

Government had the power to regulate—and, if need be, to ban—large amounts of political speech. Indeed, the amount of power Ms. Kagan and her office argued the Federal Government had in this area was so broad—so broad—that both liberal and conservative Justices found their arguments jarring, given the reverence Americans of all ideological stripes have for the first amendment. But that was, in fact, their argument.

During the first argument, the Court asked Ms. Kagan's deputy whether the government had the power to ban books if they were published by a corporation, and if the books urged the reader to support or defeat a candidate for office. Incredibly, he said, yes, the government could ban a corporation from publishing a book—even if it only mentioned the candidate once in 500 pages.

Not surprisingly, this contention prompted quite a bit of discussion among the Justices. They wanted to be clear that that is actually what Ms. Kagan's office was proposing. So, to remove any doubt about their position, Ms. Kagan's deputy said he wanted to make it, in his words, “absolutely clear” that the government did, in fact, have the power to ban certain speakers from publishing books that criticized candidates. Justice Souter asked if that meant labor unions, too. Ms. Kagan's deputy said that indeed it did.

Well, so troubled was the Court by the contention of the Solicitor General's office that the government had a constitutionally defensible ability to ban certain books by certain speakers, that it ordered another argument in the case. This time, Ms. Kagan herself appeared on behalf of the government. And this time, it was Justice Ginsburg who noted that at the first argument, Ms. Kagan's office argued that the Federal Government could, in fact, ban books, such as “campaign biographies,” despite the protections of the first amendment.

Justice Ginsburg asked whether that was still the government's position. Ms. Kagan responded that after seeing the reaction of the Supreme Court to her office's argument, they had rethought their position. Ms. Kagan maintained that while the Federal law in question did apply to materials like “full-length books,” someone probably would have a good first amendment challenge to it.

So far so good.

But her fall-back position was that the same law gives the government the power to ban pamphlets, regardless of the first amendment's protection for free speech. This caused the Justices to bristle again. One Justice asked where, in Ms. Kagan's world, does one “draw the line”?

First, her office says it is OK for the government to ban books if it doesn't like the speaker; then it says it is OK to ban pamphlets if the government doesn't like the pamphleteer—a propo-

sition that would come as a shock to the Founders, who disseminated quite a few pamphlets criticizing the government of their day.

Not surprisingly, Ms. Kagan lost the case—and in my view, it is good that she did.

Now, I asked Ms. Kagan about her position in this case last week when we met in my office. She said she made the arguments she did because she had to defend the statute. And I understand that her office has to defend Federal law. But the client doesn't choose the argument, the lawyer does. And the argument Ms. Kagan and her office chose was that the Federal Government has the power to ban books and pamphlets. That was the position of the Solicitor General and her office.

Not only was this argument troubling to those who cherish free speech, it likely contributed to the government's defeat. But my concerns about Ms. Kagan's position in this case extend farther than the arguments she and her office made, however troubling they are.

Shortly after she and I met, the press reported that she had cowritten a memo on campaign finance restrictions when she was in the Clinton administration. In it, she says that “unfortunately” the Constitution stands in the way of many restrictions on spending on political speech, and she believes that the Supreme Court's precedents establishing protections from the government in this area are “mistaken in many cases.”

And just last Thursday, she told one of our colleagues that the Court was wrong in *Citizens United* because it should have deferred more to Congress. But deferred to Congress on what? Deferred to Congress on a statute that is so broad that it encompasses “full length books” and “pamphlets,” as Ms. Kagan put it, and probably to a host of other materials as well? One can only assume that since Ms. Kagan was making these comments in her individual capacity, they provide a more complete picture of her views about the government's ability to restrict political speech.

No politician likes to be criticized in books, pamphlets, movies, billboards, or anywhere else, Mr. President, whether it is a President or a Senator.

But there is a far more important principle at stake here than the convenience and comfort of public officials. And that principle is this: in our country, the power of government is not so broad that it can ban books, pamphlets, and movies just because it doesn't like the speaker and doesn't like the speech. No government should have that much deference.

The administration has nominated one of its own to a lifetime position on the country's highest court. We need to be convinced that Ms. Kagan is committed to the principle that the first amendment is not, as she put it, just some “unfortunate,” impediment to the government's power to regulate. It

applies to groups for whom Ms. Kagan and the administration might not have empathy. And it applies to speech they might not like.

So as this process continues, I look forward to learning more about Ms. Kagan's record and beliefs in area.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business until 3 p.m., with Senators permitted to speak therein for up to 10 minutes each.

The Senator from Arizona.

NOMINATION OF ELENA KAGAN

Mr. KYL. Mr. President I, too, would like to address the Supreme Court nominee. I associate myself fully with the remarks of Senator MCCONNELL, which raise an important point for us to consider. I will correct the record in a couple of situations because I think, as the debate unfolds, it is important for us to base our decisions on the same set of facts. These are not going to be particularly newsmaking or big surprises, but I think the record should be corrected.

I know our majority leader, for example, misspoke the other day in commenting about Justice Sandra Day O'Connor because there is some similarity—she being the first woman ever appointed to the Supreme Court. I wanted to make sure the record reflected the actual situation with respect to Justice O'Connor.

Leader REID, I totally agreed with when he described her as “one of my favorite Court Justices.” He said it is “not because she is a Republican but because she was a good judge.” I subscribe to that as well.

He said:

She had run for public office. She served in the legislature in Arizona. That is why she could identify with many problems created by us legislators, and she could work her way through that.

For the record, I wanted to indicate her experience on the bench as a judge, since it is not the case that she did not have prior judicial experience when nominated to the Supreme Court. She was actually appointed to the bench by our Democratic Governor at the time, Bruce Babbitt. She was on the court of appeals and on the superior court bench before that. She served on the Maricopa County Superior Court bench from 1975 to 1979, and in 1979 Governor Babbitt appointed her to serve on the Arizona Court of Appeals. So she had extensive experience, from 1975 through 1981, as a judge, including in an appellate capacity.

Prior to that time, as Leader REID noted, she served in the Arizona State Legislature. In fact, she was the majority leader. She had an extensive legal career before that. She was a deputy county attorney. She was a civilian attorney. She was in the private practice of law. She was an assistant attorney general. Therefore, she had a very varied and rich experience both as a lawyer practicing law in regular situations in both criminal and civil context, as well as a trial court judge, which is great experience, I believe, and as an appellate court judge.

In many respects, it is almost a perfect resume for someone to demonstrate broad experience and who could understand what cases are all about when they come from Main Street, as opposed to some of the more high-profile cases that tend to come before the U.S. Supreme Court. By every measure, I think anybody would agree that her tenure on the Supreme Court reflected those values and the experience that she had when she came to the Court.

As I said, I know the majority leader simply misspoke when he suggested that she didn't have judicial experience. I did think it important to make that point.

Second point: There was a statement made on TV yesterday by some folks who were comparing Elena Kagan and Chief Justice John Roberts; in effect, that John Roberts only had 2 years on the appellate court, so they are pretty similar. In two respects that is not correct.

First, spending a couple a years on the court of appeals for the circuit court is extensive and important experience. It at least gave us an idea of how he approached judging. I think almost everybody in the Senate who voted on his confirmation understood that whatever his personal views were, he could clearly leave them behind and decide cases, as he referred to it, "like an umpire calls the balls and strikes." That is one of the reasons he was overwhelmingly confirmed.

I also recall that Justice Roberts' prior legal experience represented numerous arguments before the courts of appeals and the U.S. Supreme Court. At the time of his confirmation, he had probably had more U.S. Supreme Court arguments than any other lawyer. So this was a lawyer experienced in appellate work and U.S. Supreme Court work.

In contrast—and this is not to take away from Ms. Kagan—the truth is, I don't think she ever tried a case or argued a case to an appellate court. She certainly hadn't argued before the Supreme Court until about 6 months ago in her capacity as Solicitor General. She has other positions in her background. She has been a law school teacher and a dean of a law school. But I submit that is hardly comparable to the litigation experience and, particularly, the appellate experience John Roberts had.

All I am suggesting is, when we make these comparisons to other people, we need to be accurate about it. It is taking away nothing from Elena Kagan, but she did not have the experience of Sandra Day O'Connor or John Roberts. That is something we have to deal with—something lacking in her record.

One other thing—and this is personal to me because my views were mischaracterized. I hope this will be seen as a favorable comment toward Elena Kagan. It was reported today by Al Hunt that I thought Elena Kagan was too young for the Supreme Court. No, I don't, and I never said that. He was wrong when he reported that.

I said she was relatively young for an appointment to the Supreme Court, and that is true. At this point, I think she is 49. She would be 50 if she is confirmed. That is a fine age to be on the U.S. Supreme Court. My point was, that means, assuming her health is good—and I believe it is—she could have many decades on the Court. That is all the more reason it is important that we know her approach to judging.

My only question about her judging has been whether she would leave her personal views behind as she approaches the decisions in cases that present two conflicting sides in adjudicating their dispute before the Court. It is not hard, when somebody has been an appellate court judge for years, to see how they approach judging and whether they can leave any of their personal views behind them.

Most judges can, and that is a great thing about our system. Occasionally, we find a judge who has a particular conservative or liberal bent, and it is pretty clear they have a hard time leaving their political views behind and that they tend to want to figure out how they would like a case to come out and then rationalize a way for it to come out that way. Any good lawyer or judge can probably find an argument to support a position. But that is not the way judging should occur.

My concern expressed about Elena Kagan is that there are a couple of things in her background that suggest that she might have a hard time leaving her political views behind and approaching cases, as Chief Justice Roberts said, as "an umpire would call balls and strikes in a game."

Remember, he was asked whether he would favor the little guy in a dispute or the big guy. He said if the law was on the little guy's side, he would favor the little guy but, if the law was on the big guy's side, he would favor the big guy.

Why is that important? We all know Lady Justice has on a blindfold, and there is a reason for that. The oath of office of a judge and our tradition in this country is for a judge to approach a case not based on how he wants that case to come out in his heart of hearts, not how he would write the law if he were a legislator but, rather, how he has to apply the law to the facts of that particular case.

Occasionally, a court will even say we do not necessarily like the way this case has to come out, and we invite the legislature to change the law. In fact, the Supreme Court did that in a bill which I sponsored recently. I regretted the way the case came out. I do not think the Court had to rule the way it did. But eight of the nine Justices believed that Congress had gone too far in prohibiting a certain kind of filmmaking activity called crush videos where usually a woman with high-heeled shoes is shown crushing a small animal to death.

That did not seem to me to be free speech, and it is something Congress could prohibit. But the Supreme Court disagreed. Eight of the nine Justices said: No, even though we do not necessarily like the way this case came out because we abhor that kind of thing, it is our view that the first amendment has to allow that kind of "speech."

Again, I disagree that it is speech, but I admire the Justices, both liberal and conservative, who decided they have to apply the law even though the result was not something they liked, and they invited the Congress to fix the law, giving us a little bit of instruction as to how we can do that.

I am working with colleagues in the House of Representatives to restructure the law so we can pass it again, overwhelmingly I am sure, and this time get it right within the first amendment because I do not, obviously, want to violate the first amendment.

The point here is that Justices can rule in ways that force them to make a decision even though they do not like the way the case comes out. Then the legislature, if it involves a law we have passed, can fix it. That is the way our system is supposed to work. Rather than—and I much prefer that even though, in effect, I lost the case. I would much rather that than the Justices say: We think these crush videos are terrible, and even though the first amendment probably protects it, we are going to try to craft an argument where we can declare this law valid because from a public policy standpoint, we think that is a better result. I am pleased they ruled against my bill by saying: No, we cannot do that. We have to adhere to the law, as we read it.

What I am going to be looking for in Elena Kagan is a judge who, despite her political views—and she has been candid about what they are and others have been candid as to what they are. One of her Harvard colleagues said her heart beats on the left. OK, I do not expect President Obama to appoint somebody whose heart beats on the right as mine does. He is going to appoint someone with his more liberal political views, and that is fine.

The question is: Can she then approach cases the same way the judges did in the Supreme Court case I just described where even though they did not like the result, they felt they had

to rule that way in order to remain consistent with their view of the first amendment.

There have been a couple of things in which her personal view clearly affected her judgment as, in this case, the dean of the Harvard Law School. The one case everybody is familiar with is she disagreed with the congressional policy on don't ask, don't tell. But instead of having a policy that said President Clinton, who signed the bill, was unwelcome on the Harvard campus or the Senators and Representatives who had passed the bill—by the way, it was a Democratic House and Senate—that they were not welcome on the campus, she wrote at the time extensively that this was a discriminatory policy of the military and that, therefore, the military would not be allowed on campus to recruit, as were all other businesses.

Eventually, she had to change her position because the Solomon amendment said the university would not get any Federal funding, and they got about 15 percent of their funding from the Federal Government. They finally, after about a year, went back to the policy of allowing military recruiters on campus.

In my view, she not only mischaracterized the situation by calling it the military's discriminatory policy, when the military is obviously simply following the orders of their Commander in Chief, President Clinton, and the law passed by the Congress, but also she discriminated by not criticizing or denying entry onto the campus the people who had passed and signed the law into effect but instead discriminated against the military who at the time was fighting a war. That represents a misjudgment on her part based on, obviously, her personal convictions. It interfered with the job she was supposed to be doing at the time.

Would she apply that same kind of rationale when she sits on the U.S. Supreme Court? She obviously has strong personal views about this issue. How will she apply those personal views in cases of, let's say, "the don't ask, don't tell policy that may come before her or some other policy that she believed discriminated against gays or homosexuals. She will have to somehow find a way to demonstrate to us that she will not allow those personal convictions to color her judgment on the Court. It might be kind of hard, given it did color her judgment in this previous situation.

More recently, she wrote to Members of the Senate deeply critical of a bill Senator LINDSEY GRAHAM and I had introduced and was eventually passed by the Senate and signed into law that provided a mechanism for dealing with the terrorists at Guantanamo Bay. We defined "military combatants" in this legislation. We provided for a determination of their status, for a review of that determination of status, by a direct appeal to the District of Columbia Circuit Court of Appeals.

Nothing like that had ever been done, where after determination of status as an enemy combatant, those people would be able to go directly to a Federal court—and not just any Federal court, the DC Circuit Court of Appeals, which is one step below the Supreme Court—to have that determination reviewed. That was not sufficient for her. She said: No, this was discriminatory; that they had to have a right to appeal to other Federal courts any sentencing or determination of guilt, if they stood trial in military commissions. That has never been the law. The Supreme Court has never said that is the law. Yet she compared what we did in that bill to the discriminatory and unlawful actions of a dictator.

I do not like to be called or compared to a dictator, and I can assure my colleagues LINDSEY GRAHAM, my colleague who was primarily responsible for drafting that legislation, very much had in mind the best way to deal with this situation from a legal standpoint, as well as to protect American citizens. He was not trying to enact policies similar to dictators'.

In addition to the language being quite injudicious, it seems to me it raises questions about whether if these kinds of questions were posed to her in the future she could lay aside what are obviously her strong personal convictions about this issue.

There are bound to be cases involving enemy combatants and others in this war on terror that will continue to come to the U.S. Supreme Court. Will she recuse herself from these cases because she has expressed strong personal views? That would seem to me to be appropriate, unless she could somehow demonstrate she can put all that behind her and decide these cases strictly on the law, irrespective of her personal prejudices.

I hope I am not perceived by these comments to have made a judgment about Elena Kagan. When I voted for her confirmation as Solicitor General, I said I thought she was well educated, very intelligent, very personable, and I wanted her to have a chance to do the job as Solicitor General. I had hoped she would remain in the position for a little bit longer than a year before being nominated for a position as prestigious as the U.S. Supreme Court. Nonetheless, I am firmly committed to examining her record as thoroughly as possible and then making a judgment based on that entire record.

Despite the fact I have raised two questions, I do not want that to be suggestive of any conclusion I have reached because I have not reached a conclusion. In fact, I am a little bit critical of my colleagues who have immediately reached a conclusion without even examining the record. There is something like 160,000 pages of documents in the Clinton Library relative to her record as a policy adviser in the Clinton White House. Obviously, some of her views will be reflected in those documents and I think it is important to see what they say.

It may well be that she represents a very tempered thought that is pragmatic and not overly ideological and which appears to suggest that in the position she held, she could lay aside her personal views and give good advice. It is quite possible that is what those records will reflect. It may also reflect something different.

Until I have the benefit of reviewing those documents and then talking with her personally and hearing her testify, it seems to me a bit premature to be making a judgment about whether she should be confirmed.

Again, I wanted the opportunity to reassure all of my colleagues that Sandra Day O'Connor, the first woman appointed to the Supreme Court, did, indeed, have a good judicial experience on the bench prior to her nomination. That is not an absolute requirement, in my view, because her colleague from Arizona on the Court for a while, Chief Justice Rehnquist, had not had judicial experience. Every other nominee in the last 40 years has. He had not. Nonetheless, he had extensive experience of over 20 years in law practice, both in the private law practice as well as the Department of Justice. So he, too, had a very long record from which one could judge whether his personal views could be set aside in judging cases.

That, at the end of the day, is the test that should apply to all nominees, should apply to Elena Kagan. I am sure my colleagues and I will have ample time to review the report, reflect on it, discuss it with her, and then come to our judgments as to whether she satisfies that judgment.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INHOFE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

GLOBAL WARMING

Mr. INHOFE. Mr. President, I ask unanimous consent to speak in morning business for such time as I may consume.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. INHOFE. Mr. President, if you have been watching the global warming debate lately, you will notice the supporters of cap and trade are getting kind of nervous. They realize the political environment for cap and trade couldn't be more favorable—they have a majority of liberals in the Senate, a majority of liberals in the House, and liberals in the White House. But they also realize time is running out. The November elections are looming, and there are a lot of people coming up for reelection who don't want to go back to the electorate and say: Look at me;