



Elena Kagan's Record as Solicitor General

On May 10, 2010 Elena Kagan (b. 1960) was nominated to the Supreme Court by President Obama. She would be the fourth woman on the Court if confirmed, marking the first time three women have sat on the bench. Since March, 2009, she has served as the United States Solicitor General, the first woman to hold this position. She was confirmed as Solicitor General on March 19, 2009 in a 61-31 Senate vote.¹ As Solicitor General, she has argued six cases before the Supreme Court, filed 29 merits briefs and 37 amicus briefs. She has also filed 17 petitions for certiorari in addition to another 24 certiorari briefs filed at the invitation of the Court.²

Often referred to as the tenth Justice, the Solicitor General represents the United States before the Supreme Court. The Solicitor General is responsible for defending federal statutes, agency regulations, and executive branch actions in the Supreme Court, as well as deciding which cases to appeal in the lower courts. The Solicitor General personally argues some of the most significant cases before the Court, in addition to overseeing the filing of merits briefs, amicus briefs (both invited by the Supreme Court and on her own initiative) and petitions for certiorari. It is incumbent upon the Solicitor General to defend the government so long as there is a reasonable basis to support the statute, regulation, or action at issue – an obligation which Kagan pledged to uphold, “even when [the arguments] conflict with [her] own opinions.” Because of this broad obligation, it is unclear to what extent Kagan’s actions as Solicitor General reflect her personal beliefs. Lincoln Caplan, an expert on the Office of the Solicitor General, stated: “It’s a mistake to assume that every argument an SG makes on behalf of the government reflects her personal legal philosophy.”³ It is also difficult to know to what extent the Solicitor General’s actions are controlled or influenced by the presidential administration – further confusing how much can be read into Kagan’s record as Solicitor General.

While not all of the positions Kagan has taken as Solicitor General can be attributed to her personally, a review of her record reveals some trends and may offer insight into Kagan’s values and beliefs. In particular, commentators have looked to the cases she personally argued, as well as discretionary decisions, such as when to participate voluntarily in a case. This report provides a general overview of Kagan’s

¹ Kagan received the votes of 54 Democratic Senators as well as Senators Coburn (R-OK), Collins (R-ME), Gregg (R-NH), Hatch (R-UT), Kyl (R-TX), Lugar (R-IN), and Snowe (R-ME). The following Senators did not vote: Boxer (D-CA), Cochran (R-MS), Ensign (R-NV), Kennedy (D-MA), Klobuchar (D-MN), and Murray (D-WA).

² The cases argued by Kagan are: *Citizens United v. Federal Election Commission*, *Salazar v. Buono*, *Free Enterprise Fund v. PCAOB*, *United States v. Comstock*, *Holder v. Humanitarian Law Project*, and *Robertson v. United States ex rel. Watson*.

³ Robert Barnes, *In Elena Kagan’s Work as Solicitor General, Few Clues to Her Views*, WASHINGTON POST (May 13, 2010).

record as Solicitor General, with an emphasis on the cases she has personally argued, as well as some of the more significant cases her office has handled.

First Amendment

Out of the six cases Solicitor General Kagan has personally argued before the Supreme Court, three have centered on the First Amendment – perhaps unsurprising given that much of her legal scholarship has focused on speech. She made her first appearance before the Supreme Court in *Citizens United v. Federal Election Commission* to defend the McCain-Feingold Act’s⁴ restriction on corporate expenditures during election cycles.⁵ The case was briefed and argued before Kagan was the acting Solicitor General. However, in a highly unorthodox move, the Court invited reargument on a new issue: whether the Court should overrule its prior decisions upholding restrictions on corporate electioneering. At oral argument, Solicitor General Kagan emphasized that for over 100 years, the Supreme Court left campaign finance laws undisturbed, despite having many opportunities to overrule them. She argued that opening corporate treasuries to political spending would result in actual or perceived corruption of politicians and pay-to-play politics. Kagan surprised some by making the tactical decision to abandon the Court’s previously accepted rationale upholding campaign finance reform laws. Rather than arguing that corporate election spending would distort the marketplace of ideas and drown out the speech of individuals – the basis upon which the Court upheld a Michigan campaign finance law in *Austin v. Michigan State Chamber of Commerce*⁶ – the government’s brief instead focused on the potential for actual and perceived corruption, and the need to protect shareholders whose funds may be used for speech that they did not endorse. The Court rejected Solicitor General Kagan’s arguments in a 5-4 decision that overturned two Supreme Court decisions and undermined 100 years of precedent in order to open the floodgates to corporate spending in elections. Kagan’s involvement in this case has been heralded by the White House as evidence of her support for campaign finance reform and her commitment to protecting fundamental rights. Recently, some scholars have noted that Kagan’s academic writing is consistent with her decision to abandon the underlying rationale of *Austin*.⁷

In her second oral argument before the Court, Solicitor General Kagan defended a federal statute against a free speech challenge in *Salazar v. Buono*.⁸ Kagan supported the government display of a Christian cross in the Mojave Desert as a war memorial. In its brief, the government argued primarily that after Congress transferred the land holding the cross to a private party, the plaintiff no longer had standing. At oral argument, Kagan emphasized that the government had an important non-secular interest in preserving the war memorial, and argued that the effect of the transfer was that the cross was “no longer the government’s message.” The Court rejected the argument that the plaintiff lacked standing, and remanded the case so that the District Court could reconsider whether it

⁴ Pub. L. No. 107-155, 166 Stat. 81 (2002).

⁵ 130 S. Ct. 876 (2010).

⁶ 494 U.S. 652 (1990).

⁷ See e.g. Marvin Ammori, *Citizens United: Does Elena Kagan Disagree with Barack Obama on Corporate Speech?*, BALKINIZATION (May 9, 2010); Marvin Ammori, *Elena Kagan and Anti-Distortion of the Speech Market*, BALKINIZATION (May 24, 2010).

⁸ No. 08-472, 2010 WL 1687118 (U.S. Apr. 28, 2010).

was appropriate to invalidate Congress’s transfer of the land. The cross was to remain covered pending the court’s review, but was recently stolen.

More recently, Solicitor General Kagan appeared before the Court in *Holder v. Humanitarian Law Project* to defend the Antiterrorism and Effective Death Penalty Act (AEDPA),⁹ which prohibits providing material support to an entity designated by the Secretary of State as a “foreign terrorist organization,” against a First Amendment and Due Process challenge.¹⁰ The statute makes it a criminal offense to knowingly provide “material support or resources” to a designated foreign terrorist organization. Petitioners sought an injunction to prevent the government from prosecuting them for providing support to two designated terrorist organizations, arguing that the benign, non-terrorist related training they provided was pure political speech. The government’s brief argued that AEDPA did not violate the First Amendment, in part because as a statute that regulates conduct and only secondarily affects speech, it is only subject to intermediate scrutiny. It further argued that intermediate scrutiny was satisfied because the statute furthers the legitimate government interest of combating international terrorism.

At oral argument, Kagan stated that “Congress reasonably decided that when you help a ... foreign terrorist organization’s legal activities, you’re also helping the foreign terrorist organization’s illegal activities. Hezbollah builds bombs. Hezbollah also builds homes. What Congress decided was when you help Hezbollah build homes, you are also helping Hezbollah build bombs. That’s the entire theory behind this statute, and it’s a reasonable theory....” Kagan also argued at oral argument that petitioners are free to engage in independent advocacy about ideas held by the two groups, and are free to communicate with the two groups, so long as they do not provide material assistance. So, for instance, an advocacy group would *not* be prohibited from submitting an amicus brief in a case involving a designated foreign terrorist organization, so long as the group was not doing it *on behalf* of the organization.

To the extent that the statute had potentially unconstitutional applications, Kagan urged the Court to “put those off to another day.” The United States’ brief also argued that the material-support statute is not void for vagueness under the Due Process Clause in part because the requisite mental state – “knowingly” – diminishes vagueness concerns, and because the challenged terms are understood by persons of ordinary intelligence. The Court has not yet issued its decision in this case. If the government wins, the non-profit organizations involved will no longer be able to provide training or information to the Kurdistan Workers Party and Tamil Tigers on issues such as peaceful conflict resolution and international human rights.

In another First Amendment case, which Kagan did not personally argue, the Solicitor General’s Office defended a federal statute against a First Amendment challenge in *United States v. Stevens*, involving a statute prohibiting depictions of the torture and killing of animals.¹¹ The Solicitor General’s Office argued that just like child pornography, the statute aims to eliminate the market for the images in order to reduce the incentive to engage in the underlying activity. The Court rejected the government’s argument in an 8-1 decision, finding that unlike child pornography, there is no compelling interest in preventing animal cruelty.

⁹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁰ Nos. 08-1498 and 08-1547 (Feb. 23, 2010) (decision pending).

¹¹ 130 S. Ct. 1577 (2010).

Federalism and Executive Power

In cases involving challenges to government action as being beyond the federal government's and/or the executive branch's authority, the Solicitor General's Office under Kagan has trended toward supporting broad federal authority. For instance, in *United States v. Comstock*, Solicitor General Kagan appeared before the Court to argue in defense of 18 U.S.C. 4248, authorizing the civil commitment of "sexually dangerous" persons, already in federal custody but coming to the end of their sentences – a function traditionally handled by states.¹² The statute was challenged as surpassing Congress's authority under the Necessary and Proper Clause. At oral argument, Kagan urged an expansive reading of this power, describing it as the "power to run a responsible criminal justice system." She also argued that a "distinctive responsibility" is created when the government assumes custody of a sexual offender, and that this responsibility gives rise to an obligation to ensure that the person is released in a responsible way that protects society and the individual. She analogized the need to commit sexually dangerous offenders to the need to quarantine soon to be released inmates if they have a highly contagious disease. Justice Scalia bluntly stated his opposition to this position: "this is a recipe for the federal government taking over everything."¹³ The Court recently upheld the law in a 7-2 decision, meaning that the federal government can now civilly commit sexually dangerous inmates for indefinite periods of time.

In *Monsanto Co. v. Geertson Seed Farms*, the Solicitor General's Office appeared as a party and argued that a District Court should have deferred to the federal agency's position rather than issuing an injunction prohibiting the planting of genetically modified alfalfa.¹⁴ A group of farmers challenged the Animal and Plant Health Inspection Service (APHIS) decision to approve Roundup Ready alfalfa for deregulation without requiring Monsanto to prepare an Environmental Impact Statement (EIS). In response, the agency proposed allowing the Roundup Ready alfalfa seeds to be planted subject to certain restrictions while an EIS was conducted, but the District Court instead decided to issue an injunction prohibiting the planting of the alfalfa until the EIS was completed. If the ban is lifted and the seeds are allowed to be planted, the farmers argue that the Roundup Ready alfalfa could cross-pollinate and contaminate their crops. The Solicitor General's brief stated that the ban eliminates consumer choice and infringes on the role of the federal regulatory agency. It argued that the court should have accepted the APHIS's proposal to allow the alfalfa to be planted pending the EIS. The government's position has been criticized by opponents of genetically modified food who fear it will result in weakened remedies available under the National Environmental Policy Act (NEPA).

However, the Solicitor General's Office took a position in favor of judicial review of environmental agencies' actions in a supplemental reply brief submitted at the Court's request in *Couer Alaska, Inc. v. Southeast Alaska Conservation Council*.¹⁵ While the government argued for the application of a less rigorous environmental standard, and maintained that the discharge permit should not be invalidated, the brief did assert that courts have the power to invalidate permits issued by the Army Corps of Engineers

¹² No. 08-1224, 2010 WL 1946729 (May 17, 2010).

¹³ Transcript of Oral Argument at 20:4 – 20:5, *Comstock*, No. 08-1224, 2010 WL 1946729 (May 17, 2010).

¹⁴ No. 09-475 (Apr. 27, 2010) (decision pending).

¹⁵ 129 S. Ct. 2458 (2009).

(Corps). The Court agreed with the Solicitor General's position and upheld the permit issued by the Corps. As a result, the mining company was allowed to continue disposing mining waste into a lake.

Kucana v. Holder is another case in which the Solicitor General's Office protected the role of judicial review, where the government argued that Board of Immigration Appeals (BIA) decisions not to reopen a case should be reviewable.¹⁶ There, Kucana missed his asylum hearing, was ordered deported in absentia, and years later sought to reopen the case. Interestingly, under the Bush Administration when the case was before the Circuit Court, the Solicitor General's Office argued that the decision was vested solely in the discretion of the BIA and not subject to judicial review. Under Solicitor General Kagan's tenure the Office changed its position when the case reached the Supreme Court, finding that the Seventh Circuit's minority position was an erroneous reading of the statute. The Supreme Court agreed that the decision was subject to judicial review and remanded the case for further proceedings.

National Security & Civil Liberties

In *Kiyemba v. Obama*, the only case concerning detainees held at Guantanamo Bay to reach the Supreme Court during Solicitor General Kagan's tenure, her office argued against the release of seventeen Uighurs held at Guantanamo Bay.¹⁷ It is worth noting the decisions made in this case almost certainly involved administration officials beyond the Solicitor General. Nonetheless, it is worth exploring the arguments put forth by the Solicitor General's Office. At issue was whether a federal court has habeas corpus authority to order the release of Guantanamo Bay detainees into the United States, where immigration laws bar their entry and no other country will take them. The Solicitor General's brief argued against allowing the Uighurs to enter the United States – maintaining that the power to admit or exclude aliens is a sovereign function of the political branches and that judicial interference in this area would undermine federal power to control national borders. The administration also pointed to the government's ongoing effort to resettle the detainees as a reason not to allow the detainees' release into the United States. The Court vacated and remanded the case without issuing an opinion, due to ripeness concerns that arose after each of the detainees had been resettled or received an offer of resettlement. Five Uighurs who did not accept offers of resettlement remain in detention at Guantanamo.

The Solicitor General's Office has argued for expansive executive power when it comes to questions pertaining to the applicability of the Foreign Sovereign Immunities Act of 1976 (FSIA)¹⁸ and whether a foreign official can be subject to civil liability. In *Federal Insurance Co. v. Kingdom of Saudi Arabia*, the Solicitor General's Office filed a brief opposing certiorari.¹⁹ The brief argued that non-statutory principles articulated by the Executive Branch, and not FSIA, should govern the immunity of Saudi family royalty for their role in the 9/11 attacks. The brief went on to argue that "in light of the potentially significant foreign relations consequences" of allowing a sovereign state to be subject to U.S. liability, wrongs carried out by a foreign government called for a

¹⁶ 130 S. Ct. 827 (2010).

¹⁷ 130 S. Ct. 1235 (2010) (mem.).

¹⁸ 28 U.S.C. §§ 1330, 1602 *et seq.* (1976).

¹⁹ *cert. denied*, No. 08-640 (June 29, 2009).

diplomatic rather than a legal solution. The Solicitor General's Office made a similar argument in *Samantar v. Yousuf*, involving a former high-ranking Somali official accused of overseeing torture and genocide.²⁰ He claimed immunity under FSIA in a civil suit for damages. The Solicitor General was invited to appear as amicus and argued that policies set by the Executive Branch, rather than those contained within FSIA, should govern the immunity of foreign officials acting in their official capacity. The Solicitor General's brief contended that while FSIA governed the "foreign sovereign," it did not encompass actions against individual officials. The government also argued that the Executive Branch's primary role in shaping foreign relations made it a more appropriate arbiter of foreign officials' immunity in a civil suit. The Supreme Court recently accepted the Solicitor General's argument and held that FSIA did not apply.

At appeals of all levels, the Department of Justice under the Obama administration has continued to invoke the state-secrets privilege in cases involving national security. Critics have noted that this practice does not differ significantly from the Bush Administration's policy. The Solicitor General's Office argued for an expansive reading of the state-secrets privilege before the Supreme Court in *Mohawk Industries v. Carpenter*, a case that was actually about attorney-client privilege.²¹ The Solicitor General participated as uninvited amicus and included a section in its brief on the state-secrets privilege. The brief argued the relatively novel concept that the privilege has constitutional significance by citing a Fourth Circuit decision, as well as by drawing parallels to an 1876 Supreme Court decision - though the Supreme Court has never explicitly recognized that the state-secrets privilege has a constitutional foundation. The Court's resolution of this case did not reference the state-secrets privilege.

Criminal

Roughly one third of the cases handled by the Solicitor General's Office are criminal cases. Interestingly, Kagan has reached out to oppose positions taken by criminal defendants even when the United States was not a party to the appeal. For instance, in *Padilla v. Kentucky*, the Solicitor General's Office filed an uninvited amicus brief, arguing that a defense attorney's representation should not be considered constitutionally ineffective for failing to correctly advise a client that a guilty plea carried a risk of deportation, unless the advice prejudiced the client.²² Padilla pled guilty to various drug crimes after his lawyer told him that he "didn't need to worry about" deportation. The Solicitor General's Office argued that there was no obligation to advise defendants of the immigration consequences of pleading guilty, though it did acknowledge that affirmative misguidance might constitute a Sixth Amendment violation if the defendant was prejudiced. The Supreme Court rejected the Solicitor General's position, and held that a lawyer representing an alien charged with crimes has an affirmative Sixth Amendment obligation to inform the client that a guilty plea could cause deportation.

In *Montejo v. Louisiana*, Kagan again submitted an uninvited amicus brief, this time urging the Court to overrule *Michigan v. Jackson*,²³ a 1986 decision assuring that the

²⁰ No. 08-1555, 2010 WL 2160785 (June 1, 2010).

²¹ 130 S. Ct. 599 (2009).

²² 130 S. Ct. 1473 (2010).

²³ 475 U.S. 625 (1986).

right to counsel is not lost during police interrogation and that once an accused has claimed the right to counsel, any waiver of that right during police interrogation would not be valid unless the accused had initiated the communication with the police.²⁴ The Solicitor General's amicus brief argued that the 1986 rule served no real purpose and should be discarded. A group of former senior DOJ officials, former federal and state prosecutors, and former judges also filed an amicus brief, opposing the position taken by Kagan and arguing that *Jackson* provided a bright-line rule that had become embedded in routine police practice, just as *Miranda* had. The Supreme Court overruled *Michigan v. Jackson* in a narrow 5-4 decision. As a result, a criminal defendant can now waive his right to counsel unless he reasserts it every time he is interrogated.

Similarly, in *Maryland v. Shatzer* the Solicitor General submitted an uninvited amicus brief to argue that an invocation of the right to counsel is terminated when there is a break in custody.²⁵ The Supreme Court largely accepted this argument and used the case as an opportunity to create a new rule: when an individual has been released from custody for at least 14 days, the invocation of the right to counsel is terminated and statements made by the suspect can be used against him.

The Solicitor General's Office advocated for weakening the protections provided by *Miranda* in *Florida v. Powell*.²⁶ There, the Solicitor General voluntarily intervened as amicus to argue in favor of allowing police to deviate from a strict formula for issuing *Miranda* warnings, as long as the admonition, when viewed in its totality, conveyed the substance of *Miranda* rights. The Solicitor General's brief contended that such an approach enhanced law enforcement officers' capability to address certain circumstances, such as individuals requiring translators, in which formulaic *Miranda* warnings were insufficient to transmit the defendant's rights. The Court agreed and found that there is no constitutionally required formula so long as the essential message was communicated. In *Berghuis v. Thompkins*, the Solicitor General again voluntarily intervened as amicus to argue that a defendant does not necessarily invoke his Fifth Amendment right against self-incrimination by remaining silent for an extended period of time.²⁷ The government's brief argued that a *Miranda* waiver can be inferred from the circumstances, despite the defendant's refusal to sign a written waiver, so long as the defendant was free from coercion and comprehended his rights. The Supreme Court recently accepted this argument and issued a decision that will result in more defendants losing the protection of their constitutional rights.

The Solicitor General again took a tough-on-crime position in *Bloate v. United States*, this time as a party rather than amicus.²⁸ The government's brief argued that delays granted at the defendant's behest to prepare pretrial motions should be automatically excluded from the Speedy Trial Act's deadline for commencing trial.²⁹ The Supreme Court held that such delays should not be excluded automatically, meaning that additional time requested by a defendant does not necessarily extend the time the state can hold the defendant before commencing with trial. In *Carachuri-Rosendo v.*

²⁴ 129 S. Ct. 2079 (2009).

²⁵ 130 S. Ct. 1213 (2010).

²⁶ 130 S. Ct. 1195 (2010).

²⁷ No. 08-1470, 2010 WL 2160784 (June 1, 2010).

²⁸ 130 S. Ct. 1345 (2010).

²⁹ 18 U.S.C. 3161 *et seq.* (1974).

Holder, the Solicitor General again appeared as a party and took a tough stance, arguing that a conviction for mere possession could constitute an “aggravated felony” for deportation purposes if it qualified as a recidivist offense, even if it was not prosecuted as such.³⁰

Solicitor General Kagan appeared for oral argument before the Court again in *Robertson v. United States ex rel. Watson*, after the Solicitor General’s Office was invited to appear as amicus.³¹ There, the government’s brief argued that an Article I court may constitutionally delegate its power to prosecute a criminal contempt proceeding to a private individual. Notably, at oral argument Kagan asserted that a plea agreement signed by a U.S. Attorney’s Office binds only that office, so federal prosecutors elsewhere may not be bound by the agreement – an argument that Chief Justice Roberts found “absolutely startling.”³² The Supreme Court recently issued a per curiam dismissal of the writ of certiorari as improvidently granted. The Court’s dismissal allowed the domestic violence victim’s private prosecution of the criminal contempt charges to stand – the result advocated for by the Solicitor General’s Office.

Under Kagan’s tenure, the Solicitor General’s Office has advocated for tough applications of sentencing rules. For instance, in *Johnson v. United States*, the Solicitor General’s merits brief argued that a battery should categorically be considered a violent felony for purposes of sentencing.³³ The government argued that this interpretation would allow for more effective prosecution of domestic violence perpetrators. The Court rejected the Solicitor General’s argument and held that the prior battery conviction should not be considered a violent felony. In *United States v. O’Brien*, the Solicitor General’s Office argued that a thirty year sentencing enhancement for use of a machinegun need only be proven as an element of sentencing by a preponderance of the evidence, rather than as an element of the offense to be proven beyond a reasonable doubt.³⁴ The Supreme Court recently issued a decision rejecting this position. In *Dillon v. United States*, the Solicitor General argued that when modifying sentences under the Crack Guidelines Amendment, federal judges are constrained by a policy statement issued by the Sentencing Commission, and do not have discretion to issue sentences lower than what is specified in the amended Sentencing Guidelines.³⁵ The petitioner argued that constraining judges’ discretion in re-sentencing proceedings runs afoul of *United States v. Booker*.³⁶ The decision in this case will have wide-ranging consequences for the thousands of defendants currently incarcerated for crimes involving crack cocaine.

Access to Justice

It has fallen upon Kagan as Solicitor General to weigh in on various rules affecting litigants’ access to the courts. The Solicitor General’s Office has advocated for plaintiff-friendly statute of limitations calculations in two cases. In *Merck & Co. v. Reynolds*, the Solicitor General’s Office was invited to submit an amicus brief, which

³⁰ No. 09-60 (Mar. 31, 2010) (decision pending).

³¹ No. 08-6261, 2010 WL 2025205 (May 24, 2010).

³² Transcript of Oral Argument at 56:16 – 56:17, *Robertson*, No. 08-6261 (March 31, 2010).

³³ 130 S. Ct. 1265 (2010).

³⁴ No. 08-1569, 2010 WL 2025204 (May 24, 2010).

³⁵ No. 09-6338 (Mar. 30, 2010) (decision pending).

³⁶ 543 U.S. 220 (2005).

contended that the two-year statute of limitations should begin to run only after a plaintiff discovers, or should have discovered, all the elements of a securities fraud claim, rather than when the plaintiff first suspects illegality.³⁷ The Supreme Court recently issued an opinion adopting this construction. Similarly, in *Lewis v. City of Chicago*, the Solicitor General was invited to submit an amicus brief, which argued that the statute of limitations does not begin to run when an allegedly discriminatory hiring test was administered, but rather when the employer last uses the test results.³⁸ In advancing the argument for an expansive construction of the statute of limitations, the Solicitor General's brief noted that a strict interpretation would inhibit an individual's ability to build her case while allowing employers to evade Title VII liability. The Supreme Court recently issued a unanimous ruling adopting the position advanced by the Solicitor General's Office. In both cases, the position taken by the Solicitor General's Office would make it easier for individuals who have suffered a wrong to seek redress.

The Solicitor General's Office has weighed in on other issues affecting access to justice, such as rules providing for attorney's fees, for the most part advocating a more restrictive interpretation of attorney's fees rules. In *Perdue v. Kenny A. ex rel Winn*, the Solicitor General's Office submitted an uninvited amicus brief arguing against a generous calculation of the "lodestar" figure used to award attorney's fees on the basis that quality of representation and outcome were already included in the lodestar calculus.³⁹ The plaintiffs argued that prohibiting the attorney's fees calculation enhancement would result in less vigorous enforcement of civil rights laws. In a 5-4 decision authored by Justice Alito, the Court held that such enhancements were only appropriate in "rare" and "exceptional" circumstances.⁴⁰

In another attorney's fees case, *Astrue v. Ratliff*, the Solicitor General's Office filed a merits brief in defense of the Commissioner of Social Security.⁴¹ The brief argued that an award of attorney's fees under the Equal Access to Justice Act⁴² belonged to the prevailing party and not the prevailing party's attorney. As such, the government argued that it could deduct previously owed debts from the attorney's fee award. As in *Perdue*, there was concern within the public interest law community that adoption of the government's position would result in a decline in the number of attorneys willing to represent low-income clients.

In another case, however, the Solicitor General argued for a liberal construction of the attorney's fees provision in the Employment Retirement Income Security Act of 1974 (ERISA),⁴³ arguing that the court may, at its discretion, award attorney's fees to a claimant even if she does not ultimately prevail.⁴⁴ The Supreme Court unanimously adopted the position advocated by the Solicitor General, making it more likely that claimants will be able to find legal representation.

³⁷ No. 08-905, 2010 WL 1655827 (April 27, 2010).

³⁸ No. 08-974, 2010 WL 2025206 (May 24, 2010).

³⁹ 130 S. Ct. 1662 (2010).

⁴⁰ *Id.* at 1674.

⁴¹ No. 08-1322 (Feb. 22, 2010).

⁴² Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 (1980).

⁴³ 29 U.S.C. 1001 *et seq.* (1974).

⁴⁴ *Hardt v. Reliance Standard Life*, No. 09-448, 2010 WL 2025127 (May 24, 2010).

The Solicitor General's Office has also filed briefs both for and against the federal preemption of state courts' tort jurisdiction. In *American Home Products Corp. v. Ferrari*, the Solicitor General's Office was invited to submit an amicus brief in a case pertaining to whether the National Childhood Vaccine Safety Act of 1986 (Act)⁴⁵ was intended to bar all design defect claims against vaccine manufacturers.⁴⁶ The government's amicus brief argued that prohibiting state court suits was necessary to avoid inhibiting innovation in vaccine design.⁴⁷ The government's position would preclude a large number of individuals from being able to bring a claim against vaccine manufacturers. However, the government argued against preemption in an amicus brief the Solicitor General was invited to submit in *Williamson v. Mazda Motor of America, Inc.*⁴⁸ There, the government argued that neither the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act)⁴⁹ nor the Federal Motor Vehicle Safety Standard (FMVSS) 208⁵⁰ preempted state tort law claims concerning defective automobile design, and that states were free to set higher standards of safety for automobile construction.

Corporate Oversight & Consumer Protection

The Solicitor General's Office has handled many cases dealing with corporate corruption and consumer protection during her tenure. In 2009, Solicitor General Kagan appeared before the Court to argue *Free Enterprise Fund v. Public Company Accounting Oversight Board*,⁵¹ where she defended a key provision of the Sarbanes-Oxley Act of 2002.⁵² The constitutionality of the Public Company Accounting Oversight Board (PCAOB) was challenged on separation of powers grounds by an anti-tax group. PCAOB was created by the Sarbanes-Oxley Act in the wake of the Enron and World Com scandals. The Board oversees audits of public corporations subject to federal securities laws, ensuring corporate accountability. The group argued that because the President lacked sufficient oversight authority over the Board that it was therefore the equivalent of an unchecked "fourth branch" of government. Kagan defended against this conservative attack supporting a unitary executive by arguing that the Board does not run afoul of the Appointments Clause because the President has sufficient control over the Securities and Exchange Commission, which in turn has control over the Board. This argument is consistent with a view espoused by Kagan in a 2002 letter sent to Senator Sarbanes, in which she advised that the structure of the agency did not violate the Appointments Clause because the board members would be considered "inferior officers."⁵³ If the Court rejects the Solicitor General's Office's position, the Sarbanes-

⁴⁵ 42 U.S.C. § 300aa-1 *et seq.* (1986).

⁴⁶ No. 08-1120 (Mar. 5, 2009) (decision pending).

⁴⁷ Because the claimants in this case voluntarily dismissed their state law claims without prejudice, Solicitor General Kagan ultimately argued that the Court should instead grant the petition for a writ of certiorari in a companion case so as to avoid potential mootness concerns. *See Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233 (3d. Cir. 2009).

⁴⁸ No. 08-1314 (Apr. 22, 2009) (decision pending).

⁴⁹ 49 U.S.C. 30101 *et seq.* (1994).

⁵⁰ 49 C.F.R. § 571.208 (1989).

⁵¹ 08-861 (Dec. 7, 2009) (decision pending).

⁵² 15 U.S.C. 7201 *et seq.* (2002).

⁵³ Letter from Elena Kagan to Senator Paul Sarbanes (June 17, 2002) (on file with the Senate Judiciary Committee).

Oxley Act may be partially invalidated, resulting in less government oversight of corporations.

In *Cuomo v. Clearing House Association*, Solicitor General Kagan signed a merits brief arguing that the New York Attorney General overstepped his authority in contravention of the National Bank Act (NBA)⁵⁴ when he subpoenaed a federal bank's records.⁵⁵ The Solicitor General's Office claimed that the Office of the Comptroller of the Currency (OCC) had the sole power to request the records and that the courts should defer to the OCC's oversight regulations. The Supreme Court recently issued an opinion that generally upheld the government's position with regard to subpoenas, but held that state courts could entertain enforcement actions.

The Solicitor General's Office has also defended various statutes pertaining to consumer protection during Kagan's tenure, even in situations in which the government's involvement was not required. For instance, in *Jerman v. Carlisle*,⁵⁶ the administration intervened as uninvited amicus to argue that a debt collector could not raise a mistake of law defense after distributing foreclosure notices containing inaccurate notifications in violation of the Fair Debt Collection Practices Act.⁵⁷ The Solicitor General's brief reasoned that allowing a mistake of law defense would deter debt collectors from seeking clarifications to ambiguous laws, and would restrict liability under the statute to only the most egregious violations. In *Hamilton v. Lanning*,⁵⁸ the Solicitor General's Office was invited to submit an amicus brief, in which it argued for a lenient interpretation of Chapter 13 of the Bankruptcy Code that favors debtors who have sudden drops in income pending bankruptcy proceedings.⁵⁹

The Solicitor General's Office asked the Supreme Court to uphold the fraud convictions of Enron's CEO in *Skilling v. United States*.⁶⁰ Skilling argued that he should have received a change of venue due to a biased jury, and also that the "honest services" fraud statute was unconstitutionally vague. The same statute was defended by the Solicitor General against vagueness challenges in two other cases during Kagan's tenure: *Black v. United States*⁶¹ and *Weyhrauch v. United States*.⁶² The Solicitor General's Office addressed corporate liability again in *Jones v. Harris Associates*.⁶³ Solicitor General Kagan signed an amicus brief arguing that an investment advisor could be liable under the Investment Company Act of 1940⁶⁴ to mutual fund investors for charging excessive fees relative to unaffiliated clients. Kagan claimed that the investors need not show that the advisor misled the mutual fund directors who approved the fee and that a court should consider all the relevant circumstances. The Supreme Court recently ruled

⁵⁴ 12 U.S.C. 21 *et seq.* (1864).

⁵⁵ 129 S. Ct. 2710 (2009).

⁵⁶ 130 S. Ct. 1605 (2010).

⁵⁷ 15 U.S.C. 1692 *et seq.* (1977).

⁵⁸ No. 08-998 (Mar. 22, 2010) (decision pending).

⁵⁹ The Solicitor General did, however, argue for a more restrictive reading of the exemption provisions within Chapter 7 of the Bankruptcy Code in *Schwab v. Reilly* in situations where the petitioner deems her first valuations inaccurate. No. 08-538 (Nov. 3, 2009).

⁶⁰ No. 08-1394 (Mar. 1, 2010) (decision pending).

⁶¹ No. 08-876 (Dec. 9, 2009) (decision pending).

⁶² No. 08-1196 (Dec. 8, 2009) (decision pending).

⁶³ 130 S. Ct. 1418 (2010).

⁶⁴ 14 U.S.C. 18a-1 *et seq.* (1940).

in favor of the corporations, holding that liability exists only when the fee is so disproportionately large that it bears no reasonable relationship to the services rendered.

Cases Kagan Declined to Seek Review

As Solicitor General, Kagan is also in charge of deciding what cases *not* to appeal. Kagan decided not to appeal an award of \$100 million to four men who were wrongfully imprisoned for decades (\$1 million for each year) – despite the fact that the award was higher than previous awards and that the Circuit Court characterized the award as “troubling.”⁶⁵ In another move that could be interpreted as favorable to criminal defendants’ rights, Solicitor General Kagan declined the State of Michigan’s invitation to join as amicus curiae in a case involving a challenge to the racial make-up of a jury.⁶⁶ Commentators have seized upon Kagan’s decision not to appeal in *Witt v. Department of Air Force*, a case in which the 9th Circuit applied heightened scrutiny to a challenge to Don’t Ask, Don’t Tell.⁶⁷ Kagan’s decision not to appeal this decision is notable because it created a circuit split, and because under President Bush, the Solicitor General’s Office petitioned for a rehearing en banc. The case was remanded for the District Court to issue a ruling applying heightened scrutiny. Second Amendment proponents have criticized Solicitor General Kagan for not filing an amicus brief in *McDonald v. Chicago*, a case that challenged a Chicago gun registration law.⁶⁸

*For more information, or for questions about this report, contact the Alliance for Justice,
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⁶⁵ *Limone v. United States*, 579 F.3d 79, 106 (2009).

⁶⁶ *Berghuis v. Smith*, 130 S. Ct. 1382 (2010).

⁶⁷ 527 F.3d 806 (9th Cir.), *reh’g denied*, 548 F.3d 1264 (2008).

⁶⁸ No. 08-1521 (Mar. 2, 2009) (decision pending).