

**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 reinstated 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 *Lanzaro 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 Jobs are Unfair, Kagan Will Fight for Equality on the Court,” available at www.huffingtonpost.com/randall-l-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 Spector 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.