constitutional rights (e.g., to speech and religious liberty).

C

Against this backdrop of the decades-long reality and ongoing threat of liberal judicial activist rulings, let's now examine some representative allegations of Roberts Court conservative activism.

I

I'll begin with a remarkable colloquy⁶ among three Senate Democrats, all members of this Committee, that took place just last week on the Senate floor. In their prepared remarks, each of the three senators complained about the supposed conservative activism of the Roberts Court and used their complaint to frame the Kagan nomination. In extensive comments, each of the three senators offered what he regarded as a compelling example of that supposed conservative activism.

Senator Cardin gave as his example of "judicial activism" the Supreme Court's 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, the Court ruled by a 5-4 vote that the time period for filing a charge of employment discrimination with the EEOC begins when the discriminatory act occurs. Among other things, it specifically rejected the petitioner's claim that subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination give rise to a new charging period. The majority explained in detail that its holding flowed directly from four Supreme Court precedents over the previous three decades.

⁶ *Congressional Record* (June 22, 2010), S5220-S5223.

At the same time, the Court in *Ledbetter* expressly left open the question “whether Title VII suits are amenable to a discovery rule”—whether, that is, in those instances in which the employee was not aware that she had been discriminated against when the discriminatory act occurred, the charging period would instead run from the time that she discovers that she has been discriminated against. (Slip op. at 23 n. 10.) As the Court noted, the petitioner did “not argue that such a rule would change the outcome in her case.” (Id.) The obvious reason why she did not make that argument was that she had waited *more than five years* after she *learned* of the discrimination to file her EEOC charge—far longer than the 180-day charging period that applied under Title VII.⁷

Consider, by contrast, what Senator Cardin had to say about the Court’s *Ledbetter* ruling:

When Mrs. Ledbetter found out she was being discriminated against, she did the right thing: she brought a claim against her employer....

The Court said Mrs. Ledbetter had to file her case within 180 days after the beginning of the discrimination, and since she did not do that, her claim was barred by the statute of limitations. *This defies logic. How can a person bring a claim when they don’t know they are being discriminated against?* It makes no sense.⁸

These comments by Senator Cardin—and the vehement denunciation of the Court with which he accompanied them—simply misread *Ledbetter*. Three years after the Court’s ruling in *Ledbetter*, Senator Cardin evidently had the misunderstanding that the Court had rejected applying a discovery rule to the charging period in Title VII suits. He

⁷ See Stuart Taylor Jr., “Does The Ledbetter Law Benefit Workers, Or Lawyers?,” *National Journal*, Jan. 31, 2009.

⁸ *Congressional Record* (June 22, 2010), S5220.

also evidently didn't understand that Mrs. Ledbetter had waited more than five years after she learned of the discrimination to file her EEOC charge (as his language gives the mistaken impression that she promptly filed).

Ledbetter has been a *cause célèbre* of the Left, as a result of this same elementary misunderstanding. As Stuart Taylor has written, "Obama and other Democrats were able to make the court's ruling against *Ledbetter* seem outrageous only by systematically distorting the undisputed facts."⁹

Next in the Senate colloquy was Senator Whitehouse, who, after embracing Senator Cardin's misunderstanding of *Ledbetter*, offered his own prime example of his contention that the Roberts Court supposedly favors corporations. His showcase ruling was the Court's 2008 decision in *Exxon Shipping v. Baker*.¹⁰ In that case, the Court ruled by a 5-3 vote (with Justice Alito not participating) that a punitive damages award against Exxon in connection with the 1989 *Exxon Valdez* oil spill was excessive as a matter of maritime common law. The Court ruled that the \$2.5 billion punitive damages award that the Ninth Circuit had allowed should instead be limited to the amount of compensatory damages (\$507.5 million).

Senator Whitehouse's discussion of *Exxon Shipping v. Baker* suffers from a few unfortunate omissions. First, Senator Whitehouse does not disclose that the author of the majority opinion was the liberal Justice Souter. Second, he does not see fit to note that Justice Ginsburg, in dissent, described Justice Souter's opinion as "well stated and comprehensive" and acknowledged that the question in the case "is close."

⁹ Stuart Taylor Jr., "The Myth of the Conservative Court," <http://www.theatlantic.com/national/archive/2010/06/the-myth-of-the-conservative-court/58364/>.

¹⁰ *Congressional Record* (June 22, 2010), S5221.

Third, Senator Whitehouse leaves the impression that the Court's general review of punitive-damages awards divides the justices along ideological lines. But in fact Justices Scalia and Thomas are the strongest *opponents* of the position that the Constitution imposes general substantive limits upon punitive damages. (All the justices agreed in *Exxon Shipping v. Baker* that the Court's maritime jurisdiction gave it the authority to review the punitive-damages award in that case.)

Senator Whitehouse makes no mention of the fact that only a year before *Exxon Shipping v. Baker*, Justice Breyer (joined, among others, by Justice Souter) had written the majority opinion in *Philip Morris v. Williams* vacating a \$79.5 million punitive damages award against Philip Morris in a case brought by the estate of a man whose death was caused by his smoking. Justice Stevens, while dissenting, reiterated that he was "firmly convinced" that the "Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors." Justice Ginsburg, in a dissent that both Justices Scalia and Thomas joined, called Justice Breyer's ruling "unwarranted" and "inexplicable."

In sum, fairly understood in context, the Court's ruling in *Exxon Shipping v. Baker* provides no support for Senator Whitehouse's insinuation that the conservative justices on the Roberts Court disfavor "punitive damages assessed through the jury" against corporations. That is an issue on which the divide on the Court clearly does not fall along more general ideological lines.

The third participant in this remarkable colloquy was Senator Franken. Senator Franken began his remarks by connecting a brutal gang rape of a military contractor employee in Iraq to the Supreme Court's 2001 decision in *Circuit City Stores v. Adams*:

What happened to [the rape victim] in Iraq was bad enough, but because of the Supreme Court's decision in *Circuit City Stores v. Adams*, [her employer] had been able to force [her] to sign an employment contract that required her to arbitrate all job disputes rather than bringing them to a court of law.¹¹

In *Circuit City*, the Court ruled 5 to 4 (with Justice O'Connor, among others, in the majority) that a provision of the Federal Arbitration Act excludes from the Act's coverage contracts of employment of transportation workers, but not other employment contracts. (The underlying complaint involved alleged employment discrimination.) Over a period of more than four decades, ten courts of appeals had previously addressed the same question. All but the Ninth Circuit reached the same conclusion as the Supreme Court. But you wouldn't know any of this from listening to Senator Franken's remarks, nor would you have any idea whether and why he believed that Justice O'Connor and her colleagues in the majority got it wrong as a matter of law. Instead, you'd be led to believe that the Court's decision was "about whether you have a right to a workplace where you won't get raped."

All of this was Senator Franken's wind-up for his condemnation of a ruling that the Supreme Court issued the day before his remarks, in *Rent-a-Center West v. Jackson*, No. 09-497 (June 21, 2010). The case involved an issue of federal law that Solicitor General Kagan evidently regarded as so unimportant that her office chose not to file a brief. The Court ruled by a 5-4 vote that under the Federal Arbitration Act, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, a party's challenge to the enforceability of the agreement as a whole is for the arbitrator to decide. I'll volunteer that I have no considered opinion

¹¹ *Congressional Record* (June 22, 2010), S5222.

whether the Court got it right in *Rent-a-Center West*, for I haven't spent more than a few minutes skimming through the 25 pages of dense argument and counterargument in an unfamiliar and complicated area of the law. But Senator Franken was ready the very next day with his assessment:

Although Jackson signed an employment contract agreeing to arbitrate all employment claims, he also knew the contract was unfair, so he challenged it in court. But yesterday the Supreme Court sided with Rent-A-Center, ruling that an arbitrator, not a court, should decide whether an arbitration clause is valid. Let me say that again. The arbitrator gets to decide whether an arbitration clause is valid. Let me repeat that. The arbitrator gets to decide whether the arbitration clause is valid. That is just one step away from letting the corporation itself decide whether a contract is fair.¹²

Senator Franken evidently imagined that he was offering a legal argument that would somehow become compelling if only he just kept repeating it. But he utterly failed to address, much less grapple with, the statutory text and precedents on which the majority and dissent divide.

In sum, in this remarkable colloquy intended to set the stage for the Kagan hearing, three members of this committee have provided no substantial evidence in support of their contention that the Roberts Court has engaged in conservative judicial activism. Indeed, it's striking that none of their showcase rulings even involved the invalidation of a democratic enactment on *constitutional* grounds (and thus did not present even the risk of the special injury to the democratic processes that errors of constitutional activism involve).

¹² *Congressional Record* (June 22, 2010), S5222.

The Court's decision this past January in *Citizens United v. Federal Election Commission* is undoubtedly the most prominently alleged example of conservative judicial activism. In that case, the Court ruled, by a 5-4 margin, that a provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that barred corporations and unions from making independent expenditures for defined "electioneering communications" violated the First Amendment. In so ruling, the Court overruled its 1990 holding in *Austin v. Michigan Chamber of Commerce* (and that portion of its 2003 ruling in *McConnell v. Federal Election Commission* that applied *Austin*).

Citizens United clearly satisfies one of the two threshold tests for whether a ruling on a constitutional question may fairly be described as activist, as it involved the judicial invalidation of a democratic enactment. The second threshold test is whether it did so *wrongly*. That question is far too large for me to address here and turns on some difficult and contested issues of interpretive methodology, many of which are played out in the lengthy competing opinions in the case. For present purposes, I will instead limit myself to a few observations:

First, *Austin* was a highly dubious ruling whose actual rationale Elena Kagan, in her role as Solicitor General in *Citizens United*, declined to defend. Indeed, as election-law expert Rick Hasen, a *supporter* of the provision that was invalidated in *Citizens United*, complained last year, the government's brief essentially put the Court to the test of overruling *Austin* or of overruling "one of the central tenets" of the landmark ruling in *Buckley v. Valeo*:

[T]he government does not even mention the central holding of *Austin*, much less defend it....

[I]t is no surprise that the government does not want to emphasize *Austin* anti-distortion. After all, ... this equality rationale has already been undermined by the Court's recent opinion in *FEC v. Davis* But in passing on discussing the equality/anti-distortion rationale, the government puts a great deal of effort into an argument that only Justice Stevens has embraced (in his *Austin* concurrence): that the government can justify limits on corporate independent spending to prevent *quid pro quo* corruption of candidates. In other words, the argument that the government pushes here requires the Court to reject, at least in part, one of the central tenets of *Buckley*, that independent spending cannot be limited because the independent nature of the spending means it cannot corrupt candidates....¹³

Chief Justice Roberts likewise observed in his concurring opinion in *Citizens United*:

Finally and most importantly, the Government's own effort to defend *Austin*—or, more accurately, to defend something that is not quite *Austin*—underscores its weakness as a precedent of the Court. The Government concedes that *Austin* “is not the most lucid opinion,” yet asks us to reaffirm its holding. But while invoking *stare decisis* to support this position, the Government never once even mentions the compelling interest that *Austin* relied upon in the first place: the need to diminish “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”

¹³ <http://electionlawblog.org/archives/014156.html>.

Instead of endorsing *Austin* on its own terms, the Government urges us to reaffirm *Austin*'s specific holding on the basis of two new and potentially expansive interests—the need to prevent actual or apparent *quid pro quo* corruption, and the need to protect corporate shareholders. Those interests may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied.¹⁴

Second, even if we *assume for the sake of argument* that *Citizens United* was wrongly decided and thus was an activist decision, the question would remain whether it would be sensible to describe it as an exercise of *conservative* judicial activism. It is true, of course, that the majority consisted of Justice Kennedy and the four justices routinely described as conservative. But the majority's robust First Amendment ruling applies to unions as well as to corporations. Moreover, the ACLU—not typically regarded as favoring conservative (or corporate) causes—had advocated that the Court strike down the BCRA provision. As it summarized its position in its amicus brief:

The broad prohibition on “electioneering communications” set forth in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) violates the First Amendment, and the limiting construction adopted by this Court in [*Federal Election Commission v. Wisconsin Right to Life*] is insufficient to save it. Accordingly, the Court should strike down § 203 as facially unconstitutional and overrule that portion of *McConnell* that holds otherwise.¹⁵

¹⁴ Slip op. at 11-12 (citations omitted).

¹⁵ Amicus Curiae Brief of the American Civil Liberties Union, *Citizens United v. Federal Election Commission*, No. 08-205, at 2 (citation omitted).

Third, while *Citizens United* is evidently a convenient political target (at least when it is misrepresented), there is plenty of reason to doubt that the ruling will have a significant impact on spending on political campaigns (much less on our broader American institutions and culture). As campaign-finance expert (and former FEC chairman) Bradley Smith has explained:

The 28 states that already allow corporate campaign expenditures for state races (including governor, state legislature and attorney general) are not awash in corporate political spending....

Even within the pre-Citizens United limits, corporate PACs had room to increase their direct contributions to candidates by 40 times the amount that they were already giving—and after that, they could have still used their PACs for more corporate spending on top of that. But they did not.

Furthermore, under the law, a corporation can pay all of the legal, accounting, compliance and administrative costs of a PAC out of its general treasury. Yet in recent years just over half of all contributions to corporate PACs have been used to pay for these administrative expenses. If large corporations wanted to free up more PAC money for actual political expenses, before Citizens United they could have immediately freed up some \$300 million simply by paying their PAC administrative costs from their general treasuries. They did not.

In fact, in California, which allows unlimited corporate expenditures, the 10 largest reported funders of independent expenditure committees between 2001 and 2006 did not include a single corporation. Rather, the list consists of unions,

Indian tribes and two individuals, the long-time business partner of one of the candidates, and the partner's daughter.

After Citizens United, there will likely be a modest uptick in overall corporate spending, but mostly by small- and mid-sized corporations. The substantial costs of operating a PAC under complex legal rules, and the limits on the number of people eligible to contribute to the PAC, make PACs ineffective for most small- and mid-sized businesses. And because it takes time to organize and fund a PAC, companies that don't establish a PAC well in advance of an election are left out in the cold if they later choose to participate in the election. The upshot of this is that the court's decision is unlikely to benefit America's largest companies as much as smaller businesses.¹⁶

3

More general allegations that the Roberts Court engages in conservative judicial activism frequently involve a highly selective skewing of the evidence—drastically inflating the supposed importance of cases that fit (or that are distorted to fit) the desired narrative while simply ignoring those that don't. Thus, for example, in the midst of all the confused clamor about the *Ledbetter* decision, three important cases that the Court decided the following term in favor of the employee and against the employer received virtually no attention: *CBOCS West v. Humphries* (2008) (7-2 ruling that section 1981 encompasses retaliation claims); *Gomez-Perez v. Potter* (2008) (6-3 ruling, with majority opinion by Justice Alito, that ADEA prohibits retaliation against a federal employee who complains of age discrimination); *Meacham v. Knolls Atomic Power Laboratory* (2008)

¹⁶ Bradley Smith, "The Case for Corporate Political Spending," *Wall Street Journal*, Feb. 27, 2010.

(largely unanimous opinion placing evidentiary burden on employer to establish exemption under ADEA). Similarly, the year before *Ledbetter*, the Court, in an important, and largely unanimous, opinion in *Burlington Northern & Santa Fe Railway v. White* (2006), expansively interpreted the anti-retaliation provision of Title VII. And in an important ruling just a few weeks ago, the Supreme Court, in an opinion by Justice Scalia, reversed the Seventh Circuit and ruled unanimously that a plaintiff who does not file a timely EEOC charge challenging the *adoption* of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice as long as he alleges each of the elements of a disparate-impact claim. See *Lewis v. City of Chicago*, No. 08-974 (May 24, 2010).

4

It's entirely proper that Supreme Court decisions be subjected to careful scrutiny and, where appropriate, vigorous criticism. But as I have illustrated in this statement, so many of the criticisms of the Roberts Court for supposedly engaging in conservative judicial activism are of dismal quality and invite the suspicion that they are motivated by crude political considerations. Further, even if one indulges the assumption that some of those criticisms may have merit, the overall picture of instances of supposed conservative judicial activism pales into virtual nothingness in comparison to the decades-long reality and ongoing threat of liberal activist rulings.

In sum, anyone genuinely concerned about judicial activism has additional compelling reason to oppose the Kagan nomination.



Add women. **CHANGE** everything.

The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

New York, July 2, 2010

Dear Hon. Leahy,

There is general agreement on Solicitor General Elena Kagan's qualifications to serve on the United States Supreme Court. Having clerked for Justice Thurgood Marshall, served as Associate White House Counsel for the Clinton Administration, and as the Dean of the Harvard Law School are just a few of her bona fides that make her an exceptional nominee.

Today, women make up 48 percent of law school graduates, but comprise only a mere 18 percent of law partners and only one in four is a judge. Elevating Kagan's experience sends an urgent message to the young women who attend law schools across the country that their aspirations are within reach. It also signals to parents that their dreams for their daughter's futures can be fulfilled.

When Justice Ruth Bader Ginsburg joined the court, Justice Sandra Day O'Connor remarked with relief that the language describing her presence evolved from "the Justices and the woman" to "the nine Justices".

Two women Justices may change language, and definitely changed the public perception of the Supreme Court, but three female Justices create a critical mass. Having a third of the court made up of women allows their actual participation to be viewed as normal. Three female Justices changes conversation from gender to the agenda of the Court.

For the court and for the sake of a truly representative democracy, please confirm Elena Kagan.

Sincerely,

Marie Wilson
President and Founder
The White House Project

434 WEST 33RD STREET, 8TH FLOOR, NEW YORK, NEW YORK 10001
www.TheWhiteHouseProject.org

**Testimony of Kurt White at
the Senate Committee on the Judiciary Hearing on
the Nomination of Elena Kagan**

It is a great honor to be asked to testify at this hearing. I am most grateful, however, for the opportunity to help dispel the untrue and unfair accusations of anti-military bias that have been leveled against Ms. Elena Kagan, a woman who, in my short time of knowing her as the Dean of the Harvard Law School, went to such great lengths to show her respect for and appreciation of the United States military.

I first heard Ms. Kagan speak in the fall of 2007 as she gave the welcoming address to the students of my incoming law school class. I'm sure she had many eloquent and inspiring words, but one part of her speech has remained particularly memorable for me. As Dean Kagan was ensuring that every student knew what a special class they had just joined, she listed the number of states and countries from which students had come, and then began listing some of the incredible honors and accomplishments of those seated around me. As I listened to the descriptions of my classmates, I was somewhat surprised that I had been allowed to join this amazing group as a student at the Harvard Law School. I was most surprised, however, when Dean Kagan listed the number of military veterans among those that other students should keep their eyes out for and try to meet during the coming year. It was a proud moment to be recognized in such a way. That the Dean of the Law School saw military service as something so important that she would mention the veterans to the entire class on our first day made me immediately feel welcome and respected at my new school. I later found out from veterans in other classes that Dean Kagan made a point of highlighting military members each year during her welcoming address.

Later in the year, I had the rare opportunity as a first year law student to spend an evening visiting intimately with the Dean. Around Veterans Day Dean Kagan hosted a dinner for military veterans and their families. During this dinner Dean Kagan spoke very little other than to express her deep gratitude to the current and former service members seated at the table. The evening consisted mostly of Dean Kagan asking about our military experiences, listening intently to our stories, and expressing her sincere appreciation for our service. It was truly moving to have the Dean of the Law School take an evening out of her schedule to show her thanks to our small group of veterans. More, she made each of us feel as if she was the one honored to have the opportunity to dine and visit with us for the night. This event, which Ms. Kagan pioneered during her time as dean, meant a great deal to the veterans at the school, and luckily has been continued by her successor.

Also while Dean Kagan was leading the law school, numerous other attempts were made to emphasize the service of the military veterans at the school, from articles published on the school Web site to highlights of veterans and their stories in alumni newsletters.

During the time I knew her as Dean of the Harvard Law School, Ms. Kagan's support of the military was clearly evident. Over the past three years I have been a part of numerous conversations between veterans at the Harvard Law School where we have spoken

warmly of the graciousness shown to us since we arrived at Harvard Law School, most notably by Dean Kagan. It might seem that this would not be a conversation that we would need to have with each other on multiple occasions, but such was the importance of Dean Kagan's words and actions to us and to our overall experience at the law school that we could not help but discuss it frequently. It is thus my honor to have the opportunity to answer the anti-military accusations made against Ms. Elena Kagan, who did so much to make me and my fellow veterans feel welcome, appreciated, and revered, and whose admiration and support of the military were clearly evident during her time as Dean of the Harvard Law School.

Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
June 28, 2010

Opening Statement of U.S. Senator Sheldon Whitehouse
Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of
the United States
As Delivered

I welcome you, Solicitor General Kagan. You come before the Committee today with a remarkable record of achievement in the law. You have been a great student and scholar of the law, a skilled practitioner, and a dedicated public servant. I enjoyed meeting with you in my office and look forward to our discussions as the week proceeds.

I think it's fair to say that some of my Republican colleagues aren't so favorably disposed to your nomination. We've already heard a lot about their concerns. But let's not lose the big picture here. You are the Solicitor General of the United States – the lawyer for the United States before the Supreme Court – and the former Dean of Harvard Law School – a school to which I suspect every one of us on this Committee would be proud to have our children attend. Your nomination to the Supreme Court has to be among the least surprising ever made. And I don't want to take any suspense out of these proceedings, but things are looking good for your confirmation.

So, given this, I'd like to talk for a few minutes about the institution to which you've been nominated, our Supreme Court.

Alexander Hamilton explained, the "judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment." In other words, to fulfill its role in our constitutional system, the Supreme Court must act in a manner that demonstrates its adherence to the demands of the law, not merely an amenability to political preferences.

Important institutional traditions help the Court fulfill that duty. The Court can facilitate democratic processes, but to do so it must respect the other institutions of government. It can bolster the rule of law, but only by exercising proper judicial restraint and respecting precedent. It can uphold our Constitution, but it must not decide constitutional questions unnecessarily. The Court can exercise discretion wisely, but to do so it must balance competing constitutional values, not just apply a favored ideology. And the Court can bring true justice, but only if it approaches each case without predisposition or bias.

Unfortunately, the conservative wing of the current Supreme Court has departed from those great institutional traditions. Precedents, whether of old or recent vintage, have been discarded at a startling rate. Statutes passed by Congress have been tossed aside with little hesitation. And constitutional questions of enormous import have been taken up hastily and needlessly.

From the five-man conservative wing, we have witnessed the discovery of an individual right to bear arms in the *Heller* decision – a right that previously had gone unnoticed by the Court for 220 years. And today, its extension to all our states and municipalities. We have seen the first prohibition on a woman's right to choose upheld with no exception to protect the health of the mother. This court even has chosen to inject itself into the day-to-day business of the lower courts – issuing an extraordinary ruling prohibiting the online streaming of the gay marriage trial in San Francisco. Each decision? 5-4.

Even more striking is the record of corporate interests before this Supreme Court. The *Ledbetter* case allowed an employer to get away with wage discrimination as long as it hid it successfully from the employee. The *Gross* case made it far harder for a victim of age discrimination to prove his or her case. The *Iqbal* case erected new pleading hurdles protecting defendants – likely corporations – from injured plaintiffs. Only last week, the *Rent-A-Center* decision concluded that an employee who challenges as unconscionable an arbitration demand must have that challenge decided by the arbitrator. And the *Citizens United* decision – yet another 5-4 decision – created a constitutional right for corporations to spend unlimited money in American elections, opening our democratic system to a massive new threat of corruption and corporate control. There is an unmistakable pattern. For all the talk of "umpires" and "balls and strikes" at the Supreme Court, the strike zone for corporations gets better every day.

The tide of decisions running against the accountability of big corporations degrades a core constitutional principle. The Founding Fathers provided, as an essential element of our balanced American system of government, the institution of the jury. The Founders put the jury three times into the Constitution and the Bill of Rights. It is there for a reason, as the founding fathers knew – they were tough, smart politicians. When the forces of society are arrayed against you, when lobbyists have the legislature tied in knots, when the governor's mansion is in the pockets of special interests, when the owners of the local paper have marshaled popular opinion against you, one last sanctuary still remains: the jury. Against that tide of corporate influence and wealth stands the jury box – its hard square corners resolute. That was why DeTocqueville called the jury an "institution of government" and "a mode of the sovereignty of the people." Not for nothing was the chapter in which he discusses the jury entitled: "On What Tempers the Tyranny of the Majority."

Now, powerful corporations don't like the jury. They don't like the fact that they too must stand before a group of ordinary citizens, without the advantage of all the influence that money can buy. They would love a world in which their every contact with government was lubricated by corporate money. But to tamper with a jury is a crime. So they've long been on a campaign to smear the jury – the "runaway jury" as their P.R. folks have coached them to call it.

Sadly, the Supreme Court seems to be buying what corporations are selling. The *Exxon v. Baker*

decision, which arose from the terrible Exxon Valdez spill, rejected a jury's award of \$5 billion in punitive damages – just one year's profits for Exxon – and reduced the award by 90%. Anything more than the compensatory damage award, the Court reasoned, would make punitive damages too unpredictable for corporations. The judgment of the jury, and the wisdom of the Founding Fathers, were for the Court lesser values than providing corporations "predictability." Well what of the unpredictability for Alaska of Exxon's drunken captain running his ship aground? And one can't help but wonder now what additional precautions BP might have taken in the Gulf if that corporation didn't know that the Supreme Court had its back on "predictability".

I mention these concerns to you, Solicitor General Kagan, because, if confirmed, you will make decisions that affect every aspect of Americans' lives. If confirmed, I hope and trust that you will adhere to the best institutional traditions of the Supreme Court and act with a clear understanding of the proper role of all the institutions of government provided for us by our Founding Fathers. It is a great Constitution we have inherited. And you will be a great Justice if you interpret our Constitution in the light of its founding purpose, rather than according to the preferences of today's most powerful interests.

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VIA EMAIL AND POSTAL MAIL

June 2, 2010

The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

**RE: Support for Elena Kagan as Associate Justice of the Supreme Court
of the United States**

Dear Senator Leahy:

On behalf of the Women's Bar Association of the District of Columbia ("WBA"), I am writing to support the nomination of Elena Kagan, the 45th Solicitor General of the United States, as Associate Justice of the Supreme Court of the United States. In her years of government service as Solicitor General, Deputy Director of the Domestic Policy Council, Deputy Assistant to the President for Domestic Policy and Associate Counsel to the President, and throughout her career as a professor and Dean of Harvard Law School, Solicitor Kagan has distinguished herself as a brilliant constitutional scholar and writer and as a gifted advocate. Her outstanding credentials and experience and her deep respect for the rule of law and the role of the judiciary establish her as an exemplary nominee to serve on the Supreme Court.

Notably, Solicitor Kagan's intellect and legal acumen have been recognized by those across the political spectrum. During the nomination process for Solicitor General, eight former solicitors general—including Ken Starr, Ted Olson, and Charles Fried—supported her nomination, as did prominent conservatives Brad Berenson and Miguel Estrada, among others. During her relatively short tenure as Solicitor General, she has argued six cases before the Supreme Court and has received accolades for her reasoned arguments and effective advocacy style.

In May 2009, the WBA, in conjunction with the WBA Foundation, honored Solicitor Kagan as its Woman Lawyer of the Year. The Woman Lawyer of the Year Award recognizes a woman for her exceptional achievements in the legal profession and/or for her extraordinary contributions to the advancement of women in the profession. Many of the attributes, characteristics and skills considered for the Woman Lawyer of the Year Award are the same as those that make her eminently qualified to serve as an Associate Justice.

Women's Bar Association of the District of Columbia

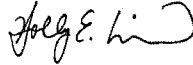
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WBA Letter of Support for Elena Kagan as Associate Justice of the
Supreme Court of the United States
Page 2

For all of these reasons, the WBA strongly urges you to vote for confirmation of Elena Kagan as an Associate Justice of the Supreme Court of the United States. If you have any questions regarding this letter of support, please contact me at [REDACTED] or [REDACTED]

Sincerely,



Holly E. Loiseau
President

cc: WBA Board of Directors
Erica Chabot, Judiciary Press Secretary, U.S. Senate Committee on the Judiciary
Jeremy Paris, Senior Counsel for Oversight and Investigations, Office of Senator Patrick Leahy

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**Testimony of
Dr. Charmaine Yoest, President and CEO
Americans United for Life
Before the United States Senate Committee on the Judiciary
on the Nomination of Elena Kagan
to the United States Supreme Court**

Thank you Chairman Leahy, Ranking Member Sessions, and members of the Committee for inviting me to testify on behalf of Americans United for Life (AUL), the oldest national pro-life public-interest law and policy nonprofit organization. Our vision at AUL is a nation where everyone is welcomed in life and protected by law. We have been committed to defending human life through vigorous judicial, legislative, and educational efforts since 1971, and have been involved in every abortion-related case before the United States Supreme Court including *Roe v. Wade*.¹ In fact, yesterday was a special anniversary for AUL and the defense of the unborn. Thirty years ago, AUL successfully defended the constitutionality of the Hyde Amendment before the United States Supreme Court in the landmark case, *Harris v. McRae*.²

I am here to express AUL's opposition to the nomination of Solicitor General Elena Kagan to the United States Supreme Court. Based on our research, we believe that Solicitor General Kagan will be an agenda-driven judge on the Court, and that she will strongly oppose even the most widely-accepted protections for unborn human life.

There are four primary points that I want to leave with you today. First, we at Americans United for Life, like most Americans, believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Second, we believe that Solicitor General Kagan's agenda-driven judicial philosophy makes her unqualified to serve on the Court. Third, Solicitor General Kagan has an extensive record that demonstrates her

¹ 410 U.S. 113 (1973).

² 448 U.S. 297 (1980).

hostility to regulations of abortion and any protections for the unborn. Fourth, based on Solicitor General Kagan's agenda-driven judicial philosophy and her hostility towards the unborn, we believe that a Justice Kagan would undermine any efforts by our elected representatives to pass or defend even the most widely-accepted common sense regulations of abortion.

I. The Importance of Judicial Philosophy

A United States Supreme Court nominee's judicial philosophy, i.e. the methodology that she would use to decide a case, is as relevant to whether she is qualified to serve on the Court as her intellectual ability, education, and professional experience. Kagan previously acknowledged it is necessary and appropriate to question a Supreme Court nominee about her judicial philosophy: "A nominee, as I have indicated before, usually can comment on judicial methodology, on prior case law, on hypothetical cases, on general issues like . . . abortion."³ A key component of a nominee's judicial philosophy includes whether she will respect the right of the people to determine the content of abortion-related laws through the democratic process.

a. The role of the Justice is not to make policy.

Supreme Court justices should exercise restraint by applying our laws, not directing policy, or pursuing their own agendas. When judges fail to respect their limited role under our Constitution, their decisions reflect their personal preferences regarding public policy. They engage in agenda-driven judging.

Agenda-driven judging entails deciding cases based on one's own political and social ideology rather than the Constitution. One need only look at how a judge decides a case to determine if she is an agenda-driven judge: is she making a reasonable inference based on the text and structure of the Constitution or statute? Or, is she deciding based on what she "believes" "justice" requires? If the latter, she is an agenda-driven judge. As Justice Thurgood Marshall (an ardent and unabashed agenda-driven judge and one of Elena Kagan's mentors) described his judicial philosophy, "You do what you think is right and let the law catch up."⁴

³ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1995)).

⁴ Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992).

That philosophy is simply lawlessness, substituting one's personal preferences for a written rule of law.

In 1973, the Supreme Court substituted personal preferences for the written law when it purported to find a right to abortion in the Constitution in *Roe v. Wade*,⁵ and virtually eliminated the ability of states to regulate this new "fundamental right" with the notoriously broad definition of health in *Doe v. Bolton*.⁶ Since that day, the Supreme Court has permitted some regulation of abortion,⁷ but far less than before *Roe*. Elected legislative bodies constantly struggle to determine what language will pass the current "test"⁸ used by the Supreme Court in abortion jurisprudence.⁹ This confusion is the direct result of judicial interference in a matter that should be handled by the legislative process. A simple ideological shift in the Court that favors its policy preferences over the political process will completely undermine abortion regulations across the country – even those regulations that have the most widespread support among Americans, like parental notification statutes, informed consent laws, partial-birth abortion bans, and limits on public funding for elective abortions.

⁵ 410 U.S. 113 (1973).

⁶ 410 U.S. 179 (1973).

⁷ See, e.g., *Maier v. Roe*, 432 U.S. 464 (1977) (upholding a Connecticut prohibition on the use of public funds for abortions, except those that are "medically necessary"); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment which restricts federal funding of Medicaid abortions only to cases of life endangerment); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding Missouri statute that (1) prohibited the use of public facilities and personnel to perform abortions and (2) in pregnancies of 20 weeks or more, required ultrasound tests to determine viability of the unborn child); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (upholding an Ohio statute requiring a minor to notify one parent or obtain a judicial waiver); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding federal regulation prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding provisions of a Pennsylvania statute that required informed consent, a waiting period, reporting requirements, and parental consent with a judicial bypass); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the "Federal Partial-Birth Abortion Ban of 2003").

⁸ Clarke D. Forsythe, *Who Will Fix the Supreme Court's Mess? A history of United States Supreme Court abortion decisions and how they have shaped abortion law*, in *Defending Life 2009: Proven Strategies for a Pro-Life America*, in *DEFENDING LIFE* 2009 47 (Denise M. Burke et al. eds., 2009) (discussing how the Supreme Court has changed the standard of review for abortion legislation at least four times).

⁹ *Id.* at 47-49 (discussing the challenges that legislative bodies face when writing abortion-related laws).

Recent polling data confirms that Americans want judges who follow the law and are not driven by their own agendas. Majorities of self-identified Republicans, Independents, and Democrats agreed that "[w]hen considering a new Justice for the United States Supreme Court, I would prefer that my United States Senators look for a man or woman who will interpret the law as it is written and not take into account his or her personal viewpoints and experiences." (Agreement: 87% Total, 84% of Democrats, 86% of Independents, 92% of Republicans, 80% of liberals, 85% of moderates, 91% of conservatives).¹⁰ Also, Americans strongly opposed a nominee who "believes that the Courts, and not the voters or elected officials, should make policies on abortion in the United States." (70% Total, 69% of Democrats, 65% of Independents, 78% of Republicans, 65% of liberals, 71% of moderates, 75% of conservatives).¹¹

Americans across the political spectrum recognize that it is not the role of judges to substitute their policy preferences for the deliberations of legislatures.

b. Justices must respect precedent, but may overturn it.

Supreme Court Justices must have a respect for prior Supreme Court decisions, but also recognize that following precedent is "not an inexorable command."¹² In his hearing before this Committee, Chief Justice Roberts explained factors to consider under the principle of *stare decisis*: "[1] [s]ettled expectations . . . [2] [w]hether or not particular precedents have proven to be unworkable . . . [3] whether the doctrinal bases of a decision have been eroded by subsequent developments. . . ."¹³ In fact, the Court enhances its legitimacy when it reverses a decision after overstepping its bounds into policymaking. Furthermore, the Supreme Court should never affirm a decision at odds with the Constitution.¹⁴

Under the principles of *stare decisis*, *Roe* is a prime example of precedent on shaky ground. First, any argument that settled expectations and reliance¹⁵ should prohibit the overturning of *Roe* reflects unawareness of the state of the law; in fact,

¹⁰The Polling Company, Inc. / WomanTrend. "Americans United for Life." Survey. 17-18 May 2009.

¹¹*Id.*

¹² *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

¹³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court*, 109th Cong. 142 (2005).

¹⁴ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833, 855-56 (1992) (discussing "reliance" on the availability of abortion).

if *Roe* were overturned, abortion would still be legal in at least 42 or 43 states.¹⁶ Second, *Roe* and its progeny have clearly proven to be unworkable. For over 30 years, state legislatures and federal courts have struggled to understand what regulations of abortion are permissible, and legislatures often resort to copying the language found in laws previously deemed constitutional by the Court.¹⁷ Third, the purported justifications of *Roe*, flimsy as they were, have dramatically eroded with further in-depth scientific information about when life begins and prenatal development, as well as public health data showing the substantial and negative physical and psychological impact of abortion on women.¹⁸ Finally, people who favor¹⁹ and people who oppose abortion rights agree that *Roe* is fundamentally a policy decision, without Constitutional language to support it. In fact, the Supreme Court has substantially modified the doctrine announced in *Roe* in subsequent cases.²⁰

As then-Chairman Specter stated in Chief Justice Roberts' hearing, *Roe* is "the central issue which perhaps concerns most Americans."²¹ AUL agrees, and we believe that Americans should know whether Kagan is able to recognize the problems with *Roe* and its progeny.

¹⁶Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. of Law & Politics 301, 343-354 (2006) (Appendix 1: "The Legal Status of Abortion Laws in the Fifty States and the District of Columbia if *Roe v. Wade* is Overturned (as of April 2006)).

¹⁷ See *supra* note 8.

¹⁸ See generally John M. Thorp, Jr., MD, Katherine E. Hartmann, MD & Elizabeth Shadigian, MD, *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBST. & GYN. SURVEY 67 (2003) (finding an increased risk for placenta previa, subsequent preterm delivery, and "mood disorders substantial enough to provoke attempts of self-harm" following an induced abortion).

¹⁹ See, e.g., Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) (stating "[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); Benjamin Wittes, *Letting Go of *Roe**, THE ATLANTIC MONTHLY, Jan/Feb 2005 (stating *Roe* "is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply."); John Hart Ely, *The Wages of Crying Wolf: A Comment on *Roe v. Wade**, 82 YALE L.J. 920, 935-37 (1973) (stating "[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure . . .").

²⁰ *Casey*, 505 U.S. at 869-79 (discussing the cases that have modified the holding in *Roe*).

²¹ See *supra* note 13 at 141.

II. Elena Kagan's Judicial Philosophy

Elena Kagan has never been a judge. However, there are several aspects of her record that strongly indicate that she will be an agenda-driven justice on the Court. Piecing these aspects together is much like constructing a jigsaw puzzle, and for those who do not want another agenda-driven justice on the Court, the resulting picture is not reassuring.

First, in 2006, Kagan called former Israeli Supreme Court Judge Aharon Barak her “judicial hero.” She stated that “he is the judge who has best advanced democracy, human rights, the rule of law, and justice.” She also stated that there have been many “famous and great judges Harvard Law School [has been] associated with . . . but the Harvard Law School association of which [she is] *most proud* is the one with President Aharon Barak.”²² The Honorable Justice Richard Goldstone, a former justice of the Constitutional Court of South Africa and chief prosecutor of the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia stated, “[Aharon Barak] is unashamedly what, in U.S. terms, would be regarded as an ‘activist judge.’”²³

Second, Kagan served as a clerk for two agenda-driven judges: former D.C. Circuit Court Judge Abner Mikva and former Supreme Court Justice Thurgood Marshall.

Finally, Kagan has written admiringly about the agenda-driven Warren Court (the Supreme Court when Earl Warren was Chief Justice from 1953-1969), the study and application of international and comparative law, and the use of the government motive doctrine. I will address each of these in turn.

a. Kagan's Judicial Hero: Israeli Judge Aharon Barak

Kagan's “judicial hero,” former Israeli Supreme Court Judge Aharon Barak, has stated that a judge “should adapt the law to life's changing needs” using “the tools that the law provides (such as interpretation, developing the common law,

²² “Israel's Aharon Barak Receives 2006 Gruber Justice Prize,” http://www.gruberprizes.org/PressReleases/PressRelease_2006_Justice.php

²³ Richard Goldstone, *The Jurisprudential Legacy of Justice Aharon Barak*, 48 HARV. INT'L L.J. ONLINE 54 (2007).

balancing, the use of comparative law).” To interpret law, “The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life’s changing reality . . . the court has given [the statute] a new meaning that suits new social needs.”²⁴

In other words, Barak believes that judges may impose their personal agendas — that is, what *they* believe is needed to respond to “life’s changing reality” — without any deference to elected legislatures. In fact, Barak expects that “the need to bridge law and society will become more pressing. Social changes are becoming more and more intensive. . . . *The legislature cannot always keep pace with these changes.* Society will need courts more than ever to bridge the gaps between law and life. . . .”²⁵

Barak’s system of government by the judiciary—which he believes is necessary because “the legislature cannot always keep pace”—is one which our Founding Fathers never embraced and is fundamentally undemocratic. Barak’s other troubling views include:

- He believes the judiciary is tasked with the protection of a democracy and only it can act as final arbiter of whether a government action will be deemed lawful.²⁶
- Barak claims the judiciary has the right to overrule executive and legislative actions that breach his expansive definition of human dignity (including the death penalty, life imprisonment with no chance of parole, and cuts to welfare aid). Barak thinks U.S. courts should follow his view, and he would “locate” this power in our Constitution under the concept of equality and the penumbras of our rights under *Griswold v. Connecticut*.²⁷

²⁴ AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 306-7, 4 (Princeton: Princeton University Press, 2006).

²⁵ *Id.* at 310-11 (emphasis added).

²⁶ *See id.* at 226-240; 241-260.

²⁷ *See id.* at 86-88.

- Barak thinks that in a constitutional democracy the people can enact “unconstitutional” constitutional amendments. Whether or not a constitutional amendment is “unconstitutional” is up to the judiciary.²⁸
- Barak claims to give the executive deference in military matters; however, in reality his view of the law’s reach is so expansive that his court has countermanded military orders, decided whether to release terrorists within the framework of a political “package deal,” and has directed the government as to where it can put up a security fence to keep suicide bombers from entering Israel from the West Bank.²⁹
- Barak believes the powers of judicial review are so expansive that decisions by military commanders over which enemy combatants can be detained for interrogation first need to go through the judiciary.³⁰
- Barak believes the judge is a “partner to the authors of the constitution. The authors establish the text; the judge determines its meaning.”³¹ Barak laments the use of “originalism” by the American Supreme Court, which means simply trying to understand a text as the authors intended it, stating “[w]hy can some enlightened democratic legal systems . . . extricate themselves from the heavy hands of intentionalism and originalism in interpreting the constitution, while constitutional law in the United States remains mired in these difficulties?”³²
- Barak rejects the American Constitutional law principle of non-justiciability of political questions, stating: “According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. . . . Even actions of a clearly political nature, such as waging war, can be examined with legal criteria.”³³ There is no sphere of personal freedom in Barak’s vision of the world.

²⁸ Aharon Barak, *Address at Round Table: Unconstitutional Constitutional Amendments – Session Two, Part I*, Talk delivered at The Hebrew University of Jerusalem April 25-6, 2010, <http://www.youtube.com/watch?v=w2sf8PzSpqg>.

²⁹ See BARAK, *supra* note 24 at 180; 289.

³⁰ HCJ 3239/02 Iad Ashak Mahmud Marab v. IDF Commander in West Bank [2002] (available at http://clyon1.court.gov.il/Files_ENG/02/390/032/A04/02032390.A04.HTM).

³¹ BARAK, *supra* note 24.

³² *Id.* at 133.

³³ *Id.* at 179.

- Barak advocates expanding rules of standing, stating: “I believe my role as a judge is to bridge the gap between law and society and to protect democracy. It follows that I also favor expanding the rules of standing and releasing them from the requirement of an injury in fact. The Supreme Court of Israel has adopted this approach.”³⁴ In Israel, anyone can bring a case before the Supreme Court, expanding the judiciary’s role in a manner alien to U.S. Constitutional law.

These and other views demonstrate how deeply troubling Kagan’s characterization of Barak as her “*judicial hero*” truly is. This characterization raises important questions about her philosophy, particularly: does she believe that as a justice she will have the right to overrule executive and legislative actions that breach *her* characterization of human dignity? Also, does she believe that as a justice, she has the right to “adapt the law to [*her* view of] life’s changing needs?” If so, what role does that leave for elected legislatures?

b. Kagan’s Mentors: Judge Abner Mikva and Justice Thurgood Marshall

Following graduation from law school, Kagan clerked for Judge Abner Mikva on the United States Circuit Court for the District of Columbia. During an interview, Mikva stated: “I think judges tend to be too separate from the political process and the body politic. I support the result of *Roe v. Wade*. When I was a member of the state legislature, I was introducing proposals to make Illinois law approximate what *Roe v. Wade* later on did . . . And then, to my pleasant surprise, the Supreme Court came down with [a decision that] preempted the whole political process.”³⁵

Judge Mikva’s statement is a striking example of an agenda-driven philosophy. As explained in part (I)(a) above, *Roe*, along with its companion case *Doe*, created a virtually unrestricted “right” to abortion and stripped legislatures of the ability to enact meaningful abortion restrictions (meaningful abortion regulations have only become law since *Roe* because the Supreme Court has modified abortion jurisprudence). The fact that Judge Mikva found the Court’s

³⁴ *Id.* at 193.

³⁵ See Interview by Harry Kreisler with Abner Jak Mikva. (Apr. 12, 1999), <http://globetrotter.berkeley.edu/people/Mikva/mikva-con4.html>.

actions to be a “pleasant surprise” shows that he supports agenda-driven judging. He thought that it was legitimate for the Supreme Court to “preempt [] the whole political process.” This raises the critical question: Does Elena Kagan agree?

Kagan’s statements regarding her mentor, Justice Thurgood Marshall, indicate that she does. Kagan described Thurgood Marshall’s constitutional interpretation as “a thing of glory”³⁶ because he thought the role of the court was to “show a special solicitude for the despised and disadvantaged.”³⁷ While that may be admirable in the abstract, the reality of Justice Marshall’s opinions concerning abortion shows little concern for the most vulnerable people in our country – unborn human life. Instead, Justice Marshall’s arguments personified a method of constitutional interpretation that was not a “thing of glory” but rather a means to push an abortion agenda through the courts.

For example, in the companion cases of *Beal v. Doe*³⁸ and *Maier v. Roe*,³⁹ the Supreme Court held that state funding restrictions on the use of Medicaid funds for non-therapeutic abortions was constitutional. Justice Marshall, on the other hand, dissented because he felt the denial of funds for abortions amounted to a violation of Equal Protection under the Fourteenth Amendment.⁴⁰ Justice Marshall not only believed that legalized abortion was constitutionally required, but also that the Fourteenth Amendment mandated that states pay for abortions.

Similarly, in the 1980 case *Harris v. McRae*⁴¹ Justice Marshall argued that the Hyde Amendment—which restricts the use of certain federal funds for abortions—was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.⁴² Marshall stated that “denial of a Medicaid-funded abortion is equivalent to denial of a legal abortion altogether.”⁴³

Marshall also dissented in cases where the Court upheld parental involvement statutes. In *H.L. v. Matheson*,⁴⁴ Marshall argued that parental

³⁶ Elena Kagan, *For Justice Marshall*, 71TEX L. REV. 1125, 1130, (1993).

³⁷ *Id.* at 1129.

³⁸ 432 U.S. 438 (1977).

³⁹ 432 U.S. 464 (1977).

⁴⁰ *Beal*, 432 U.S. at 454; *Maier*, 432 U.S. at 337.

⁴¹ 448 U.S. 297 (1980).

⁴² *Id.* at 341.

⁴³ *Id.* at 338.

⁴⁴ 450 U.S. 398 (1981).

notification laws did not pass even “rational basis” scrutiny.⁴⁵ Marshall believed “The State cannot have a *legitimate interest* in adding to this scheme mandatory parental notice of the minor’s abortion decision.”⁴⁶ Similarly, in *Hodgson v. Minnesota*,⁴⁷ Marshall dissented in a parental notification case in which the Court approved a “judicial bypass option” as well as a 48-hour delay requirement. Marshall argued, contrary to the Court, that no part of the Minnesota parental notification requirement was “even reasonably related to a legitimate state interest.”⁴⁸ Even Justice John Paul Stevens acknowledged that notification of only one parent and a 48-hour waiting period were reasonable restrictions on abortion.⁴⁹

Justice Marshall believed he had the power to “correct” society’s ills by granting rights that had never existed before, even if he had to overturn the will of the people. Marshall’s “special solicitude for the despised and disadvantaged” included telling Americans their tax dollars were to be used to abort society’s most vulnerable members under a concept of Equal Protection the Court has never embraced to this day. This begs the question: does Elena Kagan still believe Marshall’s judicial philosophy is a “thing of glory” that she would follow as a Justice? We believe she does, as is further explained in Part III below.

c. Kagan’s Statements and Writings

i. **The Warren Court**

In her graduate thesis,⁵⁰ Kagan wrote favorably about the Warren Court’s judicial philosophy. She described the Warren Court as “a court with a mission... to correct the social injustices and inequalities of American life ... [and] to transform the nation.”⁵¹ Kagan stated that “the Warren Court justices set themselves a goal...and they steered by this goal when resolving individual

⁴⁵ *Id.* at 445, 453-4 (“The State cannot have a legitimate interest in adding to this scheme mandatory parental notice of the minor’s abortion decision.”)

⁴⁶ *Id.* at 453 (emphasis added).

⁴⁷ 497 U.S. 417 (1990).

⁴⁸ *Id.* at 462.

⁴⁹ *Id.* at 449.

⁵⁰ Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method*, (Jun. 27, 1983) (thesis, Oxford University) (available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-OxfordThesis.pdf>.)

⁵¹ *Id.* at 40.

cases.”⁵² According to Kagan, the “rectification of social injustice” was the Warren Court’s standard of constitutional decision-making.⁵³

This “steering” by the Court is the essence of agenda-driven judging. Kagan did not criticize the Warren Court’s vision of a “just and fair society informing almost the whole of the Court’s constitutional analysis.”⁵⁴ Kagan only critiqued the Warren Court because it failed to write “a tenable legal argument” for its decisions regarding the exclusionary rule, leaving them vulnerable to reversal or modification by future Courts.

Kagan stated: “U.S. Supreme Court justices live in the knowledge that they have the authority to command or to block great social, political and economic change. At times, the temptation to wield this power becomes irresistible. The justices, at such times, will attempt to steer the law in order to achieve certain ends and advance certain values.”⁵⁵ Again, Kagan is not critical of this “irresistible temptation,” and gives no indication that judges should avoid “steering the law” to achieve certain ends.

Kagan further stated that “of course, the most meticulously crafted and closely analyzed opinion may not endure the test of time: a future court may overturn such an opinion on the ground that new times and circumstances demand a different interpretation of the Constitution.”⁵⁶ Kagan failed to acknowledge that if judges interpret the Constitution based on the text rather than subjective ideas about what constitutes a “just society,” their opinions would have a better chance of surviving subsequent reviews.

Kagan’s favorable view of the Warren Court’s philosophy is clear. She wrote: “Judges are judges, but they are also men...As men and as participants in American life, judges will have opinions, prejudices, values. Perhaps, most important, judges will have goals. And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. *Such activity is not necessarily wrong or invalid.*”⁵⁷

⁵² *Id.* at 40.

⁵³ *Id.* at 40.

⁵⁴ *Id.* at 41.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 41.

⁵⁷ *Id.* at 119-20 (emphasis added).

Elena Kagan's support for the Warren Court's vision of how the Supreme Court is to transform society, even at the expense of the will of democratically-elected legislatures, is deeply concerning as it indicates that she will choose to "mold and steer the law" to promote her own agenda.

ii. International and Comparative Law

Kagan has expressed a profound affection for the study and application of international and comparative law. Under Kagan's leadership as Dean of Harvard Law School, the school's curriculum was changed to require the study of comparative or international law. Strikingly, the curriculum was *not* changed to require the study of American Constitutional law.⁵⁸

Further, in 2004, Elena Kagan spoke at a conference where she emphasized the importance of international and comparative law in the curriculum of law schools, and recommended that law schools bring more visiting foreign professors to their faculty.⁵⁹ "They will help to make American students aware that there are *many different ways of solving legal problems and of using law to shape public life*," she said.⁶⁰

While increasing law students' awareness of the laws of other countries is not wrong, favoring international law as a means to "shape" American jurisprudence is problematic. Strikingly, this appears to be Kagan's intent—in her responses to follow-up questions from Senator Arlen Specter after her confirmation hearing for the office of Solicitor General, Kagan stated that "There are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions."⁶¹

Kagan's emphasis on international and comparative law presents yet another similarity to her "judicial hero," Judge Aharon Barak. In his book, *The Judge in a Democracy*, Barak dedicates an entire chapter to discussing the significance of comparative law. There, Barak states that comparative law is an "important tool"

⁵⁸ See Elena Kagan, John W. King Memorial Lecture, New Hampshire Supreme Court (October 6, 2008), <http://www.courts.state.nh.us/>.

⁵⁹ Elena Kagan, Address at Lex Mundi Annual North American Meeting 13 (May 15, 2004), <http://judiciary.senate.gov/nominations/SupremeCourt/upload/12D-Part3.pdf>.

⁶⁰ *Id.* at 13 (emphasis added).

⁶¹ Letter from Elena Kagan to Senator Arlen Specter (Mar. 18, 2009).

to enable judges to “fulfill their role in democracy.”⁶² Barak goes so far as to say that even in the absence of a direct influence of one constitutional text upon another, there still exists “a basis for interpretive inspiration.”⁶³ He gives an example of where this interpretation would be proper: to determine “the scope of human rights, resolving particularly difficult issues such as *abortion* and the death penalty, and determining constitutional remedies.”⁶⁴ In other words, Barak is arguing that judges should look to *foreign countries’ constitutions* to determine how to rule on important issues, like abortion, under their own constitutions.

Barak’s views are stunning, and completely contrary to the legal structure of the United States. Kagan’s admiration for Barak as a judge and the importance she placed on incorporating international and comparative law into Harvard Law School’s curriculum suggest that Kagan may discount the principal role our Constitution holds in American jurisprudence.

iii. Government Motive

Kagan has written favorably about the application of the “government motive” doctrine in the context of First Amendment law. She argued that first amendment doctrine is focused not on the effects of a legislative enactment, but on the *motive* of the government actor.⁶⁵ Looking for governmental motive invariably involves looking for *bad motives*, i.e. reasons to strike down an enactment by legislatures.

Pro-abortion academics and judges have long sought to impose an “anti-abortion motive” analysis to invalidate state abortion regulations. For example, Supreme Court Justice Harry Blackmun applied a motive analysis to strike down abortion health regulations in 1986 in *Thornburgh v. American College of Obstetricians & Gynecologists*.⁶⁶ A slight tilt in the Court could again lead to the application of this doctrine to state abortion regulations.

⁶² BARAK, *supra* note 24 at 197.

⁶³ *Id.* at 201.

⁶⁴ *Id.* at 201.

⁶⁵ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L.REV. 413 (1996).

⁶⁶ 476 U.S. 747 (1986) (While Pennsylvania sought to require that women be informed of any “detrimental physical and psychological effects” of abortion and of the “particular medical risks” from abortion, Blackmun struck down the statute with this sneering line: “That the

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The search for legislative “motive” has many problems. It is often a pretext for finding a reason to strike down legislation which has been passed by accountable, elected representatives. Such disdain for legislative intent ultimately undermines self-government. If there is no such thing as legislative intent, then a law, upon passage, does not convey the will of elected representatives but is simply a malleable device for judicial reconstruction. The will of the people, expressed through the representative branches of government, is rendered irrelevant upon passage of a law. That has great implications for judicial power when it comes to interpreting the Constitution, and raises grave concerns about Kagan’s judicial philosophy.

III. Elena Kagan’s Abortion Record

The pieces that make up Kagan’s abortion record create the picture of a staunchly pro-abortion ideologue who has devoted her life to serving pro-abortion political candidates, judges, and office-holders. Further, on multiple occasions she has used her positions to voice opposition to the most widely accepted regulations of abortion. Her position is so clear, that Senator Barbara Boxer (D-CA), a staunch abortion advocate, voiced support for Kagan: “I have no reason to think anything else except that [Kagan] would be a very strong supporter of privacy rights because everyone she worked for held that view.”⁶⁷ (“Privacy rights” is the euphemism under which Justice Blackmun imposed a right to abortion on America in *Roe v. Wade*.)

a. The Early Years

As an undergraduate at Princeton University, Kagan devoted “14 hours a day, six days a week” during one of her summer breaks to working for United States Senate candidate, Elizabeth Holtzman.⁶⁸ Kagan admired Holtzman’s

Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.” Justice O’Connor, dissenting, rightly skewered Blackmun’s illogic, noting that it had long been recognized to be within a state legislature’s constitutional authority to regulate the medical profession in this way (*Id.* at 829)).

⁶⁷ Manu Raju, *In Kagan, ‘a Democrat’s Democrat,’* POLITICO, May 11, 2010, <http://dyn.politico.com/printstory.cfm?uuid=89929ECB-18FF-70B2-A8FB1FF13112D311>.

⁶⁸ Elena Kagan, *Nov. 10, 1989: Fear and Loathing in Brooklyn*, THE DAILY PRINCETONIAN, May 3, 2010, <http://www.dailyprincetonian.com/2010/05/03/26082>.

“intelligence, her integrity, her ideals.”⁶⁹ Among Holtzman’s core ideals were “abortion rights.”⁷⁰ Following Holtzman’s defeat, Kagan wrote about her devastation over the loss and stated that she was surprised by the election winners: “I found it hard to conceive of the victories of these anonymous but Moral Majority-backed [candidates] . . . these “*avengers of ‘innocent life’*.”⁷¹ This statement raises the question of why “innocent life” is in quotation marks. Did Kagan contest the scientific fact that unborn human beings are alive, or was her statement expressing doubt of their innocence? Either way, it communicates hostility to unborn human life and to those who promote protection of unborn human life.

As previously discussed, Kagan also clerked for pro-abortion Judge Abner Mikva and pro-abortion Justice Thurgood Marshall. In 1988, Kagan worked as a Researcher for Michael Dukakis’ presidential campaign. Three years before *Roe v. Wade*, Dukakis introduced a bill in the Massachusetts House to repeal that state’s then strongly pro-life laws.⁷² In the summer of 1993, Kagan worked as special counsel to then-Senator Joe Biden on the Senate Judiciary Committee. Biden believes the Constitution offers an “inherent right to privacy” and “strongly supports *Roe v. Wade*.”⁷³ During a 2007 Democratic primary debate, when asked whether he would have a specific litmus test question on *Roe* for Supreme Court nominees, Biden stated: “I would make sure that the people I sent to be nominated for the Supreme Court shared my values; and understood that there is a right to privacy in the United States Constitution. That’s why I led the fight to defeat Bork, Roberts, Alito, and Thomas.”⁷⁴

From 1995-1999, Kagan worked for President Bill Clinton 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. Clinton’s anti-life actions included vetoing the Partial-Birth Abortion Ban passed by

⁶⁹ *Id.*

⁷⁰ Michael Specter, *Feminists Painfully Watching Holtzman and Ferraro Battle*, N.Y. TIMES, Mar. 14, 1992, <http://www.nytimes.com/1992/03/14/nyregion/feminists-painfully-watching-holtzman-and-ferraro-battle.html?sec=&spon=&pagewanted=all>.

⁷¹ Kagan, *supra* note 68 (emphasis added).

⁷² See James P. Finnegan, *Dukakis, Abortion*, CHICAGO TRIBUNE, Aug. 13, 1988, http://articles.chicagotribune.com/1988-08-13/news/8801230321_1_abortion-unborn-dukakis.

⁷³ See OnTheIssues.com, Joe Biden on Abortion, http://www.ontheissues.org/Social/Joe_Biden_Abortion.htm (last visited Jun. 28, 2010).

⁷⁴ *Id.*

Congress twice;⁷⁵ reversing the *Mexico City Policy*, allowing federal funding to go to groups that perform or promote abortion;⁷⁶ and supporting the Freedom of Choice Act (which would have codified into federal statutory law a more expansive “right” to abortion than even was provided by *Roe* and *Doe*).⁷⁷

President Obama, one of the most pro-abortion presidents in our nation’s history,⁷⁸ picked Kagan to be the Solicitor General in 2009, and has now nominated her to the U.S. Supreme Court. In Obama’s statement on the 35th Anniversary of *Roe v. Wade* during his presidential campaign, he noted that *Roe v. Wade* would be at stake depending on who was elected as the next President.⁷⁹

Kagan has worked for, and is close friends with, two of the most pro-abortion presidents in American history, as well as other pro-abortion politicians. As Senator Boxer stated, we *do* have every reason to believe Kagan will bring the same radical pro-abortion worldview to the Supreme Court.

b. Clerkship for Justice Marshall

During her clerkship for Justice Marshall, Kagan wrote two memoranda that shed light on how she would treat cases pertaining to unborn human life as a Supreme Court Justice.

⁷⁵ See AbortionFacts.com, Partial Birth Abortion Bans, http://www.abortionfacts.com/partial_birth/congressional_bans.asp (last visited Jun. 28, 2010).

⁷⁶ See Jake Tapper et al., *Obama Overturns ‘Mexico City Policy’ Implemented by Reagan*, ABCNEWS, Jan. 23, 2009, <http://abcnews.go.com/Politics/International/story?id=6716958&page=1>.

⁷⁷ See http://www.clintonmemoriallibrary.com/clint_abort.html.

⁷⁸ Within three days of President Obama taking office, he overturned the *Mexico City Policy*, which forbade federal funding of groups that provide or promote abortion. For other instances, see <http://www.aul.org/2008/06/what-did-barack-obama-promise-planned-parenthood>.

⁷⁹ See President Barack Obama, Statement on 35th Anniversary of *Roe v. Wade* Decision (Jan. 22, 2010), http://www.barackobama.com/2008/01/22/obama_statement_on_35th_annive.php (emphasis added).

i. Funding for Pregnancy Care Centers

While serving as a clerk for Justice Thurgood Marshall on the United States Supreme Court in October 1987, Elena Kagan wrote a memo arguing that “all religious organizations should be off limits” from receiving federal funding to support projects authorized by the Adolescent Family Life Act (including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, etc.) because those projects are “so close to the central concerns of religion.”⁸⁰

In her memo, Kagan made clear her view that the AFLA violated the Establishment Clause: “I think the [district court] got the case right.”⁸¹ While Kagan has since backpedaled from her position, her subsequent attribution⁸² of the views expressed in her memo to Justice Marshall directly contradicts her statement that she thought the district court “got the case right.” Further, she does not argue in the memo that, based on Marshall’s past opinions, he should support the lower court’s decisions.

In response to follow-up questions from Ranking Member Jeff Sessions, Kagan wrote that “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.’ . . .”⁸³

⁸⁰ Elena Kagan, *Memo to Justice Thurgood Marshall on Bowen v. Kendrick* (1987) (Reproduced from the Collections of the Manuscript Division, Library of Congress) (hereinafter, “Marshall Memo”) (The Supreme Court rejected Kagan’s position in *Bowen v. Kendrick*, 487 U.S. 589 (1988), reversing the district court’s ruling that federal grants to religious organizations under the Adolescent Family Life Act (AFLA) violated the Establishment Clause of the First Amendment. Notably, Justice Marshall dissented).

⁸¹ *Id.* at 3.

⁸² *Confirmation Hearing on the Nomination of Thomas Perrelli to be Associate Attorney General; The Nomination of Elena Kagan to be Solicitor General of the United States*, 111th Cong. 10 (2009), 11.

⁸³ *Questions for the Record for Elena Kagan Submitted by Senator Jeff Sessions*, 111th Cong. (2009).

In light of this statement, and Kagan's hostility towards preferential treatment by the government of childbirth over abortion (see Section (III)(c) below), it is questionable how Kagan would treat a case involving the funding of pregnancy care centers should it come before the Court.

ii. Funding for Prisoners' Abortions

On the other hand, Kagan looks favorably upon funding for elective abortions. In April of 1988, Elena Kagan wrote to Justice Thurgood Marshall that a Circuit Court decision mandating taxpayer funding for the elective abortions of inmates was "well-intentioned," but poorly reasoned.⁸⁴ However, despite Kagan's belief that the decision was "quite ludicrous"⁸⁵ in part, she recommended Marshall vote against reviewing the case because "this case is likely to become the vehicle that this Court uses to create some very bad law on abortion."⁸⁶

Again, Kagan's memo is deeply opinionated. It clearly expresses *her* thoughts on the Circuit Court decision and the action that Justice Marshall should take. The logical explanation for Kagan's concern that this case could be a "vehicle ... to create very bad law on abortion" is that Kagan did not want the Court to reinforce or extend its holdings in *Beal v. Doe*,⁸⁷ *Maier v. Roe*,⁸⁸ and *Harris v. McRae*⁸⁹ that the State (i.e., the taxpayer) is not required to pay for elective abortions.

c. Academic Writings: Abortion Funding Restrictions

Elena Kagan has extensively criticized the Supreme Court decision in *Rust v. Sullivan*,⁹⁰ where the Court upheld the constitutionality of Department of Health and Human Services' regulations that enforce Title X's statutory prohibition against family planning funds being "used in programs where abortion is a method of family planning." To ensure compliance with the statute, the regulations

⁸⁴ Elena Kagan, *Memo to Justice Thurgood Marshall on Lanzaro v. Monmouth County* (1988) (Reproduced from the Collections of the Manuscript Division, Library of Congress) (hereinafter, "Marshall Memo II").

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 2.

⁸⁷ 432 U.S. 438 (1977).

⁸⁸ 432 U.S. 464 (1977).

⁸⁹ 448 U.S. 297 (1980).

⁹⁰ 500 U.S. 173 (1991).

prohibited promoting and counseling on abortion. Kagan argued that the Title X regulations amount to unconstitutional viewpoint discrimination.⁹¹

In an article, Kagan wrote: “*Rust* illustrates the way in which government funding may have both more potent and more disruptive effects than direct government speech” and that selective government funding “wreaks havoc on the ability of those private parties in the best position to challenge the message to provide a counterweight to government authority.” She stated that “a refusal to fund any speech relating to abortion would have been constitutionally preferable to the funding scheme that the regulations established.”⁹² She also wrote that in *Rust*, “the Court, *to its discredit*, announced that because the selectivity occurred in the context of a governmental funding program, the presumption against viewpoint discrimination was suspended.”⁹³

In other words, Kagan believes that it is unconstitutional for the federal government to fund speech that promotes childbirth while prohibiting funding for speech that promotes abortion. In contrast, the United States Supreme Court held that the government may “make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.”⁹⁴ The Court stated that by funding one program and not another, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”⁹⁵

Elena Kagan has argued that the use of government funds to promote life over abortion is unconstitutional. However, the Supreme Court has repeatedly affirmed Congress’ determination that the state has an interest in protecting unborn human life.

⁹¹ See Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29 (1992).

⁹² *Id.* at 56.

⁹³ Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873 (1993) (emphasis added).

⁹⁴ 500 U.S. 173, 192-3 (citing *Maier v. Roe*, 432 U.S. 464, 474 (1977)). See also *Harris v. McRae*, 448 U.S. 297 (1980).

⁹⁵ *Id.* at 193.

d. White House: Abortion

While working in the Clinton White House, Kagan was heavily involved in advising the President on life issues and crafting his related policy positions. In fact, she was specifically assigned “abortion” in the White House Counsel’s Office⁹⁶ and “choice” while serving on the Domestic Policy Council.⁹⁷ When she moved over to the Domestic Policy Council, she wrote: “Bruce – if it’s ok with you, I’ll keep up with this issue,” referring to abortion. Bruce responded: “Elena – you’re perfect for the job.”⁹⁸ During this time, Kagan consistently promoted anti-life positions that at times extended beyond what President Clinton was inclined to do.

Of particular note is Kagan’s work on the President’s policy regarding a ban on partial-birth abortions. In January of 1996, Kagan drafted a memo advising Clinton to oppose the Partial-Birth Abortion Ban of 1995 (the memo was signed by Jack Quinn).⁹⁹ The following month, when President Clinton decided to adopt a policy position supporting a weaker “ban” on partial-birth abortion, Kagan viewed his position as “a problem.”¹⁰⁰

Kagan promptly drafted a memo arguing that the President’s approach “is unconstitutional, because it prohibits the use of the partial birth procedure in any pre-viability case in which the woman desires the abortion for non-health reasons. . . .”¹⁰¹ In other words, she believed that any ban that extended to pre-viability abortions for any reason was unconstitutional. She also argued that “the

⁹⁶ NLWJC – Kagan; Counsel, <http://www.clintonlibrary.gov/KAGAN%20COUNSEL/KAGAN%20Counsel%20-%20Box%20001%20-%200010.pdf>, 3236.

⁹⁷ NLWJC – Kagan; Emails Created, <http://www.clintonlibrary.gov/KAGAN%20E-Mail%20SENT/KAGAN-ARMS%20SENT%20Boxes%2001-10.pdf>, 1220.

⁹⁸ E-mail from Tracey E. Thornton to Elena Kagan (and others) (January 6, 1997) (handwritten notes).

⁹⁹ Memorandum from Jack Quinn to President of the United States (Jan. 22, 1996), <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, p. 173.

¹⁰⁰ Note from Elena Kagan to Jack Quinn (April 1996), <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 182.

¹⁰¹ Memorandum from Elena Kagan to Jack Quinn (February 15, 1996), <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 178-9.

[proabortion] groups will go crazy, exactly because the approach effects this broadscale pre-viability prohibition.”¹⁰²

Critically, in 2007 the Supreme Court upheld the Partial Birth Abortion Ban of 2003 (which does not include an exception for “health” and applies to the entire pregnancy) in *Gonzales v. Carhart*,¹⁰³ over ten years after Kagan advised President Clinton that his much weaker “ban” was unconstitutional because it applied to the entire pregnancy.

She recommended instead that President Clinton support an approach that would allow a woman to have a partial-birth abortion under a “health exception” that extended beyond what the Court required in *Roe* and *Doe*.¹⁰⁴ Under her “health exception,” a woman could have a partial-birth abortion simply because an abortionist thought it was the preferable type of abortion for her health, regardless of whether she actually “needed” an abortion for health reasons at all. In other words, her “ban” was not really a ban at all.¹⁰⁵

Kagan succeeded in changing President Clinton’s position.¹⁰⁶ With Kagan’s guidance, President Clinton’s policy on partial-birth abortion went from bad to worse. Congress did not amend the bill, and President Clinton vetoed it on April 10, 1996. In subsequent talking points that Kagan drafted on partial-birth abortion, she stated that “A ban of this kind, aside from violating the Constitution, would be the true inhumanity.”¹⁰⁷ Her words are ironic, given the inhumane nature of the procedure she was so bent on defending.

In a June 22, 1996 memo, Kagan wrote that a meeting with the American College of Obstetricians and Gynecologists (ACOG) was “something of a

¹⁰² *Id.*

¹⁰³ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹⁰⁴ See Memorandum from Elena Kagan to Jack Quinn (Feb. 15, 1996),

<http://www.clintonlibrary.gov/KAGAN%20DPC%201%20DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 179-180.

¹⁰⁵ See *id.*

¹⁰⁶ Letter from President Clinton to Congressman Conyers (Feb. 28, 1996).

<http://www.clintonlibrary.gov/KAGAN%20DPC%201%20DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 1100-11.

¹⁰⁷ Talking Points on H.R. 1833,

<http://www.clintonlibrary.gov/KAGAN%20DPC%201%20DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 447.

revelation.”¹⁰⁸ Based on the meeting, she acknowledged that “an exceedingly small number of partial-birth abortions [] could meet the standard the President has articulated. In the vast majority of cases, selection of the partial birth procedure is not necessary to avert serious adverse consequences to a woman’s health.”¹⁰⁹

Further, in a December 14, 1996 memo, Kagan wrote in response to a proposed statement by ACOG that partial-birth abortion is never medically necessary that “This [the release of the statement], of course, would be disaster -- not the less so (in fact, the more so) because ACOG continues to oppose the legislation.”¹¹⁰ Also, when discussing whether the American Medical Association (AMA) could reverse its policy at its convention that there is not an identified situation in which partial-birth abortion is the only appropriate method of abortion, ethical concerns surround it, and that it should not be used unless it is absolutely necessary, she stated

We agreed to do a bit of thinking about whether we (in truth, HHS) could contribute to that effort. Chuck and I are meeting with the AG on Tuesday; Donna offered to send over some doctors this week (though we don’t know who or when) to give a medical briefing.¹¹¹

In other words, Kagan was so opposed to the passage of a ban on partial-birth abortion that she advocated for ACOG and the AMA to suppress or modify their view.

Kagan also recommended that President Clinton support a phony late term abortion ban sponsored by Senator Daschle.¹¹² She stated that Daschle’s proposal

¹⁰⁸ Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (June 22, 1996), <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 146.

¹⁰⁹ *Id.*

¹¹⁰ Memorandum from Elena Kagan to Jack Quinn & Kathy Wallman (December 14, 1996), <http://www.clintonlibrary.gov/KAGAN%20DPC%201/DOMESTIC%20POLICY%20COUNCIL%20BOXES%2069-70.pdf>, 1336.

¹¹¹ E-mail from Elena Kagan to Sylvia M. Mathews (Jun. 1, 1997), <http://clintonlibrary.gov/KAGAN%20E-Mail%20SENT/KAGAN-ARMS%20SENT%20Boxes%2001-10.pdf>, 1759.

¹¹² Memorandum, *supra* note 110. While the amendment was promoted as going further than a partial-birth abortion ban in that it would ban any abortion after “viability,” it was rendered meaningless by its exceptions. No single abortion, partial-birth or otherwise, would have been prohibited by the amendment. Under the Daschle proposal, the abortionist would be the sole

would “provide cover for pro-choice Senators (who can be expected to support it) and that it will refocus the debate from the partial-birth procedure to late-term abortions generally.”¹¹³ Kagan recommended that the President endorse the Daschle amendment “in order to sustain [his] credibility on [the partial-birth abortion ban] and prevent Congress from overriding [his] veto.”¹¹⁴ Kagan knew this recommendation was not a risk, because the Daschle amendment was not truly a procedural ban on abortion at all.

Kagan also advised the President on the progress of other abortion-related bills. In a series of memos in 1997 and 1998, Kagan addressed the progress of other abortion-related proposals on Capitol Hill, and described how the White House was concerned about or was trying to block pro-life legislation. In a June 8, 1998 memo addressing Medicare funding for abortion, Kagan wrote “We are very concerned that Senator Nickles will soon highlight this issue, adding it to the growing list of abortion proposals Congress will take up this year.”¹¹⁵ On July 7 1998, Kagan wrote that the White House was trying to prevent the Senate from stopping RU-486 development.¹¹⁶

judge of the viability of the unborn child and would decide when (and to what child) the bill applies. Such a law would be impossible for an abortionist to violate, as its terms would be left to his subjective judgment. Second, even if the child were determined to be viable, the Daschle amendment would have allowed abortion if an abortionist determined that “continuation of the pregnancy” would “risk grievous injury” to the mother. The Daschle amendment defined “grievous injury” to include (a) any condition that is medically diagnosable and (b) any condition for which termination of pregnancy is “medically indicated.” Federal courts have interpreted “medically necessary” to mean the same things as “health” within *Doe v. Bolton*, 410 U.S. 179 (1973). The Court in *Doe*, decided the same day as *Roe v. Wade*, created an unlimited definition of maternal “health.” The Court wrote, “[T]he medical judgment may be exercised in the light of all factors— physical, emotional, physiological, familial, and the woman’s age — relevant to the well being of the patient. All these factors may relate to health.” The Court held that the abortionist was allowed to make that judgment.

¹¹³ *Id.*

¹¹⁴ Memorandum from Bruce Reed & Elena Kagan to President of the United States (May 13, 1997), <http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Subject%20File%20Series/Box%2097%20Abortion%20Doc%203.pdf>, 2.

¹¹⁵ Memorandum from Bruce Reed and Elena Kagan to President of the United States (June 4, 1998), available at <http://www.clintonlibrary.gov/KAGAN%20WHORM/WHORM.pdf>, 697.

¹¹⁶ Memorandum from Bruce Reed and Elena Kagan to President of the United States (July 2, 1998), <http://www.clintonlibrary.gov/KAGAN%20WHORM/WHORM.pdf>, 725.

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Documents from Elena Kagan's record continue to show that she is a partisan who has strong pro-abortion sentiments. It is difficult to conceive how she could be impartial in cases that come before the Court on the issue. It is critical that Senators on the Judiciary Committee extensively question Kagan on her recommendations that she made during her time in the White House. Particularly, in light of her previous statement that a partial-birth abortion ban that lacks a health of the mother exception and that extends to pre-viability abortions would be unconstitutional, would she respect the Court's decision to uphold just such a ban in *Gonzales v. Carhart*?¹¹⁷

e. White House: Other Life Issues

i. **Physician Assisted Suicide**

Kagan has expressed a disregard for the sanctity of human life in other contexts as well. In 1997, following the State of Oregon's failure to repeal its law legalizing physician assisted suicide, some members of Congress responded by supporting a federal ban on the practice. In a hand-written note at the top of a Department of Justice memorandum, Kagan wrote that she thought a federal ban on physician assisted suicide was "a fairly terrible idea."¹¹⁸

ii. **Cloning**

Kagan also played a key role in shaping and executing the President's response to the development of new cloning technology. In a May 29, 1997 memo to the President, Kagan and Jack Gibbons (Assistant to the President for Science and Technology) recommended that Clinton support domestic legislation banning human cloning.¹¹⁹ However, as the memo explains, Kagan's "ban" on cloning only banned the use of cloning aimed at the live-birth of a baby, not at cloning that takes human life.

¹¹⁷ 550 U.S. 124 (2007).

¹¹⁸ Memorandum from Dawn E. Johnsen, John C. Keeney, & Frank W. Hunger to the Attorney General (January 16, 1998), 31 (handwritten note).

¹¹⁹ Memorandum from Jack Gibbons, Assistant to President for Science and Technology, and Elena Kagan, Deputy Assistant to President for Science and Technology, to President of the United States (May 29, 1997), http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part35.pdf, 46.

The cloning of human embryos creates living human beings in the earliest stage of development. "Using them for research" means they will be "disaggregated" and killed as part of the research. By endorsing such practices, Kagan demonstrated her disrespect for unborn human life. Kagan's involvement in cloning policy was not limited to writing memos. Over the course of several months, she was in frequent dialogue with other administration officials about the content of Clinton's legislative language, which Congressional proposals they should support or oppose, and how much they could work with Senate Republicans.

Kagan and Gibbons stated in a memo that they saw "no moral rationale for treating embryos created through cloning differently from embryos developed through other means (e.g. in vitro fertilization) when embryos are used solely for research."¹²⁰ While the life-affirming response to this would be to ban the destruction of all human embryos for research, they worry instead that halting such destruction might inhibit research.¹²¹ In other words, they put pragmatism over ethics, willing to sacrifice human life in the pursuit of other goals.

IV. How Kagan's Philosophy and Abortion Record Could Affect Meaningful Protections for the Unborn

Solicitor General Kagan's record is a jigsaw puzzle. However, when the pieces come together, the picture is bleak for the Constitution and protections for innocent life. Our concern is not simply that Kagan will be another judge who supports upholding *Roe v. Wade*. Rather, we are concerned that even the most widely-accepted regulations on abortion will not withstand her review.

Since 1973, states have enacted hundreds of carefully written laws to regulate abortion and to protect women's lives and health. These laws — addressing parental involvement, informed consent, abortion funding, fetal pain, late-term procedures, abortion clinic regulations and more could all be in jeopardy if the Court becomes more agenda-driven. Kagan has expressed hostility towards restrictions on abortion funding, bans on abortion procedures (even in the third trimester of pregnancy), and other regulations.

¹²⁰ Memorandum from Jack Gibbons and Elena Kagan to President of the United States (June 8, 1997), http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%205-17/DOMESTIC%20POLICY%20COUNCIL%20BOXES%205-30_Part35.pdf, 51.

¹²¹ *Id.*

Our concerns extend to the end of life as well. If physician assisted suicide becomes legal in more states, legislatively or through state courts, activist U.S. Supreme Court justices might determine that “societal changes” or a new “social consensus” require revisiting the Court’s decisions in *Washington v. Glucksberg*¹²² and *Vacco v. Quill*,¹²³ which held that there was no right under the US Constitution to assisted suicide.

Kagan’s disregard for the value of human life at its most vulnerable stage creates concerns about how she will consider common sense abortion regulations and other cases that will come before the Court. She is deeply hostile to protecting the unborn, even when abortion is not an issue. When combined with other statements and writings that reveal her judicial philosophy it is clear that a Justice Kagan would use the Constitution and other sources of law to force a right to abortion on our country broader than the one created in *Roe v. Wade*.

¹²² 521 U.S. 702 (1997).

¹²³ 521 U.S. 793 (1997).

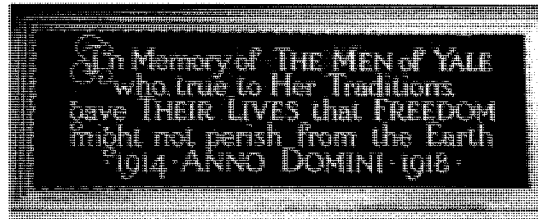
**SUPREME COURT CONFIRMATION HEARINGS FOR ELENA KAGAN
TESTIMONY OF FLAGG YOUNGBLOOD, 1 JULY 2010**

INTRODUCTION

Thank you for the opportunity today to give voice to the concerns of many of our fellow citizens and veterans regarding Elena Kagan's Supreme Court nomination.

My father, a twice-shot combat veteran of Vietnam, asked me to join the Army. "You owe it to our country," he told me at age sixteen. "You don't have to make a career like grandpa, but you should you should serve."

In the fall of 1993, as a college freshman, I had no idea the simple desire to participate in ROTC on campus would have me testifying before the Senate some seventeen years later. My daily walks by the war memorial in the heart of Yale's campus caused me to question why learning the art of military leadership



required a sixty-five mile drive to the University of Connecticut, much less the taunts from faculty and students when a tight schedule required wearing the uniform across campus or into a Yale classroom. Ranging from the unrepeatable, the most arresting remark occurred for me in an English section, when the teacher remarked, "Flagg, you shouldn't wear that uniform to class; it's not conducive to learning."

Trips to Washington, D.C. in the summers of 1994 and 1995 framed my outreach efforts, thanks, in no small part, to Young America's Foundation, and gave rise to the passage of "The ROTC Campus Access Act," better known today part of as the Solomon amendment.¹

After serving a total of five years on active duty, combined with another three and a half intermixed as a reservist living and working in Los Angeles, I received a call from the president of Young America's Foundation. On the heels of the Supreme Court reviewing the Solomon amendment, the day before Pearl Harbor's 2005 anniversary, he asked me to move cross-country in anticipation of the high court's ruling. And, I devoted the next four years to helping students from across the country defend their ability to meet with military recruiters and participate in ROTC.

¹ *Congressional Record*, 14 June 1959, p. H5963.

Given the economic downturn, I am no longer employed by the Foundation; I'm here today at my own expense, speaking as a concerned citizen who cares deeply about the future of our Constitutional republic.

LEGISLATIVE INTENT

Having worked closely with the legislative team that crafted the original language of the Solomon amendment, I must speak to the legislative intent. The goal was simple, to renew institutional support for the military on campus.

Through independent research,² I discovered nearly every elite university in the United States has extensive historical ties to the military, despite so many having been self-servingly severed during the Vietnam War. Taxpayers unwillingly spent the generation that followed underwriting the operation of these so-called "private" institutions. Congress then rightly exercised its enumerated Constitutional powers with respect to the military, conditioning "federal financial assistance that educational institutions are not obligated to accept."³

As the Supreme Court's unanimous ruling on the Solomon amendment reflects:

The Government and FAIR agree on what this statute requires: In order for a law school and its university to receive federal funding, the law school must offer military recruiters the **same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.**⁴

Claims that Dean Kagan acted sufficiently with regard to the Solomon amendment are wrong:

- Dean Kagan's admits to breaking the law, hoping her infraction on behalf of Harvard Law would go unnoticed;⁵
- The accommodations volunteer students provided for the military did not equal those supplied to other employers by Harvard Law's paid Career Services staff.⁶

² Adapted my senior thesis on the history of ROTC into a feature article for *Townhall* magazine, December 2008.

³ Supreme Court opinion, *Rumsfeld v. FAIR*, 6 March 2006, p. 9.

⁴ *IBID*, p. 5. (emphasis added)

⁵ Letter from Dean Kagan on military recruiting, 20 September 2005:

"Although the Supreme Court's action meant that no injunction applied against the Department of Defense, I reinstated the application of our anti-discrimination policy to the military (after the appropriate consultation with University officials) in the wake of the Third Circuit's decision; as a result, the military did not receive OCS assistance during our Spring 2005 recruiting season. My hope in taking this action was that the Department would choose not to enforce its interpretation of the Solomon Amendment while the Third Circuit opinion stood."

⁶ Harvard Veterans Association statement on military recruiting, 18 February 2005:

"Given our tiny membership, meager budget, and lack of any office space, we possess neither the time nor the resources to routinely schedule campus rooms or advertise extensively for outside organizations, as is the norm for most recruiting events."

To all but the 12% of Americans who hold unfavorable views of the military,⁷ “most favorable access” means, particularly in a post 9/11 environment, that Dean Kagan would have invited the military into every Harvard Law classroom each semester, personally introduced each recruiter, and encouraged every eligible young adult to take the oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic.”⁸

INCREASING RECRUITS

To defend the barriers Dean Kagan erected by saying military recruiting didn’t suffer misses the point. A consistent policy of institutional support, namely “most favorable access” as the Solomon amendment intends, would have unquestioningly increased the ranks of those interested and eligible for voluntary military service. Just imagine how many more among Harvard Law’s nineteen hundred young adults would have answered the Defense Department’s call.⁹

Barriers have their intended effect; that’s why we build fences, to prevent all but the most committed, dedicated young men such as Senator Leahy’s son, from climbing over. I personally would not have joined the Army, had my father not routinely asked and encouraged me.

A FINAL POINT

Those who defend Dean Kagan’s actions regarding the law school’s and, more broadly, the university’s relationship with the military continue to ignore a fundamental detail. Under Dean Kagan and President Lawrence Summers, Harvard Law School and Harvard University put dollars before principle, paying lip service to gay and lesbian students, the military, student veterans, alumni, Congress, and the American people throughout their tenure.

Alan Dershowitz characterized Harvard as employing a double standard.¹⁰ Janet Halley, a fellow professor of law, characterized the university’s nondiscrimination policy as having been reduced to “transcendental nonsense.”¹¹ Their intellectual honesty is admirable, regardless of whether one agrees with their views or not.

Neither Dean Kagan nor Harvard is above the law, even though both acted as though they were.

What are we to make of Dean Kagan trying to have it both ways?

What signals do her actions at Harvard Law School convey?

⁷ Rasmussen Reports, “74% Have Favorable Opinion of U.S. Military,” 29 May 2010.

⁸ www.history.army.mil/faq/oaths.htm

⁹ www.law.harvard.edu/about/faq.html#facts

¹⁰ *Harvard Law Record*, “Students Rally Against Military Recruitment on Campus,” 21 October 2004.

¹¹ *Harvard Crimson*, “Rally Decries Military Policy,” 18 October 2004.

What are the implications for her allegiance to the Constitution and her ability to judge related matters?

Most Americans realize, especially those who nobly and selflessly stand alert at freedom's edge protecting our country in times of crisis, life inescapably requires clear thinking and ethical choices.

Elena Kagan's double-dealing as Dean of Harvard Law School betrays an inability so to do and condescension towards the rule of law.

CONCLUSION

A vote to confirm Solicitor General Elena Kagan as an Associate Justice of the United States Supreme Court is a vote against our military, and the Constitutional republic it protects, not just now, but for decades to come.

June 14, 1995

CONGRESSIONAL RECORD—HOUSE

H5963

Democrats, liberals, moderates, and conservatives, people on the left and the right. That is what makes this Nation strong and powerful.

Are we saying here because some institution, by virtue of their decisions, engage in what we determine is starry-eyed idealism, I hope all the children of this country are starry-eyed idealists. It is not pessimists who bring change or who bring the best out in us, it is the dreamers, the hoppers, the idealists, and the optimists. That is no reason for us to punish universities.

Mr. Chairman, this is an amendment that takes us backward into the 19th century. It does not catapult us forward as a beacon of light and freedom and commitment to democratic principles, and the right of people to have different perspectives and different points of view.

□ 1715

Mr. Chairman, I believe that we should preserve that precious freedom, that precious dignity that comes from people expressing their points of view under the first amendment to the Constitution.

I ask my colleagues to preserve our national security establishment's access to the best minds in this country, to not allow us to be blocked by some narrow perspective to attempt to punish and to micromanage because we happen to disagree with some other group of people or institution's judgments about decisions we make.

That is not how democracy operates. I hope that my colleagues will rise today to their highest and their best and reject this amendment. It is not in the best interests of our national security, I have laid that out. It is not in the best interests of the Constitution of the United States, I have laid that out. I do not think that it speaks to the highest and best in us as we function on this floor in this institution.

With those remarks, Mr. Chairman, I urge a no vote on the Pombo-Solomon amendment. I urge my colleagues to follow me in that.

Mr. POMBO. Mr. Chairman, I yield 30 seconds to the gentleman from Indiana [Mr. BUYER].

Mr. BUYER. Mr. Chairman, I would say to my good friend from California, you did not fall asleep and wake up in a different country. We woke up to a new majority, I guess, here in the Congress.

What I would also say to my colleague, the gentleman from California [Mr. DELLUMS], is that I am going to rise in support of this because to me young men and women must not be denied the opportunity to prepare for careers of serving our Nation in the military while attending college. Some of our students and young minds, which we both have a great deal of respect for, are being denied that opportunity.

Mr. POMBO. Mr. Chairman, I yield 1 minute to the gentleman from Georgia [Mr. KINGSTON].

Mr. KINGSTON. Mr. Chairman, a constituent of mine, Paul Anderson,

sent me an April 28 article from Human Events magazine about a young man at Yale University named Flagg Youngblood. Flagg Youngblood is a hard-working student. In addition to taking a full academic load, he is taking ROTC.

However, at Yale in order to take ROTC he has to travel 65 miles twice a week during his junior and senior year to get to an ROTC room, because Yale University will not let them teach it on campus. Although if he wants to take a course called "The Story of Incest," he can take that on campus.

While Yale is making that judgment, they are greedily taking on the other hand a \$5 million contract from the U.S. Army. We are not micromanaging Yale University. If they want to have "The Story of Incest" as one of their main academic majors, let them, but do not come back to us with the other hand, while you are kicking Flagg Youngblood and the other young men and women who want to join ROTC off campus, and then take a \$5 million grant. I urge an "aye" vote for the Pombo amendment.

Mr. POMBO. Mr. Chairman, I have an additional speaker. I would inquire if they have any additional speakers on the other side.

The CHAIRMAN pro tempore [Mr. MCINNIS]. The time of the gentleman from California [Mr. DELLUMS] has expired. He has no time remaining.

Mr. DELLUMS. Mr. Chairman, I would say to my colleague that at the appropriate point in my role as ranking minority member, I do have the right to strike the requisite number of words, and I shall use that opportunity. I will not be locked out at the end of this debate.

The CHAIRMAN pro tempore. The gentleman from California is correct. He does have the right to strike the last word and proceed for 5 minutes, but his current time has expired.

The gentleman from California [Mr. POMBO] may proceed.

Mr. POMBO. Mr. Chairman, I yield the balance of my time to the gentleman from New York [Mr. SOLOMON].

The CHAIRMAN pro tempore. The gentleman from New York [Mr. SOLOMON], the chairman of the Committee on Rules, is recognized for 2 minutes.

Mr. SOLOMON. Mr. Chairman, this Pombo-Solomon amendment, this important amendment, would put an end to the hypocrisy that is running rampant on our Nation's college campuses. It happens all the time. Currently dozens of colleges and universities across this country, including the prestigious ones such as Harvard and Yale, blatantly discriminate against students willing to serve their country, and it is so aggravating to this Member.

Last year the Congress overwhelmingly approved a similar amendment prohibiting any Department of Defense funds to colleges which deny access to our military recruiters. They would not let our military recruiters on their campuses until we made them do it.

That Solomon amendment is now the law of the land, and it strengthens our All-Volunteer Forces. It tells young people that serving in our armed services is an honorable career, it is an honorable profession, and it is.

We are not going to take this nonsense from academia. They are going to let these ROTC students on their campuses or they are not going to get a nickel from this Federal Government.

Read the Constitution. The United States Constitution mandates that we must provide for a common defense to take care of the strategic interests of this country at home and around the world. Please vote for the Pombo-Solomon amendment. You have done it year in and year out on other issues similar to this. Speak up again for America.

Mr. DELLUMS. Mr. Chairman, I move to strike the requisite number of words.

The CHAIRMAN pro tempore. The gentleman from California [Mr. DELLUMS] is recognized for 5 minutes.

Mr. DELLUMS. Mr. Chairman, let me reiterate the arguments that this gentleman is trying to propound.

No. 1, I say to my colleague, it seems to me that we as policymakers here have a responsibility to step back and take the longer view. My first argument is that we should do nothing that would stand in the way of our U.S. military establishment having access to the best minds in this country, irrespective of whether we agree with their policies or not. That is No. 1.

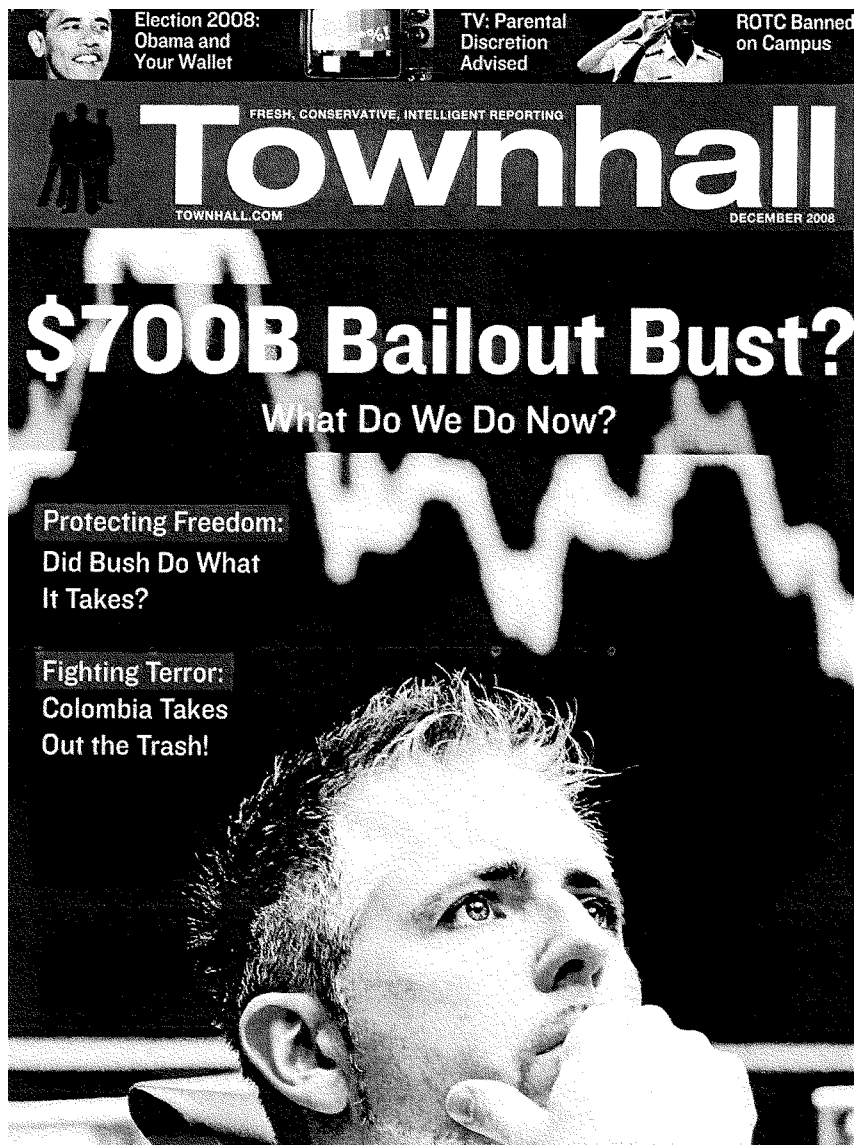
We all come here saying we are committed to national security. We should have access to the best thinking, the clearest minds, the most cogent ideas that are possible. So whatever our misgivings are, they should not deny us the opportunity to go straight there, to have access to the best minds in the country. That is the first argument that I would make.

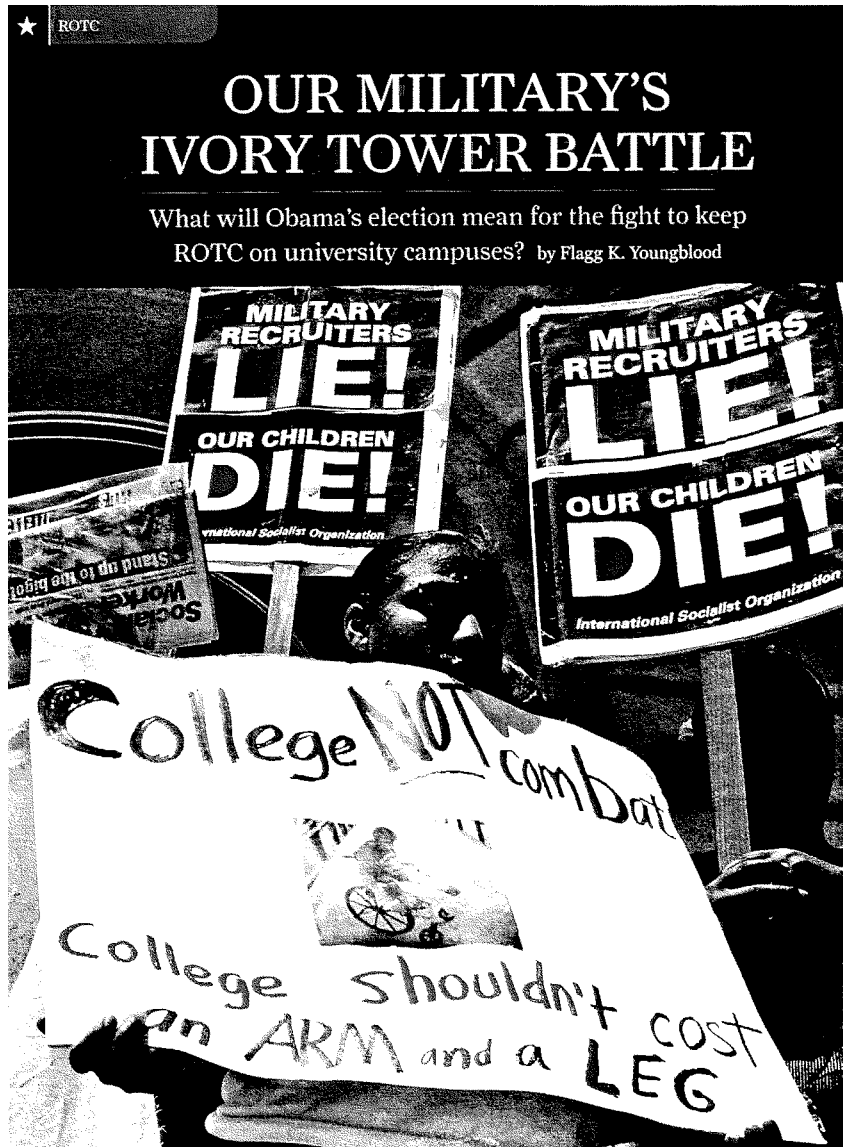
The second argument that I would make is that irrespective of whether we agree or disagree with the policies taken by a university, by its academic senate or by its faculty, that that should not stand in the way of that first point.

No. 2, because it seems to me that there are moments, Mr. Chairman, when we should be large people. We should be big people. We should be committed to democratic freedoms and principles.

As I was saying to some of the young people behind the aisle earlier today, we should never be so frightened of an idea that we turn our backs from it. The day that I am no longer willing to expose myself to a different point of view and a different perspective is the day that I die intellectually and I die spiritually.

It seems to me that if we do not agree with a university because they choose, for whatever reason, and that is the beauty of America, that they





What's nearing a century ago, the administration of Princeton alumnus and Democratic President Woodrow Wilson created the opportunity for students to serve their country and to learn what's required for the defense of liberty with the establishment of the Junior and Senior Reserve Officers' Training Corps—Junior ROTC for high schools and Senior ROTC for colleges and universities. Leftists first succeeded in denying students these opportunities using the pretext of Lyndon Johnson's war in Vietnam and cutting off much of the Ivy League and many other elite schools from the military. And the fight they started still rages on.

Throughout the campaign season, Democratic Sen. Barack Obama routinely joined the chorus of voices calling for ensuring that students have the opportunity to serve their country. Now that he's President-elect Obama, the question is: Will the chief executive, himself a Columbia alumnus and Harvard Law School graduate, deliver on his promise? And if so, what hope have we that our nation's military and the values it represents—the very values leftists succeeded in trashing during Vietnam—will remain intact?

UNLOCKING THE PAST TO UNDERSTAND THE PRESENT

More than 57 years have passed since William F. Buckley Jr. wrote "God & Man at Yale," broadcasting the first public warning about elite academics neglecting, misrepresenting and even sabotaging traditional American freedoms and values. Nearly three generations later, Buckley's criticisms of the academy ring true louder than ever, and not only among exclusive Ivy League schools but also throughout our nation's entire educational establishment—from the top of the Ivory Tower all the way down to kindergarten.

The Left's assaults on teaching

Students protested the U.S. military in front of San Francisco City Hall, pushing for a ballot initiative to put the city on record as opposing the presence of military recruiters in public high schools and colleges.

American exceptionalism have taken many forms in that time, from introducing moral relativism and deconstructionism in the classroom to Title IX in the athletic arena, which, despite being advertised as a mechanism for increasing competitive opportunities for women, had the practical effect of severely curtailing outlets for men. Yet amidst the casualties, one stands out: institutional support for our nation's armed forces.

As with most human behaviors, ethics are not learned in a vacuum but through study and interaction. America's armed forces fundamentally represent and transmit a culture of values—from honor, courage and discipline to self-reliance, selfless service and an understanding of right and wrong. Outside of Junior ROTC in our nation's high schools and Senior ROTC in our colleges and universities, very few campus organizations exist, save for the sports teams and campus ministries not co-opted by political correctness, to inculcate such standards of conduct.

In 1913, Army Chief of Staff Gen. Leonard Wood wrote about the purpose of ROTC, commenting that "the object sought is not in any way one of military aggrandizement, but a means of meeting a vital need confronting a peaceful, unarmy, though warlike nation, to preserve that desired peace and prosperity by the best known precaution, viz.—a more thorough preparation and equipment to resist any effort to break such a peace."

Anti-military rage on campus reached a visible high watermark during Vietnam, thanks largely to leftist agitators crudely exploiting dislike of the draft. At root, though, was and remains a clash of worldviews. Too many within the academy simply doubt, if not completely disagree with, John Winthrop's vision of America as "a city upon a hill" and the revolutionary idea embodied within our Constitution—that free men derive their rights directly from God and not from government.

Then, as now, the Left's goal remains to silence philosophical opposition, particularly from our military—the

individuals sworn to protect and defend the Constitution. Whether those who lead the educational establishment will ever admit it or not, deep down they recognize the reality that most students, if given a choice, will embrace the values taught by religion, athletic competition and our military and reject the Left's historically disproved pet theories.

Ronald Reagan eloquently articulated the need to understand, teach and protect our freedoms in his presidential farewell address, calling for us to re-institutionalize the American spirit. "We've got to do a better job of getting across that America is freedom—freedom of speech, freedom of religion, freedom of enterprise. And freedom is special and rare. It's fragile and needs protection."

A DAY LATE AND A DOLLAR SHORT

Reactionary by nature, conservatives and our broader coalition of believers in liberty and "peace through strength" have responded to the campus-military battle over the years, and we have had many successes. First, we advocated for an all-voluntary military and dispelled the myth of the Left's objection to compulsory national service, giving rise to the best trained, best equipped and most effective fighting force the world has ever known. Thanks to Reagan's leadership, we learned this lesson and laid bare the Left's pretense for keeping the military off campus.

Then Bill Clinton came along, and as president, he insidiously, albeit brilliantly, offered the academy cover on the campus-military question once again, couching the Left's anti-military rage in the fog of an executive edict he marketed as "Don't Ask, Don't Tell" (DADT). Publicly promising to integrate open homosexuals into the ranks of the military, Clinton relented and the Democrat-controlled Congress overwhelmingly passed the Military Personnel Eligibility Act of 1993. While the law makes clear "homosexuality is incompatible with military service," Clinton ordered the Defense Department to stop asking inductees about their sexual proclivities, intentionally obstructing a simple yes/no question in order to create problems



ARMED FORCES RECRUITING



Left: Members of the Brainerd Area Coalition for Peace and Central Lakes College People Uniting for Peace gather to protest at a military recruitment office in Brainerd, Minn.



Right: Two U.S. Army Black Hawk helicopters take off from Pride Field on the University of Southern Mississippi campus in Hattiesburg, Miss., loaded with Southern Miss ROTC cadets during the program's annual Blackhawk training exercise.

within the military. More importantly, this set the stage outside the military for constitutional conflict by providing fodder for those opposed to the military to claim every American has a newly discovered right to serve in the military.

Conservatives rightly questioned the elite academy's cries of discrimination. If the Ivory Tower wanted to stand on principle, how could it accept taxpayer money from the Defense Department, much less from the larger government whose "biased" policies the academy claimed to be fighting? And what about the eligible students who wish to serve and the academy's active denial of their ability to do so?

Enter Republican Reps. Rich Pombo of California and Gerald Solomon of New York in the mid-1990s who spearheaded amendments in federal law to cut off taxpayer funding to institutions of higher learning that do not allow students, by policy or practice, to meet with Defense Department and homeland security recruiters or participate in Senior ROTC. While the law's logic is simple—schools must contribute to the nation's defense in order to benefit from taxpayer largesse—the road

for enforcing what's now known as the "Solomon amendment" has been anything but.

Clinton thwarted enforcement, again besting Congress, despite signing the amendment into law. And only when the need arose in 2002 for additional Judge Advocate General's Corps officers did the Bush administration begin pursuing selective Solomon enforcement, leading to the U.S. Supreme Court's unanimous ruling in favor of the amendment's constitutionality in March 2006. So now military recruiters can and do visit elite law schools once again, a triumph in itself, even though the larger question of Senior ROTC's place on college campuses still remains unresolved.

Before addressing the treatment of Senior ROTC, it's worth noting where the situation with military recruiters and Junior ROTC in high schools stands.

The Bush-Kennedy education bill, No Child Left Behind (NCLB), stipulates that high schools must provide access to military recruiters in order to receive federal taxpayer funding. Though a major sore point for leftists concerned with secondary

education, no judicial challenges have yet stuck to this provision of NCLB.

Junior ROTC enjoys no Solomon-like protections under federal law, which has given rise to San Francisco's decision to expel the program from its public schools amidst rancorous debate over the past several years. Ironically, Republican Sen. Jim Inhofe of Oklahoma proposed affording such protections for the organization when San Francisco's school board first voted against JROTC, only to have the Defense Department protest his efforts as something that would hurt, not help, its existing and planned JROTC programs.

Regarding Senior ROTC, the main program the Defense Department employs to train and commission the military officers who lead our nation's armed forces, Defense's modus operandi has been to follow the path of least resistance, lowest cost and maximum yield—granting a de facto reprieve from the Solomon amendment to the six universities of the top 10 schools on *U.S. News*' 2008 college rankings that do not host programs on campus.

For years, though, Pentagon planners have not commissioned

PHOTOS: COURTESY OF NEW BRITAIN; JOHN VORWINE



and retained a sufficient number of junior officers to staff all the lower-level leadership positions our active-duty military, reserve and National Guard components require. And the impact of this shortage, of course, has rippled downstream, translating to faster promotions and a less competitive promotion environment, neither of which do anything to strengthen national defense. And while the Defense Department has understandably focused the bulk of its recruiting on the young Americans who continue to answer the call to enlist in the service of our nation, we owe it to them to provide the largest, best-trained component of leaders possible.

So much for filling the very positions ROTC was created to staff in 1916. How about stipulating that Harvard, Yale, Stanford, Columbia, Caltech and the University of Chicago, the self-proclaimed "private" schools that ingested \$4.95 billion combined in federal funding during the last school year alone, commission just one military officer for every \$1 million received annually in taxpayer money? That would have yielded an additional

495 military officers at the end 2007.

Of course, each of these schools and the Pentagon publicly say viable ROTC options exist for interested students to pursue military service through programs on other campuses. But such argumentation is disingenuous at best. Barriers such as having to drive roughly 70 miles each way from Yale to the University of Connecticut or through San Francisco Bay-area traffic from Stanford to Berkeley obviously deter students from considering military service. And the failure of these and other universities to provide course credit for studying the art of military leadership is yet another strong disincentive.

The message to students could not be clearer: Military service is not worth your time. Irrespective of times of war or peace, teaching such a selfish message endangers the nation's constitutional way of life. Especially now, in the face of ongoing Islamic extremism and the multi-year plan Congress has already undertaken to grow our military, subsidizing such unhelpful messages seems borderline suicidal.

Many schools nationwide, not just the six highlighted here, could do more to encourage voluntary military service. University leaders should speak to the importance of such service and routinely encourage participation. Institutions themselves should help promote recruiter visits and offer to host ROTC, among other actions such as providing supplemental scholarships to students who join ROTC, make other military commitments or are already veterans.

Schools should be looking for ways to say yes, not excuses to say no. President-elect Obama has called the current situation a "mistake." Will he indeed rectify it? Or will the mandates of the Solomon amendment once again be ignored, even repealed?

WHAT CAN WE EXPECT TODAY?

The campus military issue essentially boils down to two simple questions: First, will a university allow ROTC on campus and provide it with the buildings, student names and other resources, as well as the public support to ensure its success? And second, will they do the same for military and

Solomon's Shameful Six

Six of the top 10 schools on U.S. News' 2008 college rankings do not host programs on campus, yet they received nearly \$5 billion in federal funding in the most recent school year.

School	Where Can Students Participate in Army ROTC?	Travel Distance (one-way)	Where Can Students Participate in Navy ROTC?	Travel Distance (one-way)	Where Can Students Participate in Air Force ROTC?	Travel Distance (one-way)	2006-07 Federal Taxpayer Funding	Percentage of University's Annual Operating Expenses
Harvard University	Mass. Institute of Technology	15 minutes	MIT	15 minutes	MIT	15 minutes	\$514 million	16%
Yale University	University of Connecticut*	70 miles	No option	N/A	University of Connecticut*	70 miles	\$427 million	20%
Stanford University	Santa Clara University	30-45 minutes	UC Berkeley	1 hr	San Jose State	30-45 minutes	\$994 million	22%
Caltech	UCLA**	1 hour	USC	20 minutes	USC	20 minutes	\$2.02 billion	88%
Columbia University	Fordham University	20 minutes	No option	N/A	Manhattan College	20 minutes	\$667 million	25%
University of Chicago	University of Illinois, Chicago	20 minutes	Northwestern	45 minutes	Illinois Institute of Technology	15 minutes	\$327 million	22%

*Study.com/ROTC does not list ROTC as available for Yale students at UConn. Through Yale claims the nearest center.

**Study.com/ROTC lists ROTC as available for Caltech students at UCLA. Through Caltech notes USC as its only.

All financial information can be found from each institution's annual financial report, all of which are available, with some searching, on the respective school's websites.



homeland security recruiters?

Casual campus surveys, formal student polls and regular student newspaper interviews and editorials clearly reflect strong student desire, at best, or student apathy, at worst, towards voluntary military service and an ROTC presence on elite campuses. This is undoubtedly a frustration for administrators and professors, most of whom used to be the students who succeeded in getting ROTC kicked off campus in the first place.

Odds are that a President Obama will not buck the trend or dare upset either of his alma maters. If he does, we need to examine closely any changes he proposes to make to the military in order to make it more palatable to those who oppose its presence within the academy.

Repeal of the 1993 law barring gays from openly serving in the military, *per se*, is a red herring. The underlying objective is to fast-track federal recognition of same-sex marriage, as the military provides varying pay,

housing, healthcare and other benefits to service members depending on their marital status and whether or not they have children. Also, it's not difficult to see a repeal having an adverse effect on recruiting and retention rates among all ranks—officer and enlisted alike. Reality is that many heterosexuals do and will continue to feel uncomfortable with the forced cohabitation and intimacy that military life frequently requires and will thus avoid such situations by avoiding voluntary service. More so than anything else, this could precipitate a renewal of compulsory service. And what's the difference between the Left's success in undermining the Vietnam War at home and their failure with pre-surge Iraq? A draft.

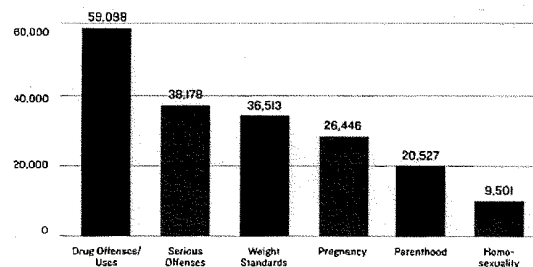
So while the Left's hope for social change looms large over the military with Obama, at least one bright spot exists. Perhaps Obama, like Woodrow Wilson before him, will establish military beachheads on elite campuses and close the academic-military divide,



Hollywood & the Academy vs. the Military

In spite of Hollywood's relentless efforts since the late 1960s to portray military officers in any manner of negative ways, Americans recognize officers' honesty just below that of priests and above that of judges, according to the most recent Harris Poll. In comparison, members of Congress scored less than half as well, along with stockbrokers and lawyers. And given the small number of active and reserve military officers in this country, roughly 380,000 among 220 million adults, such a strong, positive reputation speaks volumes, especially considering how few Americans now regularly interact with current or former military officers.

Truth About Discharges By the Center for Military Readiness



Advocates of homosexuals in the military frequently contend that the discharges of approximately 10,000 homosexuals since 1994 have done grievous harm to military readiness. The truth is that annual numbers of discharges due to homosexuality, compared to discharges for other reasons, actually are quite small. According to figures provided to the General Accountability Office (GAO) by the Department of Defense, discharges due to homosexuality amounted to only 0.37 percent of discharges for all reasons (about 5 percent of unplanned separations) between the years 1994 and 2003.

Source: Letter from Dr. David E. Chas, Under Secretary of Defense for personnel and readiness, published in GAO report, "Military Personnel: Fiscal Costs and Loss of Critical Skills Due to DoD's Homosexual Conduct Policy Cannot be Completely Estimated," GAO-05-296, February 2005, pp. 42-43.

leaving conservatives the opportunity to restore the military's values-based culture to campuses, recalibrating the bias Bill Buckley identified long ago, provided we make it that far without indelible change. Only time and our active vigilance in defending and advancing freedom via this issue will make it possible.

Think for a moment about the difference the military's values could have made, directly and indirectly, on the Ivy League elite who ran amok in Congress, at Freddie Mac, Fannie Mac and even on Wall Street. We know graduates of elite schools go into positions of leadership and influence in government and business. If only the graduates in the decades since Vietnam had had the opportunity to serve, or to interact with someone who had, perhaps we wouldn't be in as bad a crisis as we are today. •

Mr. Youngblood, an alumnus of Yale and an Army veteran, serves as director of military outreach for Young America's Foundation (www.yaf.org).